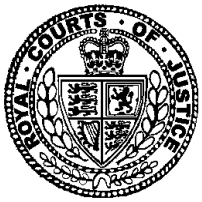

This judgment was delivered in private. The judge has given permission for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly 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.

Neutral Citation Number: [2020] EWHC 162 (Fam)

Case No: **CCR2018/23**
HS18P00283
FD18P00572

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF AB (A girl) AND BC (A boy)

AND IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 ON 27 NOVEMBER 2003 CONCERNING THE JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENT AND MATTERS OF PARENTAL RESPONSIBILITY

AND IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF THE SENIOR COURTS ACT 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2020

Before:

MS JUSTICE RUSSELL DBE

- -

Between:

M	**Applicant**
And	
F	**1st Respondent**
And	

AB & BC **(THROUGH THEIR CHILDREN'S GUARDIAN JACQUELINE RODDY)**	**2nd & 3rd Respondents**

M (in person) for the **Applicant/Appellant**
Jaqueline Renton (instructed by **Freemans Solicitors**) for the **F**
Mark Jarman (instructed by **Cafcass Legal) for AB & BC**

Hearing dates: 4th, 5th & 6th September and 4th October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

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 Honourable Ms Justice Russell DBE:

Introduction

1. This case, which concerns two teenagers of Spanish parents and nationality, is no stranger to this court or to the family courts in Spain. As will be seen these young people have been the subjects of litigation for many years. The elder child (AB) a girl, is now sixteen years old; in less than two years she will have reached her majority. As it is domestic jurisdiction in respect of arrangements for AB is now limited, once an adult this court will not have any jurisdiction, it will be her decision where she lives. Her younger brother (BC) will shortly be thirteen, and while he is still an adolescent, he was born in England and has, in actuality, lived here most of his life. Both AB and BC are separately represented through their court appointed guardian, Ms Jaqueline Roddy, and have had their case presented by counsel, instructed by Cafcass Legal. Their mother, who is a cardiologist, works for the NHS in the South of England where the children live and attend school, who appeared in person as she is not entitled to publicly funded representation. Their father, who lives on the Spanish mainland, is in receipt of public funding and is represented by solicitors and counsel. During the currency of the proceedings in this jurisdiction the children have repeatedly told their guardian, and, through her, this Court, that they want to continue to live with their mother and to remain in England. The Spanish Court has ordered that they live with their father in Spain.

2. This case was previously considered in the High Court in 2017 by Mr Justice Baker (as he then was) and the judgment is reported as *FE v MR & Ors*.; neutral citation [2017] EWHC 2298 (Fam) (14 September 2017) and can be seen on Bailii *http://www.bailii.org/ew/cases/EWHC/Fam/2017/2298.html*. The Spanish Court was invited to transfer the case pursuant to Art 15 of Brussels IIa but declined to do so. The proceedings in Spain continued during which the children were seen by a Spanish judge. The Spanish Court ordered a transfer of residence to Spain in June 2016 and for the children to live with their father; they had never lived with him after their parents separated. Pursuant to an order of the Spanish Court in Tenerife 2013, where the children were then habitually resident, they moved to live with their mother in England in December 2013. They have lived here since, attending their respective schools and are, as evidenced by their guardian's written analysis and oral evidence, well integrated into their social and peer groups.

3. These protracted proceedings have involved the family courts of both the Spanish and English & Welsh jurisdictions. I have attempted to set out the details of both sets of proceedings below. Putting the case briefly, proceedings concerning these children commenced in Spain in 2013 and at the end of 2013 the children moved to the UK where they have remained. As I have already observed these two young people have repeatedly, and over a period of years told their independent guardian that they do not want to be sent to Spain to live with their father but wish to remain in England living with their mother.

Background and chronology history

4. The background to the case is set out in the judgment referred to above and with clarity, but to set this judgment in context I shall repeat of it here, along with a chronological history of the proceedings since. The children's parents married in 2002, in Barcelona, Spain. AB was born, in Spain, in October 2003. In 2004 the family moved to another city in Spain where the 1st respondent father (F) lives and works. In 2006, when AB was still

an infant, the family moved to Kent in England, where BC was born in December of the same year. There they remained until July 2011 when they all briefly moved back to the city of P where F currently lives for a few weeks, before moving to the Canarias. Within a year, in July 2012, F left the family home and moved back to the city of P where he remains. M and children stayed in Tenerife.

5. F filed a petition for precautionary measures prior to filing for divorce against M in Tenerife in June 2013; he sought sole custody if M were move to London and shared or joint custody of the children, if M remained in Spain. On 3rd September 2013 M filed for divorce and the guardianship and custody of the children and she and the children be allowed to move to England. On 19th September 2013 by an order made by Court in Tenerife M was granted "physical custody" of the two children; a schedule of visitation to F was set out in alternative terms dependant on whether the parents resided in the same city or Island; or the parents both resided in Spain but in towns further apart; or to allow for M living outside of Spain. F was to pay child support and "extraordinary expenses" were to be shared.

