VC v GC (Jurisdiction: Brussels II Revised Art 12) [2012] EWHC 1246 (Fam)

[2013] 1 FLR 244

Family Division

Eleanor King J

2 March 2012

Brussels II Revised — Family lived in France — English mother returned to England with child with father's consent — Mother and father issued proceedings in England and France respectively — Which country was seised of the matter — Which country was best placed to determine welfare issues

The English mother and French father met in France. They briefly lived in England before settling in France, getting married and having a daughter, now aged 8. When the maternal grandmother was diagnosed with cancer it was agreed that the mother and child would move to England and the child would spend an academic year at an English school. While in England the mother decided she did not wish to return to France. The father continued to visit England and the child returned to France to visit her father. Despite the father moving to England for a few months the marriage broke down and he returned to France where he applied for a divorce and sought custody of the child. By that stage the child had lived in England for 22 months with the agreement of the father. The mother sought an adjournment of the French proceedings and the English court granted her a residence order. However, the French court made an interim residence order in favour of the father. The mother's appeal against the French order was dismissed in the High Court where it was noted that the child had been born in France and had spent her early years there. During the hearing the father accepted that the child was now habitually resident in England but that the court should apply the exception in Art 12(1)(b) of BIIR and allow the child's future to be determined by the French court. He also claimed that the mother had accepted the jurisdiction of the French courts by engaging in proceedings there.

Held – finding the child to be habitually resident in England; declining to invoke Recital 12 (1) (b) of BIIR –

(1) The starting point was that the court of habitual residence was best suited to determine issues of parental responsibility in relation to the child. Recital 12 of BIIR emphasised that one reason for that presumption was proximity and in this case there was nothing that would displace that presumption and everything to reinforce it (see paras [29], [34]).

(2) The authorities were clear that the acceptance of jurisdiction did not have to be in writing and that subsequent acts and contact could illuminate the quality of the acceptance at the time the court was seised. Nevertheless the acceptance had to be unequivocal and even putting the father's case at its highest the mother did not unequivocally accept French jurisdiction. The mother instituted and pursued proceedings in England, seeking a residence order here to ensure that the child was returned after summer contact (see para [30]).

(3) The best interests of the child were met by any welfare hearing and any consideration, by the court, of the appropriate exercise of parental responsibility, being conducted in England. The child had lived here for 3 years, she attended an English school and lived with the maternal extended family. Here, enquires could be best made as to her welfare and circumstances (see para [33]).

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Statutory provisions considered top

Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses (Brussels II) (2000) OJ L 160/19

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I) (2001) OJ L 12/1, Art 24

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 8, 9, 10, 12(1)(a), (b), (3)(b), (4)

Cases referred to in judgment top

B v B (Brussels II Revised: Jurisdiction) [2010] EWHC 1989 (Fam), [2011] 1 FLR 54, [2010] All ER (D) 31 (Aug), FD

Bush v Bush [2008] EWCA Civ 865, [2008] 2 FLR 1437, CA

I (A Child) (Contact Application: Jurisdiction), Re [2009] UKSC 10, [2009] 3 WLR 1299, [2010] 1 FLR 361, [2010] 1 All ER 445, SC

Anne-Marie Lucey for the applicant
Michael Burden for the respondent

Cur adv vult

ELEANOR KING J:

[1] This is the application of VC (the father) for a stay of an application made by GC (the mother), for a residence order dated 23 June 2011 in respect of their daughter, SMC. The father's application is made on the basis that, pursuant to Brussels II Revised (BIIR), the proper jurisdiction for consideration of all matters appertaining to parental responsibility in relation to S is France.

[2] The mother and S have lived in S since June 2009. The father lives in A-e-P. The parties were married and the father, therefore, has parental responsibility.

Background

[4] The mother and father met on holiday in France in 1999. They lived together for a period of time in England before moving to France in June 2001, where they lived with the father's parents in A-e-P. They were married on 28 July 2001 in A and continued to live with the father's parents until about February 2003, when they moved into their own rented property. S was born on 15 October 2004. In September 2007, S started school near to the paternal grandparent's home.

