Neutral Citation Number: [2023] EWHC 1762 (Fam)

Case No: FA-2022-000336

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Civil and Family Justice Centre
Quay Parade
Swansea SA1 1SP

Date: 12/07/2023

Before :

MR JUSTICE MOSTYN

- -

Between :

NJ	**Appellant**
- and -	
JB	**Respondent**

- -
- -

Bethan Bromley (instructed by **MSB Solicitors**) for the **Appellant**
Naomi Wiseman (instructed by **ILFG**) for the **Respondent**

Hearing date: 5 July 2023

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has conducted a balancing exercise and has decided that the child who is the subject of the proceedings, and her parents, should have the protection of anonymity until 1 January 2026. 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 Justice Mostyn:

1. In this judgment I shall refer to the appellant as "the mother"; to the respondent as "the father"; to the child by the pseudonym "Kate"; to Council Regulation (EC) No 2201/2003 as "B2R"; and to the decision made by the Tribunal Judiciaire de Bordeaux, Chambre de la Famille on 1 July 2021 as "the Bordeaux judgment".

Background

2. On 9 August 2022 the mother applied to the Family Court siting at Wrexham for a child arrangements order "to enforce and vary an order made on 23 November 2020 (*sic, semble* 1 July 2021) in Bordeaux, France". That order provided that the parties' child, Kate, now aged 5½, should live with the mother in England and Wales and have substantial block contact with her father in France during holiday periods. The order contained detailed terms as to the practical and administrative arrangements to implement the periods of contact. It also ordered child support in the sum of €300 a month.

3. In her application, the mother did not seek to alter the substance of the Bordeaux judgment; she sought certain minor peripheral adjustments for practical and financial reasons. In her Form C100 she stated:

> "The contact that the subject child has with her father has become unsustainable. Specifically, the mother's financial position means that she cannot continue to send the subject child to France and the financial burden on the applicant mother is unmanageable. The applicant mother seeks to vary the order to include:
>
> - change of airport
> - the respondent to fund the child's tickets to avoid reimbursement being delayed or refused"

4. On 24 October 2022 HHJ Lloyd, the Designated Family Judge for North Wales, made an order on the papers in the following terms:

> "UPON the court noting that this is an application to vary procedural aspects of an order made by the Courts in Bordeaux, namely the location of airports for handover of the child, and the future cost of financing contact.
>
> AND UPON the substantive matter having been decided in the Bordeaux courts, this court is of the view that any application to vary such order should and must be made to the proper courts in Bordeaux, the Bordeaux courts having accepted and determined appropriate jurisdiction over the proceedings.
>
> Accordingly, this application should not have been issued, and cannot proceed in the jurisdiction of England and Wales.
>
> IT IS ORDERED THAT:

> 1. The application is dismissed for want of jurisdiction."

5. The mother issued an appellant's notice. The grounds of appeal state:

> "i. Brussels II revised applies as these proceedings commenced in France, prior to the transition period of 31 December 2020 and concluded in July 2021.
>
> ii. Brussels II revised, Article 9(1) which states 'where a child has lawfully moved from one member state to another and acquired a new habitual residence there, the original state may still have jurisdiction for up to 3 months after the move for the purpose of modifying any judgment on access rights where the parent with contact rights continues to reside in the state where the child was residing'.
>
> iii. Article 8 (1) gives priority to the state of the habitual residence of the child: 'The courts shall have jurisdiction in matters of parental responsibility over a child who is habitually resident at the time the court is seized. It therefore creates a starting point of jurisdiction based on habitual residence.
>
> iv. The three-month period has lapsed since the making of the Bordeaux Order, which is why the applicant mother applied to the jurisdiction of England and Wales for a variation.
>
> v. The child moved to Wales lawfully following an interim order being granted in November 2020, a final order made in July 2021 and acquired habitual residence here."

6. On 16 November 2022 HHJ Lloyd granted permission to appeal. On 21 April 2023 the Presiding (Family) Judge for Wales, Morgan J, directed that I should hear the appeal on 5 July 2023 when sitting in Swansea. The length of time that it has taken for this appeal to be heard is regrettable.

7. The appeal has been very well argued by both counsel. Ms Wiseman does not seek to uphold the decision under appeal and concedes that the Family Court of England and Wales has exclusive jurisdiction to entertain the mother's application.

Legal analysis: Brexit

8. Article 67(2)(b) of the Withdrawal Agreement concluded between the UK and the European Union provides that B2R shall apply to the recognition and enforcement of judgments given in proceedings initiated before 31 December 2020. It states:

> "In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the following acts or provisions shall apply as follows in respect of the recognition and enforcement of judgments, decisions, authentic instruments, court settlements and agreements:
>
> (a) . . .

> (b) the provisions of Regulation (EC) No 2201/2003 regarding recognition and enforcement shall apply to judgments given in legal proceedings instituted before the end of the transition period, and to documents formally drawn up or registered as authentic instruments, and agreements concluded before the end of the transition period; …"

9. All references by me hereafter to an "anterior EU judgment" are to a judgment given in an EU state in legal proceedings initiated before 31 December 2020.

B2R

10. Article 21(1) of B2R provides that an anterior EU judgment shall be recognised here without any special procedure being required. It states:

> "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

11. Article 21(3) permits any interested party to apply for a decision that an anterior EU judgment should be recognised or not recognised. It states:

> "… any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment **be or not be** recognised." (emphasis added)

12. Article 28(2) (which lies within Section 2 of B2R) states:

> "In the United Kingdom, …a judgment [on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served] shall be enforced in England and Wales … only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

13. In England and Wales FPR Part 31 used to set out the process for the registration of an anterior EU judgment for enforcement. Following the UK's withdrawal from the EU on 31 January 2020 those parts of FPR Part 31 which referred to registration of an EU judgment have been omitted, notwithstanding that it is likely that there are, as in this case, many anterior EU judgments operative under the Withdrawal Agreement which the parties to such judgments may want to register for enforcement.