6. In December 2013, M and the two children arrived in England to live. M lodged a letter with the court in January 2014 which said that M had mailed F on 20th December 2013 to inform him that she and the children were moving to England. In March 2014 F then lodged a letter in which he sought guardianship and custody of the children be awarded to him in Spain. A hearing took place on 21st March 2014 before a judge in the Court of First Instance in F's hometown of P. The judge interviewed the children and decided they should be seen by court-appointed psychologist. On 21st December 2014 M made a criminal complaint of coercive behaviour against F following an incident at Bilbao airport during a contact handover.

7. On 27th May 2015 a Spanish Judge interviewed the children. The children were interviewed in the presence of the judge by a psychologist on 31st July 2015. They were again seen by the psychologist on 18th August and 19th August 2015. AB was interviewed by the psychologist on 8th January 2016. On 5th February 2016 the psychologist filed written report in which she recorded that it was the children's wish to be with F and the family in his home city. On 27th June 2016 the judge delivered a judgment awarding guardianship and custody of the children to F from 1st September 2016 and directed there should be holiday contact with their mother in London unless she decided to travel to Spain for contact.

8. M filed a notice of appeal on 1st September 2016 and removed the children from Spain on 3rd September 2016. In Spain, on 6th September 2016 F lodged application for a claim to enforce the order of 27th June 2016. On 20th September 2016 the Spanish judge ordered M to bring the children to Spain and pay a daily fine of €100 for each day that the children remained in England. On 5th October 2016 F issued an application without notice in England under the inherent jurisdiction for a Location Order and for registration and enforcement of Spanish Court's orders of 27th June 2016 and 20th September 2016; a location order was granted by Mrs Justice Roberts. An order for the registration and enforcement of the Spanish orders made by District Judge McGregor, which M was served with on 7th October 2016. There followed a hearing before Mr Justice MacDonald on 14th October 2016. On 7th November 2016 M filed Notice of Appeal against the order for registration and enforcement of Spanish orders.

9. At a hearing on 9th November 2016, Mr Justice Francis refused M's application for the children to be interviewed by Cafcass. This was followed by an application on behalf of AB being made, on 24th November 2016, for AB, by then thirteen, to be joined as a party. On 28th November 2016 Mr Justice Holman made an order setting aside the order made by District Judge McGregor on 5th October 2016 as District Judge McGregor had not been informed of M's pending appeal in Spain. Further directions made included for F's application for recognition and enforcement to be stayed; and for AB to be joined as a party (to be represented by an officer of the Cafcass High Court team as AB's guardian) and that the allocated Cafcass officer should interview BC to ascertain BC's wishes and feelings and to assess whether BC should also be joined to proceedings (to be represented by a guardian); and for the matter to be listed for a further hearing on 3rd February 2017.

10. On 19th January 2017, the Spanish court dismissed M's objections and application in its entirety on ground that her arguments based on the children's current wishes were insufficient; it was directed that the enforcement claim should proceed. On 20th January 2017 the first report of Ms Jacqueline Roddy, the appointed Cafcass officer, was filed in time of the hearing on 3rd February 2017 before Mr Justice Mostyn; who refused F's application to lift the stay on the recognition and enforcement proceedings. Undertakings were made by both parties that they would seek to expedite the appeal that is before the Spanish Court. Contact was ordered to take place between the children and their father over February half-term in England and during the Easter holidays in Spain.

11. In February 2017 the half term holiday in the UK contact between the children and their father took place. For the Easter holidays M took the children to Gatwick Airport on 2nd April to meet F. The children and their father flew to Spain and stayed with their paternal grandparents for Easter.

12. On 13th April 2017 F, contrary to the order of the court and without permission, took the children to Dubai and then flew on to Bangkok, Thailand, after which he took them to Indonesia after a few days. Meanwhile, on 16th April 2017 M and Cafcass were informed that the children and F were no longer in Spain. On 18th April 2017 M made an emergency application in the High Court for the children to be made Wards of court. Wardship was granted by Mr Justice Francis, and an order was made for the immediate return of the children to England. M then flew to Indonesia and where the children were located with the assistance of the Spanish Consular authorities. They were returned to the care of their mother, who returned with them to England on 26th April 2017.

13. On 5th May 2017, a further report of Jacqueline Roddy was filed. On 17th May 2017, at a further hearing Mr Justice Holman made an order joining BC as a party to proceedings and prohibiting F from removing the children from this jurisdiction unless by agreement.

14. On 5th July 2017 F was acquitted of coercion following in respect of the complaints made by M regarding his behaviour on 21st December 2014 at the contact handover. On 10th August 2017 the solicitor for the children issued an application inviting the court to submit a request to the Spanish court for the transfer of proceedings to the English court under Article 15 of Brussels IIa. F then filed an application in Spain, on 28 August 2017, for M to be arrested for failing to place the children to his care.

15. The case came before Mr Justice Baker (as he then was) on 4th September 2017; his judgment was delivered on 14th September 2017 in which he concluded as follows; that the Spanish court was first seized with the matter as M's application for divorce was

issued first and that accordingly the English court did not have jurisdiction to make welfare decisions in respect of the children under Article 19(3) of Brussels IIA; and that a request should be submitted by the English court for the proceedings to be transferred from the Spanish court under Article 15 of Brussels IIA on the grounds that the English court is better placed to evaluate the wishes and feelings of the children and that a transfer of proceedings would therefore be in their best interests. The children, who had always lived with their mother, had been living with her in the UK pursuant to the original Spanish orders since December 2013.

