Neutral Citation Number: [2021] EWFC 17

Case **No: ZC20P01401**

**In the Family Court**
**Sitting in the Royal Courts of Justice**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2021

**Before**:

**MR NICHOLAS CUSWORTH QC**
**SITTING AS A DEPUTY HIGH COURT JUDGE**

- - - - - - - - - - - - - - - - - - - -

**In the matter of AA (d.o.b. [a date in] 2006) and BB (d.o.b. . [a date in] 2016)**

**Richard Harrison QC and William Tyzack** (instructed by **Charles Russell Speechlys**) for the Applicant

**Teertha Gupta QC, Rebecca Carew Pole QC, Jennifer Perrins, Jacqueline Renton and Joshua Viney** (instructed by **Family Law in Partnership**) for the Respondent

Hearing date: 17 February 2021

**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR NICHOLAS CUSWORTH QC (SITTING AS A DEPUTY HIGH COURT JUDGE)

This judgment was delivered in private on 1 March 2021. It consists of 60 paragraphs and has been signed and dated by the judge. 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.

MR CUSWORTH QC:

**Background**

1. The mother, aged 40, was born and raised in Russia. The father is aged 41 and was born in Russia but moved to an EU Member State when he was 10. His father is a national of that state and his mother is Russian. The parties met whilst at university and started cohabiting in 1999. They married on 25 March 2006 and separated in September 2020. The children are AA (born on [a date in] 2006 and so aged 14) and BB (born on . [a date in] 2016 and so aged 4). AA is a day pupil at Z school having started at the school in 2016. BB is a day pupil at Y school having started in the nursery year in September 2020.

2. The father's case is that during the marriage, he was the homemaker and primary carer for the children. The mother does not accept this, although it is a fact that the mother's principal business interests are in Russia, and the children's schools are in London. The girls' habitual residence is a major issue between them, having as it does significant jurisdictional consequences.

3. The value of the parties' available assets is in dispute in the financial proceedings between them, but the family have had access to some wealth. A former family home is in London, which was purchased in February 2016 for £6.25m in advance of AA's starting at her London day school. A neighbouring flat bought for £7.55m in September 2020 is also held in the mother's name, although she denies beneficial ownership of the property. This is the property where the children's nanny currently stays. The family also have a home in Russia, where they stay when they are in that country. There are numerous factual issues in dispute in this case, including as indicated the question of which parent was the primary carer for the children until their separation last year.

4. There is now litigation between the parties in relation to the arrangements for the care of their children, and also in relation to the resolution of the financial aspects of their separation. Further, there is a dispute about jurisdiction in relation to both these two separate family law issues. I have already dealt with interim financial matters in a judgment which followed a hearing between the parties on 18 January 2021. The issue in relation to the divorce and financial proceedings is listed for a determination over 7 days from 11 June.

The issue in relation to jurisdiction over children matters is currently listed to be heard alongside it in that same court window. However, whether it should remain so is now the subject of the current dispute, which I heard over 1 day on the basis of submissions only from leading counsel on 17 February 2021. Between those two hearings, and since, I have been required to deal with a plethora of other short notice applications and drafting disputes about a number of different financial and welfare issues.

**The Current Application**

5. With that background, I now come to what has been the issue between the parties at this hearing, which is a preliminary question of jurisdiction pursuant to Article 13 of the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*. The mother has made an application for this court to stay the father's proceedings issued in the Central Family Court on 9 November 2020, under the terms of Article 13, on the basis of ongoing applications relating to the children's welfare that she has issued in Russia.

6. Although given a 1 day time estimate, that time was entirely taken up by the oral submissions of counsel, with no time then allowed for any judicial reading of the necessary proliferation of authorities, articles, conventions and other material which has been necessary to digest to do justice to the respective arguments in the case. Furthermore, the accurate state of affairs in the Russian Court, where there are competing proceedings in train, was not actually determined until the SJE in the case (whose impartiality was not accepted at the hearing by the father, but in respect of whose evidence there has been no subsequent challenge) was able to reply to a question of mine drafted over lunch on the day of the hearing, which established that the Court in Russia has not yet determined the question of the children's habitual residence and so accepted jurisdiction in the welfare proceedings, even though that was the basis upon which Mr Gupta QC for the mother had addressed me that morning.

7. Whilst the exact chronology of events is now agreed between them, its significance is not. I will therefore set it out here, solely as it relates to the welfare applications in each jurisdiction, as opposed to the divorce and financial proceedings:

a. On 28 October 2020, the mother issued an application to determine the place of residence for the children, in the Russian court;

b. On 5 November 2020, the Russian court 'returned' or rejected the statement of claim in respect of her application without issuing it, on the basis of a determination that the court lacked jurisdiction in relation to the children. The ruling made clear that the mother had 15 days to contest the ruling through the Court;

c. On 6 November 2020, the father filed a C100 application in the Central Family Court in London for an urgent Prohibited Steps Order preventing the children's removal from the jurisdiction, and a Child Arrangements Order, seeking an order that the children live with him and spend time with the mother. He also filed a C1A. The application was issued on 9 November.