[3] It is common ground that it was agreed that the mother should come to England on 14 June 2009, she having received news that the maternal grandmother had cancer. There is some dispute as to the exact nature of the plan at that stage. The father said that it was intended that S would be taken out of school in France and spend an academic year in England to ensure that she grew up to be bilingual. At this time, the father said in his statement, that he himself was starting a new career as an actor and it was decided that he

would visit England as often as he could and that the mother and S would come to France during the school holidays.

[4] Accordingly, by agreement, the mother came to England with S and moved in with her mother. The father gave up the rented property in France and moved back in with his parents in A-e-P. It is also common ground that by Christmas of that year, 2009, the mother had decided

that she did not wish to return to live in France (although the mother's case is that she had reached that decision some months earlier). The father suggested that they should move to Lisle or, as he says in his statement, 'perhaps to S' so that he could live with the mother and S. The father put the matter this way in his position statement, 'despite problems in their marriage, the parties spent time together and lived together mainly in England with frequent visits to France'.

[5] The mother and S went to France for a week at Christmas 2009 and the father offered to move to L on the basis that it would be easier for the mother to get back to England than was the case if they once again lived in A. The mother told the father that it was 'too late' and returned to England. The father then came to England for a week at Easter 2010. S did not go back to France until the summer of 2010, when the mother stayed a week and S stayed for a month; the father then brought her back to England in August when he moved back in with them in S.

[6] The father said in his statement at para 12:

> 'I then returned to England with the applicant and our daughter at the end of August 2010, and I knew then that my wife would never want to come back and live in France. I decided to move to S permanently as soon as my stuff would be in order in France. I had a good part in a short film in October and I wanted to use my time in France to get rid of my bank account, insurances, cancel my Social Security files and tax files.'

[7] At Christmas 2010, the family went to Lisle to visit the father's family, but returned to England just before the New Year in 2011 to live. The marriage finally broke down in April 2011 – one can only admire the father's valiant although ultimately futile attempts to make the marriage work. The father went back to France for 2 weeks with S during the school holidays and, whilst he was there, he applied for a divorce, seeking custody of S. He brought S back to England at the end of April as had been agreed with the mother before returning to France, where he has remained ever since. By that time, S had lived in England since June 2009, some 22 months, all with the agreement of the father.

[8] The mother and S live on the WE in S with the maternal grandmother and she attends the local school. The mother and her brother have bought a house, which is being renovated to make a suitable and appropriate home for the mother and S. The father has concerns about the area, and said in his statement that he does not believe that this is a suitable place in which S should be raised. It is, he alleges, a rough environment and the estate is endemic with drugs. The mother, not surprisingly, responds by saying that she was brought up on that very same estate and the father felt that she was good enough to marry.

Legal proceedings

[9] The father filed for divorce on 28 April 2011. In the documents provided, he said that the parties had been separated since June 2009, the date the mother and S first came to England. That document does not record that S was living with her mother in England, but sought what was called 'temporary measures' requiring or requesting:

> 'Parental authority shall be exercised jointly by the C's. Mr C solicits the fixing of S usual residence at his domicile with the right to visit for the mother regulated in the case of difficulties with a share of half for each spouse in the child's transport excesses. The father's rights of contribution for the child shall be reserved while waiting for specifications on the mother's real situation.'

On the same day, a document called a summons to conciliation was issued summoning the mother to a hearing in France on 19 July 2011.

[10] On 16 June, the mother, through her legal advisers, sought an adjournment of the French proceedings, and on 23 June 2011 she filed her application by C100 for a residence order in the SCC. The following day, District Judge Young made an order in her favour.

[11] On 7 July 2011, the father wrote a letter to the SCC contesting jurisdiction of the English court pursuant to BIIR. On 15 July, there was a directions hearing in England, when the matter was adjourned and a pathways appointment vacated. On 19 July, the French proceedings were listed for the conciliation attempt. The mother did not appear and sought an adjournment. On the same day, the C2 application was filed in the English court and His Honour Judge Barber granted an interim residence order to the mother.

