Neutral Citation Number: [2021] EWHC 1846 (Fam)

Case No: FD20P00034

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF COUNCIL REGULATION (EC) NUMBER 2201/2003
(BRUSSELS II REVISED REGULATIONS 2003) (BIIR)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2021

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between :

(1) K **Appellants**

(2)-(4) A, B, C
(By their Children's Guardian, Emma Huntington)

- and -

K **Respondent**

Henry Setright QC and Harry Langford (instructed by **Access Law LLP**) for the First Appellant (father)
Jamie Niven-Phillips (instructed by Cafcass Legal) for Second to Fourth Appellants (Children)
The Respondent (mother) did not appear and was not represented

Hearing date: 22 June 2021

Approved Judgment

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon Mr Justice Cobb:

Introduction

1. This judgment sets out my reasons for allowing an appeal brought before the court under *Chapter III* (*Recognition and Enforcement*) of *Council Regulation (EC) No.2201/2003* ('*BIIR*'), specifically *Article 33*. For the avoidance of doubt, notwithstanding the departure of the UK from the EU on 31 December 2020, *BIIR* continues to apply under the transitional arrangements for cases, such as this one, which were issued on or before 31 December 2020.

2. The appeal is brought by a father and separately by his three children[1], A, B and C, against the registration by Deputy District Judge Hodson on 22 July 2020 of a Polish custody order which was made on 19 December 2016 ("the December 2016 order"). The relevant part of the December 2016 order vested custody and care of the three children with the mother in Poland. In fact, the children are currently in the care of their father and living in England.

3. Separate proceedings under the *Child Abduction and Custody Act 1985* (incorporating the *1980 Hague Convention on the Civil Aspects of International Child Abduction* ('the *1980 Hague Convention*')) were issued by the mother in 2020; in those proceedings the mother sought a summary return of the three children to Poland. By judgment delivered in October 2020, the mother's application for a summary return order was refused (Mr A Verdan QC sitting as a Deputy High Court Judge) (this is reported as *Re S* [2020] EWHC 2940 (Fam)).

4. The appellant father is represented in this appeal by Mr Henry Setright QC and Mr Harry Langford; the children by Mr Jamie Niven-Phillips. The mother did not play any part in the appeal hearing; I discuss her non-participation in the next section of this judgment below.

5. For the purposes of this appeal, I read the extensive court bundle of documents, and the relevant authorities; I heard oral submissions from Mr Setright and Mr Niven-Philips. I regard it as important to give a reasoned judgment, given the continuation of proceedings in Poland, and the absence of any formal concession on the appeal from the absent mother.

The mother's absence from the hearing of the Appeal

6. In pursuing the *1980 Hague Convention* proceedings, and in defending the *BIIR* appeal proceedings during 2020 and into 2021, the mother has hitherto been represented by distinguished and experienced solicitors and leading and junior counsel.

7. On 20 May 2021, the Court and the father's lawyers were notified by the mother's solicitors that they were no longer instructed and were applying to come off the record. The father's solicitor, Mr Parsons, thereafter communicated with the mother directly by e-mail, in an attempt to confirm her engagement with this appeal; Mr Parsons has filed a statement to which he has exhibited copies of several e-mail communications

[1] The children had, in fact, had been joined into the appeal proceedings by Russell J.

with the mother. The mother's messages to Mr Parsons indicate strongly that she did not intend to attend, or take part in, the appeal hearing, that she proposed to take no further steps in any further English proceedings awaiting the outcome of the Polish proceedings, that she considered that the appeal should be "cancelled" and/or that she wanted the "case to be withdrawn"; she stopped short of indicating that she concedes the outcome of the appeal.

8. I was separately advised that on 15 June, the mother and father had an exchange of communications by social media (WhatsApp). This exchange was translated for me at the hearing. In this exchange the mother confirms (I shall not repeat the profanities here) that she wanted the father's solicitor to "stop writing to me" and to "leave me alone".

