Neutral Citation Number: [2008] EWHC 2965 (Fam)

Case No: FD08P00949

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2008

Before :

MR JUSTICE MUNBY

- -

Between :

A B	**Applicant**
- and -	
J L B	**Respondent**

- -
- -

Ms Sharon Segal (instructed by Hughes Fowler Carruthers) for the Applicant (mother)
Mr Michael Glaser (instructed by Mills & Reeve LLP) for the Respondent (father)

Hearing date: 27 November 2008

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Judgment

Mr Justice Munby :

1. I have before me an interesting and seemingly novel point in relation to Article 15 of Council Regulation (EC) no 2210/2203 (Brussels II bis).

The background

2. The mother and the father, as I shall refer to them, are both English. They married in 1999. From then until August 2003 they both worked in the Netherlands, where their only child, a son, H, was born in May 2002. In August 2003 the mother's employment took her to London, where she moved with H. The father remained in the Netherlands until February 2005 when he joined the mother and H in this country. From November 2005 until July 2007 the family lived and worked in Scotland. In August 2007 they moved to the Netherlands and H started at the American School there.

3. By early 2008 the marriage was in serious difficulties.

The proceedings

4. Coincidentally, on 14 May 2008 both the mother and the father started proceedings. The mother issued a divorce petition in the Principal Registry (FD08D02235) based on the English domicile of both parties. (At that time both parties were still living in the Netherlands (see below) and, as the father would have it, habitually resident there. In these circumstances he characterises the mother's issue of a petition in this country as 'forum shopping', presumably, he says, with a view to her achieving a more favourable financial settlement.) The father, for his part, applied to the District Court of the Hague for 'provisional measures', seeking the care of H, the exclusive use of the former matrimonial home in the Netherlands and maintenance for both himself and H. An important element of the father's case was that he did not consider it to be in H's interest to move yet again, which would, he said, involve H moving to another school and leaving behind his new friends. The following day, 15 May 2008, and whilst unaware of the father's application in the Netherlands, the mother applied to the Principal Registry for a residence order (FD08P00949).

5. Since then the parents have been disputing which court(s) should have jurisdiction, in particular in relation to the divorce and H. I need not go into all the details. In the upshot, the father conceded in a letter from his solicitors dated 10 September 2008 that the divorce should proceed in this jurisdiction. Decree nisi was pronounced by the District Judge on 6 October 2008. The ancillary relief proceedings continue; the mother had issued her Form A on 4 July 2008 and the FDR is fixed for 3 December 2008.

6. The proceedings in relation to H in the Hague court came on for hearing on 5 June 2008, both parties being legally represented. Judgment was given on 19 June 2008. The mother sought, but failed, to persuade the Hague court to make an order under Article 15(1). The father was given temporary care of H and exclusive entitlement to use the former matrimonial home.

7. The parties finally separated on 27 June 2008; previously they had both been living, in tense conditions, in the former matrimonial home. The mother subsequently

returned to this country on 1 August 2008. The father and H continue to live in the Netherlands.

8. On 11 July 2008 the District Judge made an order giving the mother leave to withdraw her application for a residence order. However, on 24 October 2008 the mother applied again for residence or, in the alternative, a defined contact order. In her Form C1 the mother indicated that she was also seeking, by way of "preliminary application",

> "for the English court to make an application under Article 15(2)(c) of [Brussels II bis] to the [Hague court] to transfer the proceedings concerning H to the High Court in London given the particular connection H has to England and given also the divorce and financial proceedings already ongoing in England."

It is that preliminary application which came on before me for hearing on 27 November 2008.

9. The listing was in accordance with the joint request of the parties, set out in a letter dated 6 November 2008, signed by both firms of solicitors, asking the court to list the matter "for a 30 minutes directions appointment in relation to jurisdiction". On 13 November 2008 the mother's solicitor appeared before the District Judge of the day who, upon production of the letter, listed the matter for "a directions hearing" before a High Court Judge with a time estimate of 30 minutes.