[12] On 28 July, a further pathways appointment was listed in the SCC and, on 2 September 2011, a further hearing was conducted in France and a decision of 'non-conciliation' was given by the judge for family affairs at the High Court in A-e-P. That order fixed the child's residence with the father. The translation before me says:

> 'At the hearing, Mrs C's Lawyer came forward to indicate that because of her financial situation that her client could not come and requested a postponement. Mr C'[s] Lawyer opposed the postponement which had already been granted to his wife …'

(That would have been the July hearing):

> '… and indicated that it was urgent that measures should be taken relative to the child on account of the starting of the new school year. The consequences were that the court decided to proceed with the matter in the absence of the mother.'

The court then made the equivalent of an order for interim residence to the father:

> 'On the exercising of parental authority, the judge said that the father did not contest the mother's educative qualities, but observes that the

> child has always lived in France and that she would like to come back to France. He suggests a visiting right for the mother for the whole period of the holidays and suggests she comes back to France to see the child one week and a month.'

It went on to say:

> 'It results from the certificates produced that the parents were married in France and lived there until 2009, when Mrs C went to look after her ill mother with the child, that since then she has decided to remain in England. The mother's lifestyle is unknown. From the documents produced by the father, it appears that the child when in France lived a comfortable and secure life, that she was surrounded by love and affection for the paternal grandparents, who seconded their son when the child was born.'

The court then went on to say that:

> 'The parental authority of the child should be exercised jointly by both parents and in the child's interest the child's residence was fixed with the father at his domicile.'

[13] On 5 October, His Honour Judge Barber in the SCC listed the matter for a hearing on 24 October. On 14 October 2011, the French High Court heard the mother's appeal against the transfer of residence of S from her to the father (it should be borne in mind that her appeal was effectively for a stay of what was an interim residence order in favour of the father). The appeal was dismissed. It was stated by the High Court in France that the mother *was assisted throughout the procedure* and had been *able to assert her defences*. The court concluded that, given the facts of the case, which included that:

> '… the child was born in France where the family has established a home and she spent her early years, the existence of a risk may justify application of Art 917 of the Civil Code Procedure, which has not been demonstrated'.

In those circumstances, the court rejected the mother's application to prevent the *provisional execution of the transfer*.

[14] When the matter came on again before His Honour Judge Barber on 24 October, he decided that given the complications that had now arisen, the matter should be transferred to the High

Court. Directions were given by Moylan J on 26 October and again on 17 November. Bodey J gave directions on 2 December, and the matter came before me for what was intended to be a final hearing on 25 January. The matter was further adjourned to today for legal argument, but also, in the event that habitual residence was to remain an issue before the court, to enable me to hear oral evidence from both the parents.

[15] Put simply then, the father's position is that the French courts are seised of this matter, and have ordered that S be removed forthwith from the care of her mother and removed to France to live with the father and the

grandparents; accordingly this court should play no further part in S's life but should forthwith stay the English proceedings. The mother's case is that S lives here and has lived here for some years; she is habitually resident in England, and England is the proper forum for any future considerations of her welfare.

The law

[16] These proceedings are governed by BIIR and in particular Art 8 and Art 12. Article 8 provides for general jurisdiction and says:

> 'The court of a member state shall have jurisdiction in matters of parental responsibility of a child who is habitually resident in that member state at the time the court was seised; (2) paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

In any consideration of Art 8, it is necessary also to consider Recital 12 in the preamble to the regulation, which says:

> '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, 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 change in the child's residence or pursuant to an agreement between the holders of parental responsibility.'
> It follows, therefore, that Brussels II specifically incorporates by way of recital that:
> 'Jurisdiction should lie in the first instance with the member state of the child's habitual residence'.

[17] The father has, this morning, accepted with reluctance that S is habitually resident in England. That has not been an easy concession to make, but in my judgment exhibits a sensible acceptance of what must have been the inevitable outcome. The father submits that notwithstanding that concession and the terms of Recital 12, the court should, nevertheless, apply the exception to be found within Art 12(1)(b) and stay these proceedings allowing S's future to be determined by a court other than that of her habitual residence, namely France.