16. Orders were made under Article 20 of Brussels IIa prohibiting or preventing F from removing the children from the jurisdiction or from M's care is renewed and that M was to make the children available for contact via Skype or FaceTime not less than once per week and for supervised contact in England.

17. On 27th September 2017 the Spanish Appellate Court received the Article 15 transfer request. The Court declined to transfer jurisdiction to the Courts of England and Wales by an order dated 27th October 2017. On the 17th November 2017, there was another hearing before Mr Justice Baker; M was ordered to cause the children to travel to Spain on 17th December 2017 so they may be again interviewed by the Spanish Court and undergo further psychological assessment. On 21st December 2017 Mr Justice Baker made an order made for the relevant court papers and documents to be transferred to Spain to assist the court there in determining the proceedings. The children travelled to Spain on 23rd December 2017 to spend time with F.

18. On 3rd January 2018, both children were seen by a psychologist appointed by the Spanish Court; the next day they were seen by the Appellate Judge. On 5th January their parents reached a "parental agreement" in Spanish proceedings which outlined arrangements for contact between the children and F. None of this agreed contact took place by the time the Spanish court rejected M's appeal in its entirety on 20th July 2018. Throughout the children continued to live at home with their mother attending their schools in England.

19. F travelled to England on 1st August 2018 to collect the children for his part of their summer holidays but the children did not have contact with F. F returned to court in Spain where, on 9th August 2018, orders were made prohibiting the children from leaving the jurisdiction of England and Wales until they were placed with F; the Spanish Consulate in London was to be requested to not issue any passports for the children to M; and M was directed to obtain F's consent before changing the children's address.

20. On 20th August 2018, F issued an application in England for registration and enforcement under the Regulation 2201/2003 of the order made by the Spanish Court on 9th August 2018. District Judge Gibson ordered that the 9th August 2018 Spanish order was to be registered for enforcement by an order dated 30th August 2019. No further action was taken until 9th October 2018 when M issued an application in the Family Court in England, for a prohibited steps order (PSO) to preventing F from removing the children from the jurisdiction. The case then came before Mrs Justice Knowles on 28th November 2018; M was ordered to serve a copy of the order on F. On 14th December 2018 the court in Spain made an order the children were to be placed with F. This was the last order concerning AB and BC made by a Spanish Court, although the Spanish proceedings had concluded in July 2018. This has been expressly accepted by F and recorded on an order made by this court on 9th April 2019 with these words *"the proceedings were concluded*

in July 2018 by virtue of the mother's appeal against the order dated 27th June 2016 being refused."

21. Throughout 2018 the children continued to live with their mother and attended their schools in England. In 2019, on 14th January the case returned to the Royal Courts of Justice for a further hearing, this time before Mr Justice Williams. It became apparent that although F's application to register and enforce the Order of 9th August 2018, had been received by the Court (because there was an Order of District Judge Gibson dated 30th August 2018) the originating documents could not be located. M was granted an extension of time to file to 25th January 2019 to file and serve an appeal against that order. The children were joined as parties to the appeal proceedings to be represented by an Officer of the Cafcass High Court Team Ms Jacqueline Roddy. The case was listed for final hearing on 25th and 26th February 2019.

22. M's Appellant's notice was filed (although undated). On 25th February 2019 the case came before me, it was not ready for final hearing or full consideration, in addition to which neither parent was represented and the case was relisted for final hearing on 9th and 10th April 2019; with a pre-hearing review listed on 1st April 2019. On 4th March 2019 F issued an application in England for the recognition and registration for enforcement of the Spanish order of 14th December 2018. On 15th March 2019 M and Cafcass Legal were served with an unsealed application for enforcement of the Spanish order of 14th December 2018. On 22nd March 2019 District Judge Gibson ordered that the order made by the Spanish court on 14 December 2018 be registered for enforcement. On 29th March 2019 F then issued an application to the English court for the recognition and registration for enforcement of the order of 27th June 2016 (previously stayed by this Court) awarding guardianship and custody of the children to F. On the same date, 29th March 2019, M was served with order of District Judge Gibson by e-mail.

23. At the pre-trial hearing on 1st April 2019, F was now represented by counsel but M remained unrepresented. The directions were made to progress the case including for the guardian to file and serve a final report (on 8th April 2019) and 9th April 2019 was retained as a final directions hearing, with a time estimate of 1 day. On 1st April 2019 M was served with order of District Judge Gibson. On 2nd April 2019 District Judge Gibson confirmed by e mail that a fresh application did not need to be made to register the order of 20th June 2016 if an application can be made in the High Court to lift the stay imposed by Mr Justice Holman on 28th November 2016.

24. On 9th April 2019, the final directions hearing took place before me and directions were made to list the case for a final hearing commencing 4th September 2019 with a time estimate of 3 days. Contact between the children and F during the summer holidays was to be agreed; failing agreement, a request could be made on paper to the Court. It was agreed that the children could spend time with F in London on 10th April 2019; it was to be facilitated by Cafcass. In April 2019, M provided the dates for contact to take place between the children and F in UK.