10. As early as 28 October 2008 the father's solicitors had written to the mother's solicitors asserting that the application was "entirely without merit" and inviting her to withdraw it. I am told that, in the course of a conversation between counsel on 24 November 2008, Mr Michael Glaser, who appeared before me on behalf of the father, told Ms Sharon Segal, who appeared on behalf of the mother, that he would be seeking a final determination and summary dismissal of the application at the forthcoming hearing. The stance of the father's solicitors was reinforced by a letter the next day, 25 November 2008, putting her solicitors on notice that they would be seeking costs against the mother in relation to the hearing two days later and serving on them a statement of costs.

11. In the event the hearing on 27 November 2008 lasted for longer than the 30 minutes allowed by the District Judge. The Associate's 'blue' records the hearing as having lasted from 11.33 to 12.52. At the end of the hearing I reserved judgment.

Article 15

12. Article 15 of Brussels II bis provides, so far as material, as follows:

> "Transfer to a court better placed to hear the case
>
> 1 By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to

hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State … ; or

(b) request a court of another Member State to assume jurisdiction …

2 Paragraph 1 shall apply:

(a) upon application from a party; or

(b) of the court's own motion; or

(c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3 The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

(a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or

(b) is the former habitual residence of the child; or

(c) is the place of the child's nationality; or

(d) is the habitual residence of a holder of parental responsibility; or

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property."

Ms Segal and Mr Glaser helpfully referred me to a recent authority on Article 15, the decision of Mr Jonathan Baker QC, sitting as Deputy Judge of the Division, in *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741. But that, as they correctly observe, does not bear directly on the point with which I am concerned. Neither Ms Segal nor Mr Glaser was able to direct me to any relevant authority on the present point – apparently there is none – nor were they aware of any previous case in which the present point had arisen.

<u>The decision of the Hague court in relation to Article 15</u>

13. I have been supplied with an agreed translation of the decision of the Hague court handed down in writing on 19 June 2008.

14. The court set out the background circumstances and rehearsed the parties' arguments in some detail. It then turned to consider a preliminary point the mother had taken challenging the jurisdiction of the court. The court held that it had jurisdiction in accordance with Article 8 of Brussels II bis because H was habitually resident in the Netherlands. It added that "The question of whether and when divorce proceedings will be instituted in the Netherlands does not alter this."

15. The court then turned to consider the mother's application under Article 15. The part of its decision which deals with the Article 15 point is short and can usefully be set out in full:

> "The wife has requested that the case be referred to the English court pursuant to Article 15 of the Brussels II bis regulation. Article 15 of the Brussels II bis regulation determines that courts in a member state that are competent to decide on a case in substantive proceedings, shall, by way of an exception and where they feel that it would be easier for a court in another member state with which the child has a special tie to hear the case or a specific part thereof, be able to defer hearing of the case or a specific part of said case, in the interest of the child, and invite the parties to address an application to this end to the court in the said other member state, in accordance with Paragraph 4.
>
> In the present case, the court sees no reason to make the exception indicated in Article 15(1) of the Brussels II bis regulation. Although his British nationality means that the minor has a special tie with England, the court is not of the opinion that it would be easier for the English court to hear the case, in the interests of the child, since the minor has his place of residence in the Netherlands."

16. It is not for me to question either the decision or the reasoning of my brother Judge in the Hague. We both sit as judges, albeit in our respective national jurisdictions, seeking faithfully to implement, in the interests of the families before us, as also in the common interest of all the peoples of the European Union, the principles set out in Brussels II bis. Principle and judicial comity alike require that I should give full faith and credit to the decision of the Hague court. I have no hesitation in doing so here. If I may say so with respect, its decision on the Article 15 point in the present case is eminently understandable; indeed, I strongly suspect that, had our respective roles been reversed, I would myself have come to precisely the same conclusion on the materials available on 19 June 2008.