[18] Article 12 deals with the prorogation of jurisdiction, the relevant part of which is as follows:

> 'The courts of a member state exercising jurisdiction by virtue of Article 12 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:
>
> (a) at least one of the spouses has parental responsibility in relation to that child;
>
> (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility at the time the court is seised and is in the superior interest of the child.'

[19] It follows, therefore, that the issue before the court is as to the application of Art 12(1)(b) to the facts of this case. There are three components to Recital 12 1(b). The court has to be satisfied that:

(a) The jurisdiction of the court has been accepted expressly or otherwise in an unequivocal manner by the holders of parental responsibility.

(b) That that happens at the time the court is seised of the matter.

(c) That it is in the superior interests of the child.

[20] In the case of *Bush v Bush* [2008] EWCA Civ 865, [2008] 2 FLR 1437, the family in question were living and habitually resident in Spain. The mother in that case instituted divorce proceedings in England based on domicile. The father filed an acknowledgement of service shortly before he issued proceedings in Spain. The Court of Appeal held that the filing of the statement of arrangements was not an unequivocal acceptance of jurisdiction.

[21] Lawrence Collins LJ in his judgment said at para [53]:

> 'It is plain that Article 12(1)(b) of B II R, when it speaks of the jurisdiction being "accepted expressly or otherwise in an unequivocal manner … at the time the court is seised", is not simply referring to a mere submission in matrimonial proceedings equivalent to what would be an entry of appearance under the Brussels I Article 24. First, it is clear that it does not refer to acceptance of the jurisdiction in relation to matrimonial proceedings alone. It must refer to jurisdiction in matters of parental responsibility. Second, the emphasis is on the acceptance of jurisdiction "expressly" or "in an unequivocal manner". This must mean that acceptance of jurisdiction of a court other than that of the child's habitual residence is not lightly to be inferred, and that the paradigm case will be actual agreement by the parents at the time the matrimonial proceedings are instituted.
> [54] …
> Each of these propositions is supported, if support were needed, by Recital 12.'

[22] Thorpe LJ said at para [48] of his judgment:

> 'It would in my opinion create a most unhelpful precedent if a court exercising divorce jurisdiction, exceptionally and transiently seised with jurisdiction in matters relating to parental responsibility, were to issue an order permitting a parent to leave …', or in this case recover, '… the jurisdiction of the child's habitual residence without any involvement of the courts of the children's long settled residence.'

[23] Miss Lucey on behalf of the father makes the point that a statement of arrangements is not something filed in relation to parental responsibility, (as was noted by Collins LJ in the passage to which I have already referred).

[24] In *Re I (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10, [2009] 3 WLR 1299, [2010] 1 FLR 361, the Supreme Court considered the interpretation of Art 12(1)(a). In relation to the words, 'at the time the court is

seised', they outlined a number of differing interpretations, but concluded that in that case, (where jurisdiction had undoubtedly been accepted), it was not necessary for them to decide which of the varying interpretations put forward would be binding.

[25] In the headnote of *Re I (A Child) (Contact Application: Jurisdiction)* the Supreme Court summarised the position in this way: (para [3]):

> 'Although the correct interpretation of Article 12(3)(b) (and therefore 12(1)(b)) might, in another case, have to be the subject of a reference to the European Court of Justice …
> … for the purposes of this case it did not matter whether the words "at the time the court is seised" meant:

(i) that the jurisdiction of the court had to be accepted at the time the proceedings began by all those who were then parties;

(ii) that the jurisdiction of the court could be accepted at any time after the proceedings had begun by all those who were parties when the proceedings began; or

(iii) was distinguishing between apparent seising when the application was lodged and actual seising when the respondent had had an opportunity to indicate whether or not he accepted jurisdiction.