d. On 11 November 2020, M filed a 'private complaint' – effectively an appeal - against the determination that the Russian Court could not deal with her claims;

e. On 13 November 2020, M issued her second application for the court to determine that the place of residence of the children was with the mother at her address in Russia, and to recover maintenance payments for their support;

f. On 17 November 2020, the Russian court returned this second statement of claim, once more on the basis of a lack of jurisdiction;

g. On 24 November 2020, the mother issued her third application to determine the place of residence of the children, and to recover maintenance payments for their support; which application was accepted on 26 November, and pre-trial hearing set for 21 December;

h. On 18 December 2020 the mother filed a C1A in the English proceedings;

i. On 21 December 2020 the Russian Regional Court allowed the mother's

private complaint against the original rejection (on 5 November 2020) of her first application, which had been filed on 28 October: the pre-trial hearing of her third claim, which had been listed for that day, had in fact separately been adjourned to 26 January 2021;

j. On the same day in England, the first hearing of the father's application took place before DJ Barrie**;** the mother would only just have learnt that her original claim could now proceed (Russia being several hours ahead of England): the recital to the order sets out that: "*The mother disputes the jurisdiction of the courts of England and Wales to make substantive orders under the Children Act 1989…*": amongst the directions given was the listing of a jurisdiction hearing to determine the habitual residence of the children, which both parties then acknowledged was required;

k. On 20 January 2021, the mother's first application was reconsidered and accepted by the court and set down for a pre-trial hearing on 2 March 2021; on the following day the mother applied for joinder of the two proceeding claims, although that had not yet been determined at the date of the hearing before me;

l. On 26 January 2021, the mother's third claim was adjourned on her application to 9 February 2021, and then to 18 and finally 24 February, on the basis of separate applications by both parties to enable this application to come before me;

m. There were at the date of the hearing before me two hearings listed in Russia, on 24 February and 2 March, in the 2 applications. Soon therefore, directions will be given for a hearing at which the Russian Court will determine the issue of the children's habitual residence, and so whether Russia considers itself to have jurisdiction to deal with welfare issues in relation to these girls.

8. Other aspects of these proceedings were also before me on 22 January, part-heard from the hearing originally listed on 18 January. On that day, Leading Counsel for the mother raised for the first time her client's contention that Article 13 of the 1996 Hague

Convention operated to require a stay of the Father's Children Act proceedings in this court. The United Kingdom and Russia are both signatories to this Convention.

9. Article 13 is in the following terms:

> (1) The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child must abstain from exercising this jurisdiction if, at the time of the commencement of the proceedings, corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request and are still under consideration.
>
> (2) The provisions of the preceding paragraph shall not apply if the authorities before whom the request for measures was initially introduced have declined jurisdiction.

10. The father's response to the mother's stay application, in brief, is as follows:

a. Relying on Article 61 of Council Regulation (EC) No 2201/2003 ('BIIR'), he says that the 1996 Hague Convention does not apply in this case. Although the United Kingdom ceased to be a Member State of the European Union on 31 January 2020, under the terms of the Withdrawal Agreement, European law applies as regards proceedings issued prior to the conclusion of the transition period on 31 December 2020. His application was issued on 9 November 2020**,** and is therefore governed by European law. Accordingly, he says that the court cannot impose a stay on the English proceedings pursuant to Article 13 of that convention;

b. He maintains that in any event, the mother had agreed to the English court being seised of the question of habitual residence and jurisdiction, and, on application of the court's general powers of case management and/or abuse of process principles, this court should proceed to determine that issue; and

c. Finally, he says that even if Article 13 does apply, he says that it does not operate to impose a mandatory stay on the English proceedings on the facts of this case.

**Article 61, BIIR**

11. In particular, in relation to his primary argument, the father relies on Article 61 of BIIR, which is in the following terms:

> *Article 61*
> **Relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children**
> As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:
>
> (a) where the child concerned has his or her habitual residence on the territory of a Member State;
>
> (b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

12. He therefore says that, on the basis that the court will find that the children are habitually resident in this jurisdiction, BIIR must apply to this case, rather than the 1996 Hague Convention. Unfortunately, however, the *lis pendens* rules in BIIR, contained in Article 19, expressly apply only to issues between contracting states, one of which Russia is not. Under Article 19 (2):

> Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

13. The consequence of this Mr Harrison says is that the UK is bound to apply BIIR and assume jurisdiction once habitual residence is determined, and the operation of the 1996 Hague Convention becomes an irrelevance. This he accepts may lead to proceedings in relation to the children continuing in the 2 different countries, if both assume jurisdiction in relation to the children. He relies on the principle in *Owusu v Jackson* [2005] ECR I-1383, [2005] QB 801, which he says has the effect that once the court is operating within the strictures of the European code, its powers to grant stays outside of that code are effectively abolished.

14. Further, he points to the decision in *UD v XB* (Case C-393/18 PPU) EU:C:2018:835 where the CJEU decided as follows:

> **[32]** As regards Art 8(1) of Brussels IIA itself, that provision states that the courts of a Member State are to have jurisdiction in matters of parental responsibility with reference to a child who is habitually resident in that Member State at the time when the matter is brought before the court concerned. Thus, nothing in that provision indicates that the application of the general rule of jurisdiction in matters of parental responsibility, which it establishes, is conditional on there being a legal relationship involving a number of Member States.
>
> **[33]** As the Advocate General observes in points 23 and 25 of his Opinion, it follows that, unlike certain provisions of Brussels IIA concerning jurisdiction such as Arts 9, 10 and 15, the terms of which necessarily imply that their application is dependent on a potential conflict of jurisdiction between courts in a number of Member States, it does not follow from the wording of Art 8(1) of that Regulation that that provision is limited to disputes relating to such conflicts.

15. However, whilst that decision makes plain that the general rule of jurisdiction in matters of parental responsibility applies regardless of whether or not the dispute in question involves 2 contracting states, it equally confirms that the application of some Articles is '*dependent on a potential conflict of jurisdiction between courts in a number of Member States'*, and one such, although not named in the judgment, is the *lis pendens* rule in Article 19.

16. For his part, Mr Gupta QC for the mother says that the *Owusu* principle does not apply in a situation such as this which firstly is under the auspices of BIIR, and not Brussels 1 as was *Owusu*. Further, he says that it does not apply in a situation where there are competing proceedings in a non-contracting state, as there are here, but as there were not in *Owusu*. He relies on 2 cases, which I shall consider in turn.