25. On 6th May 2019 M, who has remained unrepresented throughout, served unsealed and unissued Appellant's notice against Registration of Order of 20th June 2016. On 9th May 2019 F informed the court and parties that confirmed that he *"cannot"* travel to the UK for the contact dates in July and August 2019 suggested by M and proposed alternative dates. On 13th May 2019 M confirmed that the only dates contact can take place are the dates that she has already proposed. The guardian discussed contact with AB and on 22nd

May and Ms Roddy informed the parties and the court that AB was content with dates proposed by F; but the same day M confirmed that the only dates contact can take place are the dates that she had already proposed. On 28th May 2019, F's solicitor requested judicial intervention over contact arrangements. On 5th June 2019 M informed the parties that although she would support contact the children did not wish go.

26. On 13th June 2019, following a further request for judicial intervention by F's solicitor it was directed that the parties file a draft order setting out a schedule of contact by 17th June 2019 and that they set out their respective proposals for contact to take place. On 17th June 2019 F's solicitor filed a draft order and proposals for contact, Cafcass filed their position confirming that AB had agreed to have contact with F in July. No document was received from M. On 19th June 2019, it was directed by the court that the parties liaise to list the issue of contact. The next day, 20th June 2019, AB contacted F and told him that she no longer wanted to see him in July. F then conceded that contact in July would not take place and the focus of contact was moved to August.

27. By the third week of June 2019 M and the children's guardian had been informed by F that July contact would not be pursued and the Court was informed that further discussion was taking place, as there had been *"a change in position"*, nonetheless by 8th July 2019 Cafcass confirmed that the guardian has been unable to speak to BC and recommended that the matter was restored to Court in the absence of any agreement. The hearing took place on 25th July 2019 as a result of which directions were made for contact to take place between 15th and 20th August 2019. I have set out the details over the difficulties in arranging contact over the summer holidays because it makes two issues clear, that the children are, as their guardian says, equivocal about their father and spending time with him, and secondly both parents are unable reach agreement. Moreover to this I add, which is that there are times when F has himself given the appearance of equivocation and has not taken up the opportunity of additional contact, the last occasion according to my note of the proceedings was when the case was listed in October 2019, when the case was listed for M to make her final submissions, although this is now disputed by F.

28. To return to the chronology contact took place between the children and their father in England between August 16th and 20th August, including overnights at a hotel, although not on the first night.

29. The hearing took place on 4th September 2019. M had emailed the Court on 7th August 2019 to ask for an adjournment. M was working as a locum cardiologist and it later transpired, and was confirmed by the hospital management, that her absence would have put patients at risk as the other cardiologists were on annual leave: this was not clear from her email and in any event the adjournment was not granted.

30. The hearing took place on 4th September 2019 during the long Vacation. The court heard the oral evidence of F and of the children's guardian; it is noted that F objected to any oral evidence being given. The latter confirmed that it was her view and recommendation to the Court that the children should not be sent to Spain to live with their father. As M could only attend court on the final day of the hearing when she gave oral evidence after F and the guardian (she was unable to attend the hearing because of her work commitments; see above) it was agreed that a transcript of the evidence would be prepared and, to allow her time to consider the evidence which coincided with the Court being on vacation, the case was adjourned and the hearing finally concluded on Friday 4th October 2019.

Habitual Residence and the children's views, wishes and feelings

31. The relevant law governing this case is contained in the Regulation BIIa, the Senior Courts Act 1981 and Children Act 1989 of which more below. In this judgment I shall make no attempt at a lengthy exposition nor comprehensive analysis of the law, nor is my judgment intended, in any sense, to stand counter to the previous judgments of the Court referred to above. This judgement is made on the facts before it in respect of these particular young people. The principle fact is this; on any objective and neutral analysis both children are habitually resident in England. They have lived here since 2013, are settled here and fully integrated into their school and education as well as in their peer group and social environment; there is no evidence before this Court which could be said to amount to anything of substance contrary to such a finding. Wherever the proceedings concerning them both commenced or was initiated they have been living with their mother in England for an uninterrupted period exceeding six years. They have never been in their father's sole care nor has he ever cared for them alone for any substantial period of time.

32. Secondly, as far as the evidence before this Court is concerned, both AB and BC want to remain living in the England and both have been equally consistent in expressing this to be their wish, to this Court, over a period of years. I make no attempt to analyse what occurred during the proceedings in Spain nor to go behind it, but I am bound to reach any decision I make on the evidence before this Court which, in turn, is based on the independent analysis of their guardian Ms Roddy from whom I heard oral evidence; evidence which, under cross-examination, remained as she had set out in her written analysis.

33. The guardian's view and analysis. Ms Roddy filed her third report in respect of AB and BC, the first report in these proceedings, in April 2019. In summary Ms Roddy's report set out that both AB and BC strenuously oppose living in Spain and have both retracted their views as previously expressed to the Spanish court; both have written letters to me which was attached to that report and reiterated those views. Their guardian, as she said, had *"met the children a number of times and listened carefully to their views"* enabling Ms Roddy, as she said at paragraph 41*"to have the wider benefit of considering the likely harm and loss to the children were they to be forced to go and live in Spain against their clearly and strongly expressed wishes"*.