<u>The mother's case</u>

17. How then does the mother put her case?

18. Ms Segal does not seek to go behind the decision of the Hague court. Her submission is short and simple. There have, she says, been material and significant changes in the circumstances since the Hague court reached its decision on 19 June 2008 so that it would, she submits, be appropriate for the English court to make an application to the Hague court as provided for in Article 15(2)(c) in order to enable the Hague court to reconsider the Article 15 issue.

19. Ms Segal accordingly invites me to direct the filing of short witness statements by both parties dealing with what she says are the relevant matters (the circumstances in which the family ended up in the Netherlands, the connection H has with each country and the discussions the parties have had about the future, for example, and in particular, in relation to H's future schooling); the filing of detailed skeleton arguments; and the listing of a substantive hearing to determine, as she puts it, the correct forum or the appropriate jurisdiction for the determination of the matter. Such a hearing, she says, would not necessarily involve the court hearing any oral evidence and would last no more than a day, perhaps only half a day.

The father's case

20. For his part, and as foreshadowed in his conversation with Ms Segal on 24 November 2008, Mr Glaser submits that the mother's application has no reasonable prospect of success – there has, he says, been no material change in the circumstances since the Hague court reached its decision on 19 June 2008 and there is no other conceivable basis for re-opening the issue; that the application is an abuse of the process; and that it should be summarily dismissed. In the latter connection he refers me to cases such as *Re B (Minors) (Contact)* [1994] 2 FLR 1 and *B v B (Unmeritorious Applications)* [1999] 1 FLR 505: see the discussion in the Family Court Practice 2008 at pages 2090-1.

21. The mother's response to this is that she should not be denied the opportunity to set out her case more fully, both in a witness statement and in a more detailed skeleton argument.

The issue

22. In these circumstances the issue is whether, as Mr Glaser submits, I should summarily dismiss the mother's application or whether, as Ms Segal submits, I should treat it as requiring further investigation and give appropriate directions accordingly.

The mother's case in detail

23. Ms Segal submits that the case falls within Article 15(3). H, she says, has, within the meaning of Article 15(1) "a particular connection" with the United Kingdom on each of the grounds set out in Articles 15(3)(b)-(d): the United Kingdom was H's habitual residence from August 2003 to July 2007 (albeit that, within the United Kingdom, his habitual residence from August 2005 to July 2007 may have been in Scotland rather than England); the United Kingdom is the place of H's nationality; and the United Kingdom is now again the mother's habitual residence.

24. Moreover, she says, the English court would be "better placed to hear the case" within the meaning of Article 15(1), given what she says is the substantial connection that

both parties have with the United Kingdom (both sets of grandparents live in England), the fact that neither of the parents speaks much Dutch and the fact that H speaks almost no Dutch, and given also that the divorce and ancillary relief proceedings are now taking place (by agreement of both parties) in the English court – so that the present bifurcation of the proceedings means that the parties are each having to instruct two different sets of lawyers and incur what she suggests are unnecessary costs, including the cost of translators. In this connection Ms Segal also sought to deploy a number of arguments familiar from the *forum (non) conveniens* jurisprudence as to the relative ease and difficulty of the parties litigating in the one jurisdiction or the other.

25. Finally, Ms Segal says that it is, within the meaning of Article 15(1), "in the best interests of the child" that the matter should proceed in the English court rather than the Hague court.

26. So far as concerns the justification for re-visiting a decision already taken by the Hague court, Ms Segal submits that there have been three material and significant changes in the circumstances since the Hague court reached its decision on 19 June 2008:

    i) First, the mother returned to this country on 1 August 2008 and has since re-acquired an English habitual residence.

    ii) Secondly, the father on 10 September 2008 conceded that the divorce should proceed in this jurisdiction. Decree nisi was pronounced on 6 October 2008 and the ancillary relief proceedings are ongoing. In her Form C1 issued on 24 October 2008 the mother asserts that the continuation of the order made by the Hague court "was dependent on the issue of divorce proceedings in the Netherlands."

    iii) Thirdly, H's circumstances, she says, have changed or are about to change inasmuch as H's continuation at the American school is now, she suggests, in