17. The first was *JKN v JCN* [2010] EWHC 843 (Fam), a decision of Lucy Theis QC (as she then was). That case involved a question of discretionary stay under s.5 of the Family Law Act 1986, but was also a case otherwise governed by BIIR, through the Domicile and Matrimonial Proceedings Act 1973. The Deputy Judge was asked to determine whether the *Owusu* principle applied to cases where there were parallel proceedings in non-contracting states, and/or to BIIR. Her determination was set out at [149]:

> 149. I have come to the conclusion (not without some hesitation) that:
>
> (i) It is neither necessary nor desirable to extend the *Owusu* principle in cases where there are parallel proceedings in a non-Member State. I have reached this conclusion for the following principal reasons:
>
> (a) The risk of irreconcilable judgments which undermine two important

objectives of the Brussels scheme namely: avoiding irreconcilable judgments between Member States and ensuring recognition of judgments between Member States.

(b) It would lead to an undesirable lacuna, as there will be no mechanism in place for resolving this situation with the consequence of both proceedings continuing with the consequent increased uncertainty and cost.

(c) The supporting rationale by Jacob LJ in *Lucasfilm* [*Ltd and others v Ainsworth and another* [2009] EWCA Civ 1328]

> '..the EU could not legislate for third countries' [111];
>
> 'The Regulation is not setting up the courts of the Member States as some kind of non-exclusive world tribunals for wrongs done outside the EU by persons who happen to be domiciled within the EU.' [129]
>
> 'We do not have to decide whether [*Catalyst Investment Group v Lewinsohn* [2009] EWHC 1964] was correct, though we note that, if [Barling J] is right, there is this oddity: that there is a clear lis pendens rule, with associated court first seized rule, for parallel cases within the EU but none for parallel cases where one is running within the EU Member State and one without. …

(d) The reasoning that underpins *Owusu* is not incompatible with retaining the discretionary power where there are parallel proceedings in a non-Member State. It does not undermine certainty for the defendant (as he will be bringing the proceedings in the non-Member State); the claimant (although not mentioned in Article 2) will have knowledge of the proceedings in the non-Member State and it is likely to be in his interests to have one set of proceedings rather than two (the latter would happen if the *Owusu* doctrine was extended); there would be less risk of irreconcilable judgments given in Member States which are not recognised in another Member State; *Coreck* (which was decided 4 years before *Owusu*) permits judicial discretion in circumstances where there is no provision for it in Brussels I.

(ii) If I am wrong about what is set out in (i) above, I have come to the conclusion that it is neither necessary nor desirable for the *Owusu* doctrine to be extended to BIIR for the following principal reasons:

(a) There is no direct connection between Brussels I and BIIR save for the reference in recital 11 of BIIR to maintenance obligations being excluded from its scope as these are already covered by Brussels I.

(b) Whilst the court can look at one Regulation to interpret the other where their language is identical, the respective provisions in the Regulations are different in a number of material respects as set out in paragraph 147 (v) above with the consequences, if the *Owusu* doctrine is extended, outlined in that paragraph.

(c) *Re I* [*(a child)(contact application: jurisdiction)* [2009] UKSC 10] makes clear that forum non conveniens is not an anathema to BIIR.

18. I interject here that amongst the consequences outlined at [147 (v)] of extending the Owusu doctrine, the judge had specified at (e)-(f):

> (e) There is no good reason for the lacuna which would operate if *Owusu* applied. BIIR provides in Article 19 a mechanism if there are competing divorce proceedings in another Member State; if jurisdiction is based on Article 7 national law provides the solution. If the jurisdiction is based on Article 3 and the other competing forum is a non– Member State there is no mechanism to deal with this. This can result in two sets of proceedings with the resulting

consequences and increased cost.

(f) Extending *Owusu* to BIIR is bound to have implications regarding Article 8 and jurisdiction in matters relating to parental responsibility. First, Article 15 provides a mechanism for a transfer of a case relating to parental responsibility between Member States where that is in the best interests of the child. There is no corresponding provision permitting a case to be stayed in favour of a non-Member State. There is no justification for depriving the courts of that power if it is in the best interests of the child to do so. Secondly, section 5(2) of the Family Law Act 1986 expressly empowers the court to grant a stay in favour of a non-Member State. Extending *Owusu* to BIIR would require the court to disapply the provisions of primary legislation which has been amended with the specific purpose of bringing the statute into conformity with BIIR.

19. She next went on to consider at [149 (iii)] the meaning of the words in Sch.1 para.9(1) of the Domicile and Matrimonial Proceedings Act 1973 which applies to discretionary stays in proceedings other than those 'governed by the Council Regulation'. She said:

(iii) In so far as it is necessary, bearing in mind my conclusions in (i) and (ii) above, I accept the arguments advanced on behalf of the husband that the narrow construction of the amendment to Sch 1 para 9 DMPA 1973 is to be preferred for the following reasons:

(a) The natural and preferable construction of 'proceedings governed by the Council Regulation' refers to the position where there are competing proceedings in another Member State.

(b) This construction is necessary to make clear that the discretionary powers conferred by paragraph 9 were ousted in cases where the mandatory provisions of Art 19 BIIR were engaged.

(c) The court's discretion to stay under paragraph 9 remains in place where the competing proceedings are in a non-Member State.

(d) This construction is not incompatible with EU law as it provides for the express provision in Article 19 and provides a mechanism in place to deal with competing non-Member State proceedings and reduces the risk of irreconcilable judgments.