14. In contrast to the (pre-Brexit) FPR Part 31 procedure, there is no prescribed process for a party to follow when applying under B2R Article 28(3) for a decision that all or part of an anterior EU judgment should **not be** recognised.

15. B2R Article 23(e) permits recognition to be withheld if the earlier EU judgment is irreconcilable with a later judgment relating to parental responsibility given in the Family Court. It states:

> "A judgment relating to parental responsibility shall not be recognised: …
>
> (e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought; …"

16. A judgment may be partially recognised or not recognised. Article 36 states:

> "**Partial enforcement**
>
> 1 Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.
>
> 2 An applicant may request partial enforcement of a judgment."

17. When deciding whether to recognise, or not to recognise, an anterior EU judgment the Family Court cannot review its substance. Article 26 states:

> "**Non-review as to substance**
>
> Under no circumstances may a judgment be reviewed as to its substance."

18. Therefore, it follows that the Family Court deciding a child arrangement application has the power not to recognise, in whole or in part, an anterior EU judgment if its judgment on that application is irreconcilable with that anterior judgment. Such non-recognition does not, and cannot, involve any questioning of the merits of the anterior judgment, but simply identifies, and withholds recognition of, its irreconcilable terms.

19. In my opinion an application under Article 21(3) that the anterior EU judgment should not be recognised does not require a formal process, such as the issue of an application notice, but can be raised as an issue within a child arrangement application. Further, the decision on such an issue can be incorporated within the judgment given on that child arrangement application.

Jurisdiction: the general rule

20. Section 2(1)(a) of the Family Law Act 1986 states:

> "(1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless … it has jurisdiction under the 1996 Hague Convention."

21. Article 5(1) 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 states:

> "The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to

> take measures directed to the protection of the child's person or property."

22. It will be interesting to see whether, following Brexit, our domestic definition of habitual residence diverges from the definition given by the Court of Justice of the European Union. However, there is no need to dwell on that possibility in this case.

Exceptions to the general rule

23. Article 9 provides that where there has been an anterior EU judgment the original court retains jurisdiction for the purposes of implementing the contact provisions in that judgment for three months after the child in question has departed to live in another EU state. It states:

> **"Continuing jurisdiction of the child's former habitual residence**
>
> 1 Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.
>
> 2 Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction."

24. Under Article 10 the original court retains jurisdiction in specified circumstances where the child has been taken unlawfully to, and has acquired a habitual residence in, another EU state.

This case

25. The Bordeaux Judgment of 1 July 2021 was made in proceedings which began before the UK left the European Union on 31 December 2020. Its recognition, or non-recognition, therefore fall within the provisions set out above.

26. Kate is habitually resident in England and Wales, literally, factually and legally. There can be no argument about that. Thus, the Family Court of England and Wales clearly has jurisdiction to entertain the mother's August 2022 child arrangements application.

27. In contrast, the Bordeaux court now has no jurisdiction under B2R, or under the 1996 Hague Convention 1996, to entertain a new application for a child arrangements order in respect of Kate. Under Article 9 of B2R the Bordeaux Court retained jurisdiction

for the purposes of implementing the contact provisions in its child arrangements order for three months after Kate was permitted to live with her mother in Wales. That three-month time limit expired long ago.

28. Equally, there is no possibility that jurisdiction is retained by the Bordeaux court under Article 10, as that court in November 2020 authorised Kate to make her primary residence at her mother's home in Wales.

29. The Family Court therefore not only has the power to make a child arrangements order, as explained above, but is now the only court that can do so. If its judgment is irreconcilable with the Bordeaux judgment it can withhold recognition of the conflicting parts of that anterior judgment.

30. I therefore allow the appeal and set aside the order of 24 October 2022. The mother's application should be listed for a FHDRA as soon as possible.

Sequelae

31. The matters in dispute about the implementation of the contact provisions in the Bordeaux judgment are very limited. I have given the parties my opinion as to how those issues might be resolved. I hope that the parties will treat my advice with the seriousness it deserves.

32. One of the matters that has held up a fruitful dialogue with a view to resolving these relatively minor issues has been the contents of a Cafcass Safeguarding Enquiries Report dated 14 October 2022. In a lengthy document the author analysed a number of allegations of domestic abuse that predated the Bordeaux judgment of 1 July 2021. It is clear that these allegations were considered by the court in Bordeaux but no findings were made in respect of them and their existence did not stand in the way of a full order for contact being made.

33. In her recommendations the Cafcass officer proposed:

    i) that disclosure be sought of the court proceedings in France to ascertain how the allegations of historical domestic abuse were considered in light of further abuse raised by mother within her application;

    ii) that no conciliation can or should take place in the light of the allegations made by the mother against the father.

    iii) that a child impact analysis be undertaken in the light of the ongoing welfare concerns that had been raised; and

    iv) that a rule 16.4 Guardian be appointed to act for Kate in the light of the international element of the case and the allegations of domestic abuse made by the mother against the father.

34. The problem with the officer's first proposal, on which the latter three proposals are hinged, is that the officer is proposing a course of action that will lead inevitably to the Family Court being asked to review the substance of the Bordeaux judgment. This is impermissible, as I have explained above.

35. I have to say that the recommendations made by the Cafcass officer strike me as disproportionate and, to the extent that the officer proposes that the Family Court should analyse the history before 1 July 2021, as impermissible. My view is shared by both counsel.

36. Fortunately, both parties told me through counsel that they would be prepared to consider carefully my proposals and to engage in further discussions in order to seek to reach a concluded agreement.

37. I hope that they succeed.