That was because, in this case, the father had unequivocally accepted the jurisdiction of the English courts both before and after the proceedings were begun, and, therefore, both parties had accepted the jurisdiction of the English court's jurisdiction "at the time the court was seised". There might be little practical difference between the rival interpretations in any event, as the court could take into account later behaviour as evidence of an earlier state of affairs, and was, therefore, entitled to look at the parties' conduct after the proceedings had begun in order to decide whether they had accepted jurisdiction at the time the proceedings began. Whichever interpretation was correct, the acceptance in question must be that of the parties to the proceedings at the time when the court was seised, so the fact that the child had subsequently been made a party did not affect that application.'

Clearly then the acceptance does not have to be in writing. Important also for consideration on the facts of the present case is the observations made by Baroness Hale of Richmond in her judgment at para [31]:

'As will become apparent shortly, we do not need to resolve this question in this particular case, because we have unequivocal acceptance of the jurisdiction both before and after the proceedings were begun. Moreover, it may not matter much in practice. Even if the words "at the time the court is seised" qualify the parties' acceptance, and refer only to the precise date when the proceedings are initiated rather than to once they have begun, the court is entitled to look at the parties' conduct after the proceedings have begun in order to decide whether they had accepted jurisdiction at the time the proceedings did

begin. There is nothing unusual about this. Courts often take into account later behaviour as evidence of an earlier state of affairs.'

[26] *Re I (A Child) (Contact Application: Jurisdiction)* then went on to consider the phrase 'superior interests of children'. Again referring to the judgment of Baroness Hale of Richmond, at para [36]:

'The final requirement in Article 12(3) is that the jurisdiction of the English courts should be in the best interests of the child. Nothing turns, in my view, on the difference between "the best interests of the child" in Article 12(3), "the superior interests of the child" in Article 12(1) and "the child's interest" in Article 12(4). They must mean the same thing, which is that it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere. This question is quite different from the substantive question in the proceedings, which is "what outcome to these proceedings will be in the best interests of the child?" It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor.'

And at para [38]:

'The other factor in this case is the very proper stance taken by the child's guardian *ad litem*. When the issue of forum *non conveniens* was ventilated before His Honour Judge Barnett in the High Court, the guardian took the view that on balance it would be better for the case to

be heard here. The nub of the issue is the contact which the child should have with his mother in this country. Any continuing risks associated with that contact will be better assessed here and any safeguards will need to be put in place here. Inquiries in Pakistan can be made through international social services or other agencies.'

[27] The Court of Appeal also considered the issue of the child's interests in *Bush v Bush*. At para [44], Thorpe LJ said:

'So how does the divorce court assume or refuse jurisdiction in any matter relating to parental responsibility having regard to the best interests of the child? In my judgment that requires consideration of which is the more appropriate court, the court of the child's habitual residence or the court seised with the parental divorce. Any such proportionate judgment must have regard to all the familiar considerations that dictate the determination of a *forum conveniens* issue, namely the balance of fairness including convenience.'

[28] Holman J has recently tackled a similar problem in *B v B (Brussels II Revised: Jurisdiction)* [2010] EWHC 1989 (Fam), [2011] 1 FLR 54. This was a case where the parties had undoubtedly accepted the jurisdiction of the English courts. The little boy in question was, however, habitually resident in

Germany where he lived with his mother, the English courts having given her permission to relocate to that country some time before. Holman J held that, under the regulation, there was power for the court to continue to hear the case pursuant to the *unequivocal agreement*. He found, however, that notwithstanding the *unequivocal agreement* it was not in the child's best interests for the arrangements in relation to contact to be determined in England; those issues, he said, should be resolved in Germany, the country which was best placed to assess the welfare needs of the child and whose jurisdiction had already been invoked by the mother.