20. This decision was considered in the Court of Appeal in the second case, *Mittal v Mittal* [2013] EWCA Civ 1255, where Lewison LJ said, under the heading '*The impact of the Owusu case on BIIR'*:

37. In my judgment the *Owusu* case [2005] QB 801 has little to do with our case. First, it was concerned with a different Convention regulating jurisdiction in a very different field of activity…Second, the legislative language under consideration in *Owusu* was very different from the language of BIIR…Third, both Advocate General Leger and the court declined to answer the question that arises in our case, namely whether proceedings should be stayed in favour of competing prior proceedings in a non-member state. Part of the policy of both the Judgments Regulation and BIIR is to avoid competing and potentially conflicting judgments in different jurisdictions (lis alibi pendens). Since the *Owusu* case was concerned with different facts, different legislative language and a different piece of legislation, it could therefore only be applied to BIIR by way of analogy. The analogy would have to found itself

on the policy underlying both the Judgments Regulation and BIIR. But fourth, the policy objectives of the Brussels Convention (and latterly the Judgments Regulation) were different from those of BIIR…

48. In *JKN v JCN (Divorce: Forum)* [2011] 1 FLR 826, para 149(iii) Ms Theis QC decided that proceedings were only 'governed' by BIIR if they fell within article 19 of BIIR. I agree with her. The whole context of paragraph 9 of Schedule 1 to the 1973 Act concerns stays of proceedings. In my judgment in the context of a legislative provision dealing with a stay of proceedings, the proceedings are only 'governed' by BIIR if BIIR tells the court how to deal with the application. Since, in my judgment, neither BIIR nor the decision of the Court of Justice in the *Owusu* case [2005] QB 801 does that (except in cases to which article 19 applies), the proceedings are not 'governed' by BIIR. I also agree with the husband that the wife's argument involves reading 'governed by' as meaning 'where jurisdiction is granted by'...

50 ... I do not consider that it is necessary to make a reference to the Court of Justice. I am comforted in that conclusion by the decision of the Cour de cassation in France of 17 June 2009 (Appeal No 08—12456). That court held that divorce proceedings in France should be stayed in favour of prior divorce proceedings in Iceland (which is not a member state) on the ground of lis alibi pendens; and that to order a stay on that ground was not an infringement of BIIR. The conclusion I have reached cannot, therefore, be regarded as the peculiarity of an island race of common lawyers. It is one that is shared by our civilian colleagues in mainland Europe.

21. Whilst neither of those cases involved consideration of the 1996 Hague Convention, and so Article 61 of BIIR did not fall for consideration, I do not accept that very different principles should apply. Whilst Article 61 (1) states that the Regulation should apply where the child has her habitual residence in the territory of a member state, in the same terms as the general provision in Article 8, that must I consider pre-suppose that the Regulation applies to the situation in question in the first place; and because Article 19 deals only with *lis pendens* situations between contracting states, it does not apply to the situation in this case.

22. In this I am fortified by the terms of Article 61 (2) which deals with enforcement between 2 contracting states, in a situation where the child is habitually resident in a third state which is a signatory to the 1996 Convention; so, where the issue remains between two contracting states the Regulation prevails, but enforcement as against that third state is not discussed, and so presumptively not included.

23. Finally, and decisively, BIIR itself sets out the intended limits to the scope of Article 61. Article 62 of the Regulation confirms, under the heading '*Scope of effects*' that:

> 1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

So, in matters not 'governed by the Regulation', the 1996 Hague Convention continues to apply.

24. Applying the same reasoning as that adopted after very full argument and careful consideration in *JKN v JCN,* and in the Court of Appeal in *Mittal v Mittal*, I am quite satisfied than this case does not fall into the unsatisfactory lacuna which Mr Harrison says is the inevitable consequence of his interpretation of Article 61. Rather, the situation here is not 'governed by' Article 19 of the Regulation, but by contrast is undoubtedly governed by Article 13 of the 1996 Hague Convention, involving as this case does a *lis pendens* issue between the UK and a 1996 Convention country that is not a signatory to BIIR.

25. I am aware that the effect of Article 61 of BIIR was also considered by Theis J in *West Sussex County Council v H* [2014] EWHC 2550 (Fam), in a decision which appears to run counter to that judge's earlier decision in *JKN v JCN*. The issue in that case was whether a request under Article 8 of the 1996 Hague Convention could be made for the transfer of proceedings from England to Albania (Albania being a party to the 1996 Convention but not BIIR). However, she found herself to be prevented from considering this by the fact that the transfer provisions in Article 15 of BIIR relate only to countries within the BIIR regime. She said at [30]:

> …the effect of Article 61 is that jurisdiction must be exercised under the Regulation rather than under the Hague Convention of 19 October 1996... In those circumstances, it is submitted, rightly, that the court cannot make use of the Article 15 procedure because that is to request a transfer to another Member State, and Albania is not a Member State. It is also submitted, in my judgment rightly, that the court could not use the transfer request under Article 8 of the Convention, since Article 61(a) of the Regulation acts to provide for jurisdiction only to be exercised under the Regulation and that this would be consistent with the practice guide's comment at page 16 that 'the scope for using Article 8 must be limited'.

26. It is not clear from the report whether the judge was reminded of her own earlier decision, or whether *Mittal v Mittal* was cited to her. Although it would be surprising if the principles governing the operation of Article 61 of BIIR were intended to be different in their application to Article 15 from their application to Article 19, which both themselves only operate as between contracting states, I consider that the latter

two cases are more directly in point, concerning as they do situations of *lis pendens*, than the *West Sussex* case, which can be distinguished on that basis.

27. Finally on this issue, I note that with effect from 2022, the recasting of BIIR will provide expressly for this situation under what will become Article 97(2), which will provide that:

> (c) where proceedings relating to parental responsibility are pending before a court of a State Party to the 1996 Hague Convention in which this Regulation does not apply at the time when a court of a Member State is seised of proceedings relating to the same child and involving the same cause of action, Article 13 of that Convention shall apply.