34. Whilst Ms Roddy considered that AB and BC "*have been emotionally harmed by their mother's lack of promoting their relationship with their father, and to properly acknowledge his importance in their lives, and that must be remedied. If not they will, in time, hold their mother responsible for that loss"* it was still her view that the balance of harm rested in favour of the children remaining with their mother. It was Ms Roddy's considered view that both young people's views were and are *"authentically their own (not withstanding their alignment with their mother, and as such does not consider they need to [be] separately represented"*. The guardian was concerned by their antipathy towards even visiting Spain; as she said, based on her meetings with them, they are both unwilling to even agree to holiday in Spain *"their current hostility to Spain crystallised by their fear that their father will retain them there.* [Paragraph 45]*"* In her written and oral evidence the guardian expressed her *"real concern as to whether a reversal of residence will be successful or may indeed further traumatise already vulnerable children"* at paragraph 46.

35. The guardian assessed AB and BC within the resilience/ vulnerability matrix at paragraph 47 and concluded that they could move to Spain but that any change of residence against their clearly expressed wishes would *"burden the next part of their lives with anger that is likely to cause resentment towards their father…"*. AB and BC have told the guardian that they will refuse to go and Ms Roddy told this Court that a *"move to live in Spain will cause disruption in every aspect of the children's lives"*. On a more practical but nonetheless important level there is the fact that they have never lived with their father on his own, that there is a notable paucity of information as to where they will live, and the practical arrangements for their care (when F is working, for example) no confirmed or clearly identified school places (the children have both for the most part, and certainly for the last six years, been educated in an English medium school and within the English education system.

36. The guardian considered their education further when giving oral evidence in September 2019. The move for BC would obviously be difficult as he has received the majority of his education in English. AB is at a crucial point of her education and does not want to move, something that her father recognised to some extent in his oral evidence to this court, while also maintaining the naive or blinkered stance that AB would be settled in Spain within a matter of weeks. In her first report the guardian told the Court *"that the interests of the children can best be provided for by the continuity of living with their mother in England"*

37. While I am definitively not concerned with a relocation application the fact remains that I am concerned with a young person approaching adulthood, of an age when she can legally marry, who has given this Court, both through her guardian and in her own letter to the court, cogent reasons why she does not wish to be sent to live in Spain.

38. The guardian's analysis and evidence dealt with the arrangements she made for contact to take place on 10th April 2019 which, she said, *"should help the delicate process of [AB and BC and their father] getting to know each other again"*. The April contact facilitated by Ms Roddy afforded AB and BC the opportunity to spend time with their father for the first time since January 2018. The contact was described as positive, and Ms Roddy said that it *"boded well for the restoration of the almost lost relationship with their father"*. The parties had agreed that the children would spend time with their father in England during the summer and provided their respective dates; but, as set out above, contact was not agreed and the case returned to court on 25th July to determine the dates during the school summer holiday, when the Court decided that AB and BC would spend time with the father between 15th and 20th August 2019.

39. Ms Roddy filed a further and final report which emphasised her point *"central to my recommendation that the children remain living with their mother in England was that they have a real relationship with their father; and that their mother should understand her role in promoting that…"* Nonetheless, the guardian's view was that in relation to the time spent with her father AB's *"equivocal position was influenced by her residual distrust of her father, arising from his actions in Easter 2017".* Although there were protective measures agreed by the parties and ordered by the court AB remained fearful that her father might engineer a means to take them out of the country. The guardian considered that this was influenced by M and urged AB to leave the required safeguards to the adults and the court, but I consider it is more likely than not likely that AB's position has also been influenced by the recent actions taken by F to enforce the Spanish Court orders and her experience in respect of contact in the past when F removed the

children to Thailand and Indonesia. Nor do I agree that AB demonstrated a *"conflicted position"*, as described by the guardian, by her indicating she does not wish to see her father at all but then saying she wished to attend the wedding of her paternal aunt in Spain as these are two separate events involving different members of her family.

40. While the guardian's view that AB and BC have a right and a need to know and spend time with their father is self-evidently true, their views of F and the limited trust they have in him is likely, as a matter of common sense, to be dependent on his conduct as well as their mother's. Their need to maintain and build on their relationship with F is influenced by his unwillingness to listen to their, repeatedly expressed, views, wishes and feelings. In order to spend time with him, especially in Spain, they need to know they can rely on him, safe and secure in the knowledge that he will ensure they can return home (their home as they see it is England) and neither they nor their mother would be subject to legal action in Spain. While M may have failed to promote the children's relationship with their father her actions have not taken place in isolation. The failure of the parties to work together is a reflection, at least in part, of the conflict that is apparent in this case between the two jurisdictions.