9. During the morning prior to the hearing, the HMCTS-appointed Polish language interpreter called the mother's mobile phone 22 times in an effort to speak with her. She did not answer. He left two voice-messages asking the mother to contact him, given that the hearing was due to begin. She did not respond. I delayed started the hearing until 11:00hs, but she did not sign onto the video platform. I am aware that the mother successfully participated in the *1980 Hague Convention* proceedings in September 2020 by video platform, so this medium is not unfamiliar to her.

10. In the circumstances, I concluded that the mother had knowingly chosen not to take part in this appeal, and I resolved to continue in her absence.

Background

11. The background can be shortly stated. The mother and the father are both Polish; they are both aged 38. They met at school, and formed a relationship as young adults; in 2005 they moved to the USA and in the following year they married. The three children were born in the USA; they are now aged 15, 11 and 9 (two girls and then a boy). In 2012 the entire family returned to Poland and they lived initially with the paternal grandmother. In 2014, the father moved to England on his own to find work. The marriage came to an end in 2015.

12. In December 2016, the Family Court in Poland made a number of orders, including the dissolution of the marriage. The order contained the following (in translation):

> "… exercising parental responsibility over the minor children of the parties, which are: [A], [B], [C], entrusts both parents, determining the whereabouts of minor children to the plaintiff [mother]."

The order went on to impose a child maintenance obligation on the father, and provided for the father to have contact with the three children, which was to include one month every summer holiday.

13. The children had contact with their father in 2017, and visited him in England for their holidays in 2018.

14. They visited their father in England again, as per the court order, in 2019, arriving towards the end of July. At the end of that visit, the father did not return them to Poland

and/or to their mother; the children started in school in England. The father issued an application in the Polish court for variation of the December 2016 order; he cited concerns about the mother's harsh parenting of the children and her personal conduct, including alcohol abuse. He averred that the children did not wish to return to Poland or to her. By order of the Polish Court of 8 November 2019, that application failed; the court declared that the father had failed to demonstrate that an interim variation of the December 2016 order was in the children's best interests. The father's appeal against this order was refused. The mother then issued an application for the summary return of the children under the *1980 Hague Convention* in this jurisdiction. The children were joined as parties to those proceedings and represented by Cafcass Legal.

15. In July 2020 the mother separately applied for registration of the December 2016 order under *Article 28(2)* of *BIIR*. This was granted by Deputy District Judge Hodson. The father issued a notice of appeal against the registration in accordance with *rule 31 Family Procedure Rules 2010*.

16. In September 2020, the combined applications (i.e., for summary return and for appeal against the registration) came before Mr A Verdan QC sitting as a Deputy High Court Judge. Having heard argument, and having been referred to several authorities on the issues, he determined, as a preliminary issue, that the application under the *1980 Hague Convention* should be determined first. He heard submissions on that application, following which he decided that:

    i) The children were habitually resident in Poland at the material time that the mother's rights of custody were breached;

    ii) A (aged 15) objected to returning to Poland, and that objection fell within the exceptions offered by *Article 13* of the *1980 Hague Convention*;

    iii) There was a grave risk of physical and/or psychological harm to the three children if they were to return to Poland and it would further be 'intolerable' for them if they were separated (i.e., if A stayed, but B and C were required to return); he found that there were no effective protective measures which would afford the children a necessary safeguard;

    iv) In exercising his discretion, he decided against a summary return of the children.

    A fully reasoned judgment explaining his reasons for those orders was delivered on 30 October 2020 ([2020] EWHC 2940 (Fam)).

17. The mother sought permission to appeal; this application was refused on the papers by Moylan LJ in December 2020.

18. As far as I know, the mother took no steps under *Article 11(6)-(8)* of *BIIR* to bring the non-return order to the attention of the Polish Court.

19. On 9 December 2020 the father formally sought permission to amend his Notice of Appeal in the *BIIR* appeal process to plead reliance on *Article 23(e) BIIR*. The appeal came before Peel J on 9 March 2021 for final hearing; given the inadequate time estimate in light of the expanded basis on which the appeal was being pursued, the appeal hearing was adjourned to this date in June 2021.