That prospective provision serves in my view to confirm the above interpretation of the current situation, and that a purposive interpretation of the current unspecific provision is entirely justified. I also note that Article 97(2) (b) of the recast Regulation would adopt the same approach to applications for transfer under Article 8 of the 1996 Convention, as that to *lis pendens* under Article 13, which would avoid in future the lack of jurisdiction accepted in the *West Sussex* case.

**Prorogation**

28. I now turn to address the father's second argument, which is that this is a case in which the court would in any event have jurisdiction pursuant to BIIR, Article 12, which is in the following terms:

> *Article 12*
> **Prorogation of jurisdiction**
> …
> 3. The courts of a Member State shall …have jurisdiction in relation to parental responsibility in proceedings …where:
> (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

29. Here, the father relies on the fact that on 18 December 2020 the mother's then solicitors wrote to his, setting out that a hearing was then listed on the following Monday, 21 December, in relation to the mother's application in relation to the children in Russia, in which they said:

> Whilst our client does not accept that the children, or the family generally, are habitually resident in this jurisdiction, she has, since 16 November 2020, accepted that the English Court has jurisdiction to consider immediate and protective matters regarding the children. This includes matters relating to a return to Russia.
>
> Accordingly, and entirely without prejudice to her position in this jurisdiction, her Russian lawyers will be applying for an adjournment of the hearing on 21 December 2020. She will also be seeking (following Monday's hearing) a general stay of the Russian children proceedings, pending consideration by the English court of the central issue regarding the children's future living arrangements, namely their return to their home in Russia.

30. Further, the father argues that because the mother's advisors did not raise the Article 13 point until 22 January 2021, they were too late to do so, and that such matters have to be dealt with at the outset of proceedings, which of course as a general rule is right. However, in this case, given that the circumstances giving rise to the Article 13 argument were only confirmed by the decision of the Russian Court on 21 December 2020, I remind myself that that day was the earliest date on which the point could realistically have been taken.

31. I do not consider that either the letter of 18 December 2020 or the fact of notification of the Article 13 point only on 22 January 2021 is sufficient to vest jurisdiction in relation to matters relating to parental responsibility in respect of AA and BB to the English Court, for the following reasons:

    (a) The mother's solicitors made it very plain in their letter that they did not accept the court's general jurisdiction, save in respect of provisional or protective matters, in circumstances where the children are physically present in this jurisdiction, but where the question of their habitual residence was in issue;

    (b) When the letter is sent, the Russian Court had as indicated not yet handed down its determination of the mother's appeal by way of private complaint in relation to her first application made on 27 October 2020. If she had lost that appeal, she would have had a very much weaker argument in relation to any consideration of *lis pendens* under Article 13 of the 1996 Convention, and may well not have been able to advance such an argument at all;

    (c) The only issue in relation to which they expressly accepted this court's

jurisdiction was in relation to whether or not the children should return to Russia, which they categorised as a protective measure, and so open to this Court under Article 12 of the 1996 Convention, and not incompatible with its terms, in the event that Russia were to be found to have jurisdiction and that Convention applied.

(d) The determination in the Russian Court was made on 21 December, only a few hours before the directions hearing before DJ Barrie in this jurisdiction. A recital to the order of DJ Barrie anyway records that:

> 'The mother disputes the jurisdiction of the courts of England and Wales to make substantive orders under the Children Act 1989 in the present proceedings, but both parties agreed that the present court has jurisdiction to make interim orders amounting to provisional or protective measures and to give directions for a hearing to resolve the substantive jurisdictional issue'.

(e) Whilst Mr Gupta's position statement was drafted on the basis that the Russian Court had already accepted jurisdiction in this matter, it became clear during the course of the hearing that that was not so, and that the question of whether the girls can be said to be habitually resident in that jurisdiction has yet to be determined there. I will deal below with the impact of that circumstance on the application of Article 13 in this case; however, in circumstances where no court has yet accepted substantive jurisdiction, and Article 13 applies by its own terms only in situations where more than one court has already done so, I do not accept that the mother can be prevented by the operation of Article 12 (3) of BIIR from raising the point now.

**Article 13**

32. How then to apply the provisions of Article 13 of the 1996 Convention to the circumstances in this case? Neither Russia nor England has yet determined that it has jurisdiction by reason of the girls' habitual residence, so the situation provided for in the Article has not yet arisen. For the avoidance of doubt, I acknowledge that the 1996 Convention is an international instrument and the expressions used within it fall to be determined under its autonomous law, as interpreted by the courts of England and Wales.

33. The interpretation of the words of Article 13 (1) are here in issue between the parties.

They are:

- '*The authorities of a Contracting State which have jurisdiction under Articles 5 to 10 to take measures for the protection of the person or property of the child*
- *must abstain from exercising this jurisdiction if,*
- *at the time of the commencement of theproceedings,*
- *corresponding measures have been requested from the authorities of another Contracting State having jurisdiction under Articles 5 to 10 at the time of the request*
- *and are still under consideration'.*

34. The first thing to note is that the Article presupposes that both Contracting States involved have jurisdiction under Articles 5 – 10, which are essentially rooted in the habitual residence of the child.

35. Second, the operation of the Article is mandatory if the circumstances specified arise. Those circumstances include:
    (a) That a request for corresponding measures has already been made in another state at the time of commencement of proceedings; and
    (b) That the other state had jurisdiction at the time when those measures were requested of it; and
    (c) That those measures are still under consideration.