41. The guardian considers, and I agree, that M represents the children's key attachment figure and role model. In her final report and in her oral evidence Ms Roddy expressed her sympathy for F's position, but it remained her recommendation *"that they should remain in their mother's care in the UK, as set out in my previous report"* [at paragraph 27]. Ms Roddy went on to say that had the children been younger, it was likely that she would have recommended a change of residence to their father's care; but in her oral evidence Ms Roddy was less peremptory, F had by then given oral evidence, saying that she was struck by F's inability to recognise the loss of the home and family (meaning their mother), and that while *"I agree that the children would benefit from increased contact with the paternal family it would fall far short of compensation for the loss of their mother."* Ms Roddy commented on F's evidence that the children would take 3 or 4 weeks to settle, saying that it would be a *"massive change*". She went on to say that it had reminded her of a proposal that F had made earlier in proceedings that the children should spend alternative years with each parent, as *"parity for adults"* which *"falls far short of what is needed for children, particularly [with reference] to their education."*

42. In her oral evidence Ms Roddy told this court that BC had told her that he had changed his position from that expressed to the Spanish judge because he had at the time been bribed by his father with the promise of a mobile phone. Whatever the truth of this (and I make no finding) the fact remains that BC has only ever told his independent guardian that he does not want to go to live in Spain. The guardian also said in her oral evidence that the children were made uncomfortable by their father's pursuit of his enforcement application, and that AB had described it to Ms Roddy as an *"obsession."* AB is described by Ms Roddy as *"strong-willed"*, and by this I have taken it that AB is sure of her own views rather than there is any suggestion that it is inappropriate for a teenager to be self-possessed and able to give firm expression of their views, that AB had voiced her *"annoyance at [F's] attempts to interfere in her life."* Ms Roddy said she thought it *"difficult for her to remain engaged with the children in any way they perceive as being relevant as they have constantly told me what they want to happen in particular in respect of a return to live in Spain."*

43. Ms Roddy was asked what she thought of F's proposal that AB remain in England to complete her GCSEs (she is more than halfway through them) while BC moved to Spain

to live with F immediately. Ms Roddy referred to the increasing importance of peer groups (with whom the children are integrated in England) which was she said something that parents often struggled with; and that F had failed to recognise that both children were properly connected to their environment. She explained the importance of friendships in greater detail and the emotional investment and practical experience they afforded in emotional and social development. Ms Roddy said that AB would meet the challenge (if moved against her will) but that the question would be the cost to her emotionally, AB was, Ms Roddy said, doing well. Ms Roddy was strongly opposed to the children being separated; as was AB who described it as *"horrible"*; Ms Roddy said it would be damaging and that BC would *"struggle …living in Spain without AB, deprived of the one comfort he can rely on, his sister, and his understanding of the world."*

44. Ms Roddy told this Court that F had *"finally conceded his failure to deal with the court orders in Spain…there needs to be real evidence that he has done so…"* before the children could safely travel there. The orders included the initial stages of criminal proceedings against M as well as the existing orders in respect of the children and the inhibitions placed on their ability to have travel documents and passports issued in their names. In cross-examination Ms Roddy said that *"the children's equivocal position about even spending time with their father is to do with the risk that it would mean that it's okay for them to go to Spain….they are desperately trying to say 'leave us alone, I can't even say that I want to see Dad in case it enhances the prospect that we would go to live in Spain."*

45. Ms Roddy rejected the suggestion that AB and BC were expressing their mother's views rather than their own although she was aware of the *"layers of influence …"* the children were *"frankly fed up with the proceedings and irritated at saying the same thing over and over to me and question why…but they are very clear, and have been consistently clear, [they] want to remain living in England where [they have] established their home and their lives…[F's] pursuit of the move to Spain and from everything familiar to them is interfering with their ability to have the relationship they should with him."*

46. Ms Roddy went on when questioned about M's influence on what the children were saying *"I have not discounted the impact of [M] and her influence but [F] tends to attribute blame to her for the children's expressed wishes and feelings improperly, in that he has failed to take into account that the children are entitled to, and have, formed their own view and formed connections to this country where they live and belong and they have not disregarded their Spanish identity and celebrate it."* Ms Roddy said *"But whereas [F] thinks the children are just aping what [M] wants them to say, that is not my assessment. I've referred to in my report to the risk to particularly [AB] of her frustrations in not being heard, in not being listened to as a young woman of, what almost 16, not having her right to be almost an active participant in the process in terms of formulating plans for her and the risk to her emotional health…….were she to develop on a trajectory where she feels she's not been heard [and that] includes not being heard by her father."*

47. Later she said that F consistently attributes it all, including the children's bad memories of their father's behaviour towards their mother, to M *"without taking into account the children's own views based on their own thoughts, views or experience."* Moreover, it was Ms Roddy's view that the children's mother had not capitalised on past incidents during the marriage, and that, in fact, the contrary was true as AB had described her mother comforting her by minimising what AB had spoken about remembering.