20. In the meantime, the Polish Court reconsidered the circumstances of the children at a hearing on 28 May 2021. The parents both attended the hearing (remotely) and were represented. I have seen a transcript of the hearing; the children spoke directly to the judge in the presence (it seems) of their parents. They all indicated that they wished to remain in England with their father. At the conclusion of the hearing, the judge of the Polish Court made an interim order that the children remain with the father in England, and listed a final hearing for September 2021. This order explicitly varies ("changes in this way the decree of the Regional Court … as of 19 December 2016") and substitutes for the December 2016 order.

21. In light of this ruling in the Polish Court, the father sought further permission to amend the Notice of Appeal again in order to rely on *Article 23(f) BIIR*. I considered this as a preliminary issue at the hearing.

The law

22. The core principle of mutual recognition and enforcement of orders as between Members States under *BIIR* is set out in *Article 21 BIIR*: it specifically provides that no "special procedure" shall be required.

23. *Article 23* of *BIIR* provides seven circumstances in which judgments relating to parental responsibility shall not be recognised: viz:-

> "A judgment relating to parental responsibility shall not be recognised:
>
> (a) If such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;
>
> …
>
> (e) If it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;
>
> (f) If it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought."

24. This leads to other important articles of the *BIIR* in relation to both review:

> "*Article 26*
>
> "*Non-review as to substance*

> Under no circumstances may a judgment be reviewed as to its substance".

and enforceability:

> "*Article 28*
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> "*Enforceable judgments*
>
> 1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
>
> 2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom." (emphasis by underlining added).

25. Peter Jackson LJ in *Re E (BIIa: Recognition and Enforcement)* [2020] EWCA Civ 1030 described *BIIR* and its predecessors of having:

> §2: "… the common purpose of promoting international co-operation for the benefit of children and avoiding conflicts of jurisdiction. Treating the best interests of children as a primary consideration, they provide a mechanism for the mutual recognition of judicial decisions, so that a judgment in one participating state is to be recognised and enforced in another participating state in effect as if it was a domestic judgment given in that state ."

26. He observed (§3) that "recognition and enforcement should be based on mutual trust and specified exceptions should be kept to a minimum". He later added (§33):

> "Registration is in the first instance an essentially administrative process, although a judicial act is required. Any substantive dispute takes the form of an appeal to the High Court, issued within a month of the date of service of the notice of registration. In the absence of a successful appeal, the order will continue to be recognised and it will be enforceable as if it was a domestic order. The effect of a successful appeal is that the order cannot be recognised, and therefore cannot be enforced." (all underlining added for emphasis).

The arguments on appeal

27. The father's original sole Ground of Appeal was reliant upon *Article 23(a) BIIR*. His case was that the recourse to enforcement as a means of securing a return under *BIIR* when the mother had been unsuccessful in her endeavour to secure the summary return of the children under *1980 Hague Convention* procedure (i) subverts other provisions of *BIIR* and specifically *Article 11* (which complements and supports the structure of the *1980 Hague Convention*); (ii) is inconsistent with case law: *Re A (child)* [2016] EWCA Civ 572 and (iii) is contrary to the best interests of these children. The father further submitted that this mother's attempt to secure a return by these means is contrary to public policy which imports a requirement that Member States / signatories will not use international treaties and regulations in a manner inconsistent with international obligations that are enshrined in other such instruments.

28. Following the judgment of Mr Verdan QC, and as earlier indicated, the father amended his Grounds of Appeal to include a claim based on *Article 23(e)*. The father's case was expanded to include an argument that the judgment delivered at the conclusion of the *1980 Hague Convention* proceedings was a "later judgment relating to parental responsibility given in the Member State in which recognition is sought" with which the December 2016 Order was "irreconcilable".

29. At the end of last week, and further to the Order made following the hearing in Poland on 28 May, the father applied to me for permission to amend his Notice once again to add a yet further Ground of Appeal based on *Article 23(f)*. In the course of submissions, I challenged Mr Setright to explain how *Article 23(f)* covered this particular situation. While acknowledging the ambiguity of language within the provision, he respectfully encouraged me to read *Article 23(f)* with *Article 23(e)* – thus, he submitted, "another" Member State in *Article 23(f)* means 'other than' the Member State in which recognition is sought, not 'other than' the state from which the original judgment – for which enforcement is claimed – emanated. In the circumstances, he argued that 'another member state' in *Article 23(f)* is (or certainly can be) Poland.