36. There can be no issue but that their subject matter and those of the father's application of 6 November are corresponding measures. The mother sought a determination of the children's residence whilst the father sought an order preventing the children's removal from the jurisdiction of this court, and defined child arrangements.

37. The parties disagree about the point in time at which the last element – the measures still being under consideration - must be measured. Mr Harrison says that the natural construction of the words is that they must relate back to the phrase 'at the time of commencement of proceedings', whereas Mr Gupta suggests that it must refer to the time when the court hears the application for a stay to be imposed. The explanation of Article

13 set out in the *Practical Handbook* on the operation of the Hague Convention 1996 at para 4.32 would tend to support this later position, in that it makes clear that the Article applies:

> '…for as long as the proceedings in respect of the "corresponding measures" in the other Contracting State are still under consideration.'

38. However, the Lagarde Explanatory Report in relation to the 1996 Convention at [79] restates the import of this paragraph thus:

> The authority having jurisdiction under Articles 5-10 should abstain from deciding on the request for measures with which it has been seised if corresponding measures have been requested from the authorities of another Contracting State which then had jurisdiction under the same Articles 5-10, such measures then being still under examination.

39. The use of the word 'then' both in relation to the second state having jurisdiction, and the measures being still under examination, might suggest that the same temporal requirement applied to both. However, I note that the French version of the report uses 2 different words, both rendered into English as 'then' – '*alors*' for the possession of jurisdiction, '*encore*' for the measures being under examination – which might more naturally have been rendered as 'still' – the word in the Practical Handbook. That would tend to support Mr Gupta's position, which I prefer of the two. Ultimately, I suspect that the drafters of this clause did not expect that there would be a substantial difference between the time when the second set of proceedings were commenced, and the time when the requirement to impose a stay arose. Even if I am wrong in this, however, my overall determination of this issue would not be affected, as I will explain.

40. The underlying issue between the parties here goes to the status of the Russian proceedings at the dates of filing and issue of the father's English proceedings on 6 and 9 November 2020. In this regard, I have considered the report of the SJE, Professor Khazova, but done so on the basis that I fully accept Mr Harrison's submissions to the effect that the function of the expert in Russian law is to explain the relevant provisions of that law, and that it is not her function to express an opinion on the question of whether, at the material time, the mother's Russian proceedings were '*under consideration*' for the purpose of the Convention. That is a matter for me. I make no criticism of her for seeking to answer the question, however, as she was asked to do so.

41. In her full report of 15 February 2021, and subsequent responses to queries from both sides – and on the issue of whether habitual residence had yet been considered, from me, she provided the following relevant opinion:

> '[Email 17.2.21]: …the question of the children's habitual residence has not yet been finally determined by the court in [Russia], and … directions for the determination of that question are likely to be given by the judge at the preliminary hearing on 2 March 2021…. a pre-trial hearing - a stage where the judge gets prepared for hearing the case (clarifies claim, facts, evidence - if everything is ok and ready for consideration). Then, she will schedule a hearing where this is supposed to be decided.'
>
> '[Email 16.2.21]: The stage of the initiation of a civil case consists of the following procedural steps: filing of a statement of claim; acceptance or rejection of a statement of claim, return of a statement of claim, leaving a statement of claim without movement; filing of a counterclaim, acceptance or rejection of a counterclaim. No other procedural actions are possible at this stage. The initiation of a civil case in court is carried out by filing a statement of claim…
> … key point is that we need to differentiate between filing a statement of claim (petition) which is the beginning, the first step in initiation of a civil case, and commencement of civil proceedings, which occur when a judge rules on acceptance of a case and on initiation (commencement) of proceedings. The latter is NOT the beginning of "proceedings" but a response of a court to the petitioner's claim. The beginning is filing the claim.'
>
> '[10.1] With regard to the measures sought by the Wife in her Claim of 27 October 2020, the Ruling of 21 December 2020 meant that they should become under consideration from date when the [Russian court] decided on taking over the Wife's Statement of Claim (accepted for proceedings)…in order to determine the priority of applying to the court for a determination of the children's place of residence, it is not the date of acceptance/initiation of the proceedings but the date when the claim was filed in the court that should be relevant'
>
> '[6.6] The rulings can be appealed by a Private Complain. Therefore, the private complain does not operate as a new claim; it does not set new proceedings either under Russian law; it is an action that is taken in the course of ongoing civil proceedings on the case. It does not change the date when the Petitioner filled her claim, in this case when the Wife's Statement of Claim was filed in the court.'
>
> '[6.4] As explained in the Decree of the Plenum of the Supreme Court N 52 of 27 December 2007 "…the term for consideration of the separated claim(s) should be calculated from the date of commencement of the period for the originally stated claim, and in case of merging of cases into one proceeding, the term for consideration of such case is calculated from the earliest date of commencement of the period for one of the merged cases".

42. So, beyond her unequivocal indication about the status of the enquiry into jurisdiction, she has also clearly indicated that the mother's filing of her claim should be taken as

the start point for the proceedings, notwithstanding the later successful appeal against initial rejection. And whilst she did indicate that the measures sought would come 'under consideration' once the proceedings were accepted by the court, which happened only in January 2021, what that means for the application of the Convention is a matter for this court to determine.

43. As the above chronology set out, by the date when the father filed his application, on 6 November, the mother had filed her original application, received by the court at the latest on 28 October. However, that application had been returned because the Judge who considered it determined that the court lacked jurisdiction in relation to the children. The ruling dated 5 November 2020 gives the mother permission to appeal that decision within 15 days. Within that time, but before the mother had lodged her appeal, the father issued his application in relation to the children in London. On 11 November, still within the time allowed but two days after the father's claim was issued, the mother lodged her appeal, by way of private complaint.