48. As I have already observed AB is sixteen, she can legally marry, and, from her guardian's descriptions, AB has reached patently sensible and informed decisions about her own future, particularly in respect of her education; it is repugnant that a family court and judge should ignore what she and her brother have repeatedly told their guardian. AB is 16, outside the usual ambit of the English & Welsh Courts to make Children Act orders. She has told her guardian *"that she doesn't consider anyone-including a judge-could tell her what she must do."*

49. F's oral evidence to this court implicitly accepted that was AB's view by saying that one option would be for AB to remain in England until the completion of her GCSEs. F had said *"That would be one good solution, that [BC] comes now and then [AB], after she finishes her GCSE's, let her see what she says. That could be a good solution"* and later *"what I said about having [BC] and not [AB] is probably the best solution.."* Nonetheless, despite showing some limited empathy with the children's situation and despite what the guardian had said in evidence about the effect of his active pursuit of such a course on his relationship with his children, it remained his primary position that he was seeking immediate enforcement of the Spanish orders.

50. In her oral evidence, given on 6th September 2019, M accepted that AB and BC *"loved their father and he loves them."*. She accepted, too, that it was important for their well-being and general development for them to have a relationship with F and with their extended paternal family. M told the court that the children had told her that they had had *"a very good time with [F] in the summer."* Nonetheless, as she said, *"I don't feel safe to go to Spain…and caught in an impossible position,"* because of the Spanish Court orders. In this M is placed in a situation that directly impinges on her ability to travel freely to her own country. There are no such constraints on F, a matter that is unlikely to have passed the notice of either AB or BC. M said that she had agreed to the orders made in Spain because *"I had to do this as it was the only way I could bring the children back to England, I didn't have any other choice. I would have agreed to anything to bring the children back to England"*. M accepted that the children had suffered harm by not seeing their father. She said that they wanted to see him but that they did not trust him. M said she did not want to move back to Spain because, as she said, entirely reasonably, she has made her career and life in England. I found M in her evidence to be more open to reason and more realistic about the effects on AB and BC of this conflict than F. Whatever the legalities in Spanish and in English & Welsh law it is she who has been placed in the more restrictive and onerous position, something that F has failed entirely to consider. Her position, which is not all of her making, is highly likely to have informed the views of AB and BC.

Law

51. I am grateful to both counsel for setting out the law and case law with commendable clarity. As submitted there are restricted defences to enforcement set out in Art 23 BIIa and clearly most immediately apparent defence available on behalf of the children is Art 23 (a) *(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.* As is clear from the word "manifestly" in any consideration that recognition is contrary to public policy the bar is set high to quote Lord Justice Munby, as he then was, in *Re L (Brussels II Revised: Appeal)* [2012] EWCA Civ 1157, wherein at paragraph 46 he said *"Article 23(a), in my judgment, contains a very narrow exception and, consistently with*

the entire scheme of BIIR and with the underlying philosophy spelt out in Recital (21)[1]*, sets the bar very high."*

52. While I consider that it is arguable that recognition might be considered contrary to public policy, at least in respect of a young person of sixteen the enforcement of an order against her consistently expressed wishes, it is not necessary for me to consider such an argument in depth following the conclusion of the Spanish proceedings (as accepted by F) in July 2018. Guidance is provided by the CBCU in the Swedish case of *Re P* (Case C-455/15 PPU EU:C:2025:753, [2016] 1 FLR 337) specifically *"In order to comply with the prohibition laid down in Art 26 of BIIA of any review of the substance of a judgment given in another Member State, the infringement would have to constitute a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order…"* could provide or leave open an agreement that recognition of the Spanish judgment, having regard to the best interests of a child on the threshold of adulthood and that young person's individual private law rights would constitute a manifest infraction of that persons rights fundamental under the laws of England and Wales. This would have to have some traction were the facts of the case pertaining to that person's right to marry within this jurisdiction.

53. Any such argument could not extend to BC as he is still thirteen. In his oral evidence F seemingly accepted that he would not seek enforcement of the order in respect of AB and that she should stay in England at least until the completion of her GCSEs. Later it was made clear that his preferred option was immediate enforcement and both young peoples' removal to Spain. In any case this would have amounted to no more than a postponement of the ultimate decision. The limited defence in Art 23 (a) does not apply to BC; but, while F, at least, seeks the immediate return of BC, allowing AB to remain in England for some months, their guardian strenuously opposed any separation of the brother from his sister and gave good reasons for doing so.

54. The need to consider whether having lived in England since December 2013, the public policy argument is sufficiently strong in this case to allow the court to refuse recognition and enforcement "*taking into account the best interests of the child"*, would, it was submitted by Mr Jarman counsel for AB and BC, involve consideration of the Art 8 Rights of the children within that appraisal of public policy. As their counsel observed, whatever each parent's respective arguments, the Spanish proceedings have taken a significant period of time to be resolved during which the children have grown, remained living in England and attained greater maturity. As already observed above in this judgment, on any objective and neutral basis AB and BC are habitually resident in England; moreover, having previously lived in England between 2006 and July 2011, on their return to England in December 2013 and to date they have lived in England for over a decade since 2006. As evidenced by the guardian's analysis, they are settled and fully integrated into their locality, their peer group, their schools and their home life with their mother (who has been their principle carer giver throughout their lives) in England. In addition to which, on the evidence before this court, both AB and BC have consistently and strongly expressed their wish to live with their mother and remain in England. It was a Spanish court that permitted them to return to England in the first place.

[1] Which provides: "The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required."