30. The children rely on *Article 23(a), Article 23(e),* and *Article 23(f)* for broadly all the same reasons advanced on behalf of the father. Mr Niven-Phillips attached particular emphasis on the *Article 23(f)* ground:

> "If the court determines that the 2016 order should not be recognised with reliance on *Article 23(f) BIIR*, it may be that it will not then be necessary for the court to go on to consider the remaining grounds of appeal …"

31. The question arose at the hearing as to whether permission was formally required to amend the Notice of Appeal for a second time, given that this is an appeal for which permission is not required. I take the view that as an issue of case management, permission to amend a Notice of Appeal in these circumstances *is* required in accordance with *rule 30.9 FPR 2010*. Whether I am right about that or not, I nonetheless granted permission to the father to amend his Notice of Appeal to add a new Ground of Appeal

32. Mr Setright and Mr Langford further contend, with justification it seems to me, that none of the grounds for non-recognition are or would be made out in relation to the 28 May 2021 Polish Court order.

Conclusion

33. At the conclusion of the hearing, I informed the parties that I would be allowing the appeal. These are my reasons.

34. First, I am satisfied that December 2016 order is indeed 'irreconcilable' with the "later judgment relating to parental responsibility" given in Poland in May 2021. I was persuaded by Mr Setright and Mr Langford's submission in this regard that *Article 23(e)* and *Article 23(f)* should be read together so that the word "another" in *Article 23(f)* refers to a Member State 'other' than that in which recognition is sought. I am further satisfied that the May 2021 judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought (i.e., there are no grounds in *Article 23* for *not* recognising it). It matters not in my judgment that the May 2021 judgment/order is an *interim* judgment/order only because it explicitly replaces the December 2016 order. It seems to me that should the Polish Court reverse the May 2021 ruling in relation to the care of the children, the appropriate course would be for a further application to be made (if so advised) for *that* order to be recognised and then enforced in this jurisdiction, rather than the December 2016 Order.

35. Secondly, if I am wrong in my interpretation of *Article 23(f)* above, I would nonetheless find that the judgment of Mr Verdan QC is "a later judgment relating to parental responsibility given in the Member State in which recognition is sought" which is 'irreconcilable' with the December 2016 Order (*Article 23(e)*). I note that leading counsel for the mother had previously filed a document arguing that the appellant must show that the decision of 22 July 2020 was wrong *as at that time*. As a matter of principle, it was submitted on behalf of the mother, the appellants cannot therefore rely upon a factual matter, or relevant judgment, which has only come into existence since DDJ Hodson made his decision on 22 July 2020. I have not heard full argument on this point, but on the arguments presented as they have been, I must record that I am unpersuaded that this is a correct approach. An application of such a rule would not be faithful to the intent of the *BIIR*, and if such an approach were to be strictly applied, it would be likely to lead to an anomalous result in this as in other cases. Moreover, it is not an approach which appears to be supported by the Court of Appeal in *Re E. (Children)* [2020] EWCA Civ 1030 to which I have already referred.

36. If there is a further moot point in this regard it is whether a judgment given in *1980 Hague Convention* proceedings is a "judgment relating to parental responsibility". Mr Setright argues that it plainly is, arguing that the *1980 Hague Convention* is essentially a child-centric instrument which is crucially founded upon determination of 'rights of custody' which themselves invariably presage the exercise of parental responsibility. As Mr Setright and Mr Langford put it in their written submissions:

> "The decision to refuse to return these children to Poland is, it is submitted, a decision relating to parental responsibility. The necessary requirement for any application under the *1980 Hague Convention* is that the holder has rights of custody pursuant to *Article 3* of that Convention. *Article 5* (a) further provides that those rights include the right to determine the place of residence of the child. *Council Regulation 2201/2203* by *Article 2 (7)* provides that the term parental responsibility shall include rights of custody.

> The pursuit of the return of the children by the *1980 Hague Convention* is an exercise in parental responsibility by assertion of the holder's rights of custody and is the objective of the application under the Convention."