44. On 21 December, that appeal was allowed, and the mother's first application restored to the court of first instance where it is now one of the 2 applications proceeding to a determination of whether the Russian Court does have jurisdiction by reason of the children's habitual residence. Little turns on the timing of the mother's two later applications, the first of which was rejected by the judge and not appealed, the second of which was allowed and is now proceeding toward a hearing on jurisdiction. On any view, that last application was lodged after the father's application, and on the basis that the 1996 Convention applied, would have to have waited behind the father's application had it stood alone. All will therefore turn on the status of the first Russian application.

45. Although, in the absence of jurisdiction having been established in either country, Article 13 cannot yet apply, I do consider that the question (of how the order of events would require its application if both countries did so establish) is one that should be decided now, in the best interests of AA and BB. Otherwise there would be the prospect of further confusion and delay at a later stage once the disputed questions of habitual residence have been resolved, in the very possible event that both candidate countries claimed jurisdiction.

46. In this regard, as I will explain, I consider that even if I am wrong about the time for application of the phrase *"are still under consideration"* for the purposes of the Convention, the Russian proceedings were sufficiently extant on 6 November to qualify as being under consideration for the purposes of Article 13 (1).

47. Mr Harrison for the father makes the case that after the mother's initial application was rejected by the court on 5 November, there was nothing practically under consideration by the Russian court until the mother lodged her private complaint on 11 November, after the father's English application was filed. He says that the fact that the mother's time to appeal had not yet expired should not affect the question of whether there were in reality measures under consideration in Russia on 6 November.

48. In *Moore v Moore* [2007] EWCA Civ 361, the Court of Appeal determined that the *lis pendens* provisions then contained in Article 27 of Brussels 1 should be interpreted to extend to the determination of a pending appeal against a refusal of jurisdiction. Thorpe LJ said:

> [103] The effect of an appeal from a decision by the court first seised that it has no jurisdiction does not appear to be settled by authority... It is true that a judgment for the purposes of Brussels I is final even if an appeal is pending: e.g. Articles 37 and 46. But the object of Article 27 is to prevent irreconcilable judgments, and as a matter of policy it would be very odd if proceedings in the court second seised could continue even if on appeal the jurisdiction of the court first seised is established. Consequently, we consider (contrary to the view of the judge) that Article 27 applies until the proceedings in the court first seised are finally determined in relation to its jurisdiction. That would mean that the expression in Article 27.1 "until such time as the jurisdiction of the court first seised is established" should be interpreted to include the case where the court first seised has declared that it has no jurisdiction, but an appeal is pending against that decision, and that it would be unsatisfactory for the matter to be dealt with through a discretionary stay in the court seised second.

49. What though of the period after judgment but before any appeal has been lodged? Mr Gupta here reminds me of my own decision in *Ville de Bauge v China* [2014] EWHC (Fam) 3975, which was a case under Article 19 of BIIR, involving proceedings in Italy, and where the question of seisin was therefore governed by Article 16 of that instrument.

50. In that case, I compared an earlier Italian decision, where no right of appeal had existed. I said:

14. …In [*C v S (Divorce: Jurisdiction)* [2010] EWHC 2676 (Fam), [2011] 2 FLR 19,] the factual situation which faced the court was explained by [Hedley J] as follows:

> 16. 'There were a number of matters on which the experts were in agreement...; thirdly, that that was an order which was not capable of being appealed; and, fourthly, that there are no apparent outstanding proceedings in Italy at the present time. There was, however, a crucial matter on which they disagreed.
>
> 17. Miss Ceschini said that the effect of the order on 9th October was to finish the case and that… it was the fact that the order declaring the petition void and that the proceedings be shelved had the effect of absolutely bringing proceedings to an end.
>
> 18. Dr. Calá agreed thus far but he went on to say that …the Italian civil code would …have the effect of enabling an application to be made to revive the order, so long as some application was made within 12 months of its making…, and accordingly this case was capable of being revived. It was his opinion that, insofar as it was capable of being provided, first, that it amounted to a lis pendens under Article 19...
>
> 19. It follows, in those circumstances, that if Miss Ceschini is right, there were no proceedings in existence at the time when the English court exercised jurisdiction; whereas if Dr. Calá is right, there were archived but revivable proceedings which were capable of constituting a lis pendens and which, accordingly, were capable of allowing the Italian court to remain seised of the matter.
>
> 20. Those are matters to which I have given close and anxious attention. I have reminded myself that, in European jurisprudence, Regulations and Articles are often to be treated as living and purposive instruments and not always to be read as tightly as one might read an English statute. Certainly, I have come to the conclusion that Article 19 must be read purposively and, in my judgment, for a court to remain seised of a matter, there must in fact be existing proceedings before it. To construe the Article in any other way is potentially to make a nonsense of it by a court being seised of a matter about which it can do nothing unless a party revives it... For Article 19 to bear real meaning, in my judgment, it is essential that there be proceedings which can be properly described as "existing" before the court at the relevant date.'

15. [Counsel] thus contends that the situation here is truly analogous to that in *C v S*, and that in consequence, once the final separation order was made by the Italian Court…, those proceedings were over and the Italian court's seisin came to an end. His client was therefore free, he submits, to issue a fresh English divorce petition during the hiatus period in Italy, and thus become first in time for the purposes of Art 19. He relies heavily upon Ms Ceschini's expressed view that the Italian separation order was immediately enforceable…, notwithstanding her later expressed opinion that: 'The separation order... was not final…', because the term to appeal had not then expired. It is noticeable that, in the earlier case of *C v S*, her opinion that the order in that case was final was based, at least in part, upon the agreed fact that it was an order that was not capable of being appealed…

17. Whilst (a) the order remained potentially subject to appeal, and (b) as a result the husband (or the wife) was precluded from issuing divorce proceedings in Italy, it cannot be said that there were no proceedings which 'could properly be described as existing'. …there was a long stop time limit, at the end of which the order would have become final and the right of potential appeal been discharged. If, thereafter, the husband had taken no steps to issue divorce proceedings in Italy, then it might have become possible for the wife to have done so in England…. In those circumstances I am satisfied that the seisin of the Italian court… has not been lost along the way...