Holman J said at para [30]:

'This court was first seised long ago and its jurisdiction was indeed accepted, expressly or otherwise, in an unequivocal manner by both the parents. It is necessary, however, before I continue to exert any jurisdiction in reliance on Article 12(3), to consider whether it is in the best interests of Sohail still to do so. On behalf of the father, Ms Gifford submits that it is in the continuing best interests of Sohail that I should exert jurisdiction and "confirm" and continue the order of Her Honour Judge Hughes "as a final order", because these proceedings are on foot here, and the father is able to obtain public funding here, but is not able or may not be able to obtain public funding in Germany. Further, he is present in England and Wales at the moment on immigration bail, but his status here is so shaky or tenuous at the moment that if he were to travel to Germany in order to participate in proceedings or in contact there, he would not gain readmission here. I understand those arguments from the perspective of the father.

[31] On the other hand, the fact is that this child has now been habitually resident in Germany for about 10 months, which is a significant period of time in the lifetime of a young boy still only aged about three-and-three-quarters. I know very little about his circumstances in Germany. In the near future it seems idle to make any order as to contact here since, as recent events have demonstrated, the father is not in a position to put the mother in cleared funds …

[33] So I cannot see that it is in the best interests of this child that this court, at a distance, should assert some continuing authority over him. Rather, it is patently in his best interests that all future issues as to contact are considered and resolved in the court in Germany …

I would unhesitatingly conclude that the courts of Germany "would be better placed to hear the case" and that that "is in the best interests of the child".'

Conclusions

[29] The starting point then is that the court of habitual residence is best suited to determine issues of parental responsibility in relation to S. The father forcefully submits that the mother

unequivocally accepted the jurisdiction of the French courts by engaging albeit to a limited extent with the proceedings, by being represented and by appealing the order transferring custody to the father. Only at a late stage, it is pointed out, has she specifically challenged the jurisdiction of the French courts.

[30] The authorities are clear that the acceptance of jurisdiction does not have to be in writing and that subsequent acts and contact can illuminate the quality of the acceptance at the time the court was seised. Nevertheless, the acceptance still has to be unequivocal, and in my judgment, even putting the father's case at its highest, the mother did not unequivocally accept French jurisdiction. She instituted and pursued proceedings in England, seeking a residence order to ensure that S was returned to her after summer contact.

[31] Any parent in this mother's situation is faced with a serious dilemma; whether to decline to engage in the foreign proceedings on any level for fear of that engagement resulting in a finding of *unequivocal acceptance* or rather to engage in the foreign proceedings to such limited extent as is necessary to protect her and her child's position in the event that the jurisdictional issue goes against her.

[32] In this case, an order was made requiring the mother to deliver up to the father her daughter, a child who, save for contact, had never been away from her mother, and who thereafter was to have only visiting rights until a final hearing at some unknown time in the future. It is hard to see how the mother's decision to appeal that interim order for a transfer of residence within the time limits prescribed by the French court could lead this court to a conclusion that she had accepted unequivocally the French court's jurisdiction, particularly given that she had initiated proceedings in the English courts.

[33] If I am wrong in reaching that conclusion, I am nevertheless clear in my mind that the best interests of S are met by any welfare hearing and of any consideration by a court of the appropriate exercise of parental responsibility being conducted in this country. S has lived here since 2009. It is her home. She attends English school and lives within the maternal extended family. Here enquiries can best be made as to her welfare and circumstances. The issues raised by her father as to the suitability of the estate where she lives are potentially serious and can be best investigated by the English courts with the assistance of Cafcass rather than long distance from France.

[34] The court has, therefore, come full circle. The starting point is that the court of habitual residence should decide issues of parental responsibility. Recital 12 emphasises that one reason for that presumption is proximity. In the present case, I can see nothing that would displace that presumption and everything to reinforce it, even if there had, (as in *B v B (Brussels II Revised: Jurisdiction)*), been an unequivocal agreement to France assuming jurisdiction.

[35] In all the circumstances, I find that S is habitually resident in the United Kingdom. I decline to invoke Recital 12(1)(b) in order to stay the proceedings as it is in S's superior interests in relation to her future care and welfare that the court of habitual residence should be the court to determine all future issues of parental responsibility.

Order accordingly.

Solicitors:*Dawson Cornwell* for the applicant

Best for the respondent

SAMANTHA BANGHAM

Law Reporter