I have not heard any detailed argument of the contrary position. However, it seems clear to me that the judgement of Mr Verdan QC is plainly *not* a 'welfare' decision of a court of general jurisdiction of a type such as would arise following the hearing of an application for an order under *section 8* of the *Children Act 1989*, for instance. That said, I accept the submissions of Mr Setright and Mr Langford as outlined above, and can indicate that, for the reasons spelled out there, I am satisfied that the October 2020 judgment *has* been given in respect of matters 'relating to parental responsibility'.

37. Thirdly, even if I were wrong on both of the earlier approaches, I am satisfied that it would be contrary to public policy to recognise and enforce an order made in a Member State which was contrary to a combination of *both*:

i) A finding of this court that an *Article 13(b) 1980 Hague Convention* exception had been made out in relation to a young person aged 15 who was objecting to a return to Poland, where the court had exercised its discretion not to return her and her brothers under that process;

together with:

ii) A subsequent contradictory order (May 2021) of the same Member State, by which it confirmed (having been made aware of the ruling in this country) that the children could remain for the time being in the care of their father in England.

I may add that, while I accept Holman J's view[2] that it is possible to contemplate a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our State, I am not sure that I would have concluded that the fact that Mr Verdan QC had found that an *Article 13(b)* exception applied in this particular case (§(i) above) would have met the 'high hurdle' (*Re S*, ibid. at §32) of the public policy argument *on its own in this case*.

38. I note at an earlier stage that leading counsel for the mother had argued that:

> "… it is to be noted that "public policy" in the context of Article 23(a) of BIIa is to be construed very restrictively: see, for example *In the Matter of D (A Child) International Recognition)* [2016] EWCA Civ 12; [2016] 1 W.L.R. 2469."

39. In the decision of *Re D* referred to in the passage quoted above, Ryder LJ, giving the judgment of the court, said this (at §21/22):

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[2] *Re S (Brussels II: Recognition: Best Interests of Child)(No.1)* [2003] EWHC 2115 (Fam); [2004] 1 FLR 571, and see also *LAB v KB (Abduction: Brussels II Revised)* [2010] 2 FLR 1664.

> "In *Re L (Brussels II Revised: Appeal)* [2013] 1 FLR 430, Munby LJ, as he then was, said:
>
> > "[46] *Article 23(a)*, in my judgment, contains a very narrow exception and, consistently with the entire scheme of BIIR and with the underlying philosophy is spelt out in Recital (21), sets the bar very high."
>
> There is undoubtedly a distinction to be drawn between the grounds described in article 23(a) and (b), to which I shall return, but I accept the submission that the exceptions in article 23 are intended to be very narrow. The judge emphasised one of the elements of the analysis conducted in *Re L* which is the decision of the CJEU in Case C-7/98 *Bamberski v Krombach* [2001] QB 709 where the Luxembourg court held that:
>
> > "[37] Recourse to the public policy clause in article 27(1) of the convention [then Brussels 1] can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle."'

40. In a different context, (namely recognition of validity of marriage), in *NB v MI* [2021] EWHC 224 (Fam), Mostyn J referenced Dicey, Morris & Collins on the Conflict of Laws (Sweet and Maxwell, 15th Edition), Rule 2:

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law".

And went on to say:

> "… in English domestic law it is now well settled that the doctrine of public policy should only be invoked <u>in clear cases</u> in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. The court will only take the exceptional and momentous decision of non-recognition where recognition would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal." (emphasis by underlining added).

41. I accept that *Article 23(a) BIIR* provides a "very narrow exception" as Munby LJ had pointed out, and that the circumstances under which non-recognition will be achieved

under this provision will be extremely limited, and only where there is a 'clear' case. However, on the basis that the Court of the Member State where the original order has been made has itself discharged that order, it seems to me that if I were to allow the registration of the original order to stand and be enforced, this would be "at variance to an unacceptable degree" with the current state of the effective order(s) in Poland.

42. Thus, by at least one, but by probably all three, of the routes identified above, I am satisfied that that the Appellant father (K) and the children (A, B, C) have made good their case for this court not to recognise now the December 2016 Polish custody order. Accordingly, I propose to set aside the order of DDJ Hodson of 22 July 2020.

43. That is my judgment.