51. A case under the 1996 Convention has significant differences from one governed by the seisin provisions in Article 16 of BIIR, but a comparison may be drawn. Under Article 13 of the 1996 Convention, the commencement of the proceedings in the country being asked to abstain is a key point. By then, there must have been a request for corresponding measures in another contracting state, which state had jurisdiction under the Convention when the request was made to it. Of course, that last element has yet to be determined. But assuming that the measures originally requested can be seen to be under consideration now, is there still room for a window, whilst the court's initial determination has been made but its rejection of the proceedings is still within the time for appeal but not yet appealed, during which the proceedings could not properly be described as existing – the words of Hedley J in *C v S*? For if the proceedings were still existing, can it be said that the measures sought were not still under consideration?

52. I consider that, just as in the Italian scenario relevant in *C v S* and *Ville de Bauge*, the proceedings would only cease to exist, and matters would only cease to be under consideration for the purposes of Article 13, once the usual time for appeal of any order dismissing or rejecting the proceedings had expired. If that time had expired, then no proceedings would exist from that point, and the circumstances of a prior request still being under consideration would not be met. The next step then must be to determine whether jurisdiction existed at the time of the original request, without which Article 13 will not apply.

53. That the judge ruled on 5 November that the court lacked jurisdiction was a determination of the mother's application which the order of the court made clear that she was entitled to appeal within 15 days. She did so, and ultimately her appeal was successful, such that a hearing to determine whether there is jurisdiction will now take

place. If the judge had initially made the opposite decision, as the Russian Court later determined that she should have, then there would be no question but that the measures requested were 'still under consideration' when the father filed his claim. The mother should not be prejudiced by the fact of an erroneous ruling, timeously appealed and later overturned.

54. Mr Harrison suggested that the decision on 5 November amounted to a declining of jurisdiction by Russia for purposes of Article 13 (2), which was operative when the father's application was filed on the next day. I do not accept that. It would have amounted to such a declining, once the time for appeal had passed. Before the time for appeal had passed, and then once the appeal process was in train, the measures initially under consideration remained so and continue to be to date. In the event that the Russian court does accept jurisdiction, then I find that the conditions required for the operation of Article 13 are made out.

**Outcome**

55. First though, there must be a decision made about which court does have jurisdiction. As Mr Gupta himself asserted, rightly, the issue dealt with under Article 13 is not the establishment of jurisdiction itself. Article 13 expressly anticipates that two different courts have jurisdiction. It is a mechanism which allows a stay to be ordered – so it is concerned with which court should be allowed to exercise jurisdiction, rather than being concerned with whether jurisdiction exists at all. Before the Russian Court has determined that it considers itself to have jurisdiction, I am clear that it would not be appropriate for this court to declare now that it will abstain from exercising jurisdiction, especially as its own jurisdiction is contested and has not either been established. Equally, there is no apparent reason for this court to seek to prevent the Russian court from determining the question according to its own timetable.

56. In this regard it is noteworthy that two Russian judges have already determined that the mother's case on jurisdiction is not sufficient to justify a ruling in her favour, and although one of those rulings has been overturned on appeal, the effect of it was only to allow a different judge to determine the jurisdictional question on evidence from both parties, as Professor Khazova has confirmed. It was not a finding that the Russian Court has the jurisdiction to deal with matters of parental responsibility. The outcome

of the hearing to determine substantive jurisdiction in relation to these children in Russia is not by any means a foregone conclusion, especially in circumstances where both girls are currently being educated in London.

57. It is not in the interests of any child to find itself in a position where no court is currently in a position to exercise a substantive welfare jurisdiction in relation to his or her interests. I remind myself of the words of Hayden J in *Re B (A Child) (Custody Rights: Habitual Residence)* [2016] EWHC 2174 (Fam), where he said at [18]:

> 'If there is one clear message emerging both from the European case law and from the Supreme Court, it is that the child is at the centre of the exercise when evaluating his or her habitual residence.'

Whilst he was speaking of the exercise which the judge determining jurisdiction has to undertake, there is a real danger that the persistent jurisdictional disputes in this case will impact negatively on the ability of either court to make decisions in these children's best interests.

58. I also bear in mind that, unlike the regime under BIIR where the court second seised must decline jurisdiction once the court first seised has confirmed its own, under the 1996 Hague Convention, the scheme is predicated upon more than one court potentially being involved, depending upon a sufficiently connected court's ability to assess the best interests of the child, either at the instance of the court of the child's habitual residence (Article 8), or their own (Article 9), and based on the child's substantial connection, location or nationality, or the place where their parents' divorce proceedings are taking place. There is thus significant flexibility built into the terms of the Convention, to accommodate children's best interests. With truly international children such as these, the position may well remain fluid for some time.

59. I do not therefore consider that this court should now take the decision to defer the determination of whether it has jurisdiction, in the absence of parental agreement. That issue should remain listed for resolution as it is currently, subject to a review in the event that the Russian court comes to a positive determination first. Even then, the terms of Article 13 clearly anticipate a situation where there are 2 countries with jurisdiction under the Convention, which one simply abstains from exercising, so the right course then may require further consideration in light of the best interests of AA

and BB as they appear at the time. If jurisdiction were to be determined here, however, it would clearly be wrong for this court to seek to exercise it contrary to the terms of Article 13.

60. That is my judgment.

28 February 2021