55. Thus the situation in which AB and BC find themselves in arises following their lawful move from Spain to England pursuant to a Spanish court order; dated 19th September 2013, when AB was then aged nine and BC was six. At that time the Spanish court had emphasized the children's connection with England in this way "… *as much as the father may try to disguise, the usual place of residence of the children has been London for most part of their life, specifically, until one year and half ago, when they came to live in Tenerife*". As referred to above the Spanish court then set out the three possible situations in which the children would be in the *"physical custody"* of M but have *"visitation"* with F; the situations envisaged by the Spanish court included, *"...with the mother residing outside Spain with the children."*

56. The Spanish family court in Tenerife had determined that *"..custody of the children should be awarded exclusively to their mother, given that she is the parent with whom the children have always lived since their birth, and her moving to London poses no difficulty whatsoever in awarding her the custody on an exclusive basis."* So it was in moving to England with both children in December 2013, where they have lived continuously since, M had following the provisions of the Spanish court's order. When F applied to another Spanish court in March 2014 seeking the "*guardianship and custody of the children be awarded to him in [P]"* those proceedings took over two years, a period of twenty-seven months in fact, for the court in P to determine that the children's custody be transferred to F by the order was dated 27th June 2016.

57. As I have determined, on any objective view, the children are and remain habitually resident in England following their lawful move in December 2013. I was referred to, amongst others the case law in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014]1 FLR 111; *Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 75, [2014] 1 FLR 772 ; *Re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 1 FLR 1486; *Re R (Children) (Reunite International Child Abduction Centre and others intervening)* [2015] UKSC 35, [2015] 2 FLR 503 and *Re B (A child) (Habitual Residence: Inherent Jurisdiction)* [2016] UKSC 4, 58. [2016] 1 FLR 561]. It was in applying the principles contained in those and other cases as to the facts of the case alone that I reached the conclusion regarding the habitual residence of the children.

58. When, in September 2017, Mr Justice Baker (as he then was) determined that as M had issued divorce proceedings in September 2013, the courts of England and Wales were second seized, and on application of Art 19(2) BIIa Spain had jurisdiction the Spanish proceedings were still extant and had not concluded as M's appeal was still before the Spanish court. When the Spanish court refused to transfer proceedings pursuant to Art 15 B11A and the proceedings continued to the appeal hearing which was determined in July 2018 when M's appeal was refused. As already referred to F agreed before this court and it was recorded that "*the proceedings were concluded in July 2018 by virtue of the mother's appeal against the order dated 27 June 2016 being refused*" in April of 2019.

59. As the Spanish court has made final orders it must follow that jurisdiction falls to be considered pursuant to Art 8 BIIa; on the basis of the children's habitual residence, which is England, as a consequence of which this court has jurisdiction, pursuant to Art 17 BIIA. This is by virtue of the fact that M's application for child arrangements orders and Prohibited Steps Orders were issued for the first in time in October 2018, subsequent to the conclusion of the Spanish proceedings. F himself reapplied for orders in March 2019;

although his original application was made in October 2016 it was stayed by order of Mr Justice Holman on 28 November 2018.

60. In July 2018, when the Spanish appellate process ended, the Spanish proceedings had concluded as accepted by F. It was submitted on behalf of AB and BC that as a matter of fact there are no "concurrent" proceedings and therefore it must also follow that there can be no argument as to which court is currently seized; it is this court. There are no proceedings currently in Spain, nor have there been since July 2018 well over a year ago at the time of trial. There are extant Children Act 1989 proceedings before this court. In addition based on Recital 12 of the 2003 Regulation which provides "*The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, [my emphasis] in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility"*

61. It is hard to see any other logical conclusion based on their habitual residence and proximity other than that this court has jurisdiction and that the best interests of AB and BC are best served, as recommended by their guardian, by remaining living with their mother in England. Any order made in an English and/or Welsh court now would be an "*a later judgment*" for the purposes of Art 23 (e) and any order based on the best interests of AB and BC as set out above in the evidence of their guardian "*irreconcilable*" with the Spanish order. The evidence of this experienced guardian is accepted by this court as self-evidently congruent with the views of AB and BC and their welfare. Art 23(e) reads "*e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought."* Jurisdiction is with and in this court as a result of the conclusion of the proceedings in Spain, the subsequent commencement of Children Act 1989 proceedings in this jurisdiction and the children's habitual residence in England.

62. M's appeal against enforcement is allowed pursuant to Art 23 (e).

63. Exceptionally, given AB's age there will be s8 CA 1989 child arrangement orders in line with the guardian's recommendations; that AB and BC live with their mother, M; AB and BC are to have contact, or spend time, with their father, F in England and Spain, at dates and times to be agreed, no less than 3 months in advance (and in default the first half of all school holidays is to be spent with F) during the children's school holidays, subject to F providing written permission to renew the children's passports immediately and providing satisfactory documentary evidence that all criminal complaints against the M in Spain has been withdrawn and the order dated 14th December 2018 has been discharged. Following any contact or time spent with their paternal family in Spain, F must ensure that AB and BC are returned to the jurisdiction of England and Wales.

64. This is my judgment.

AR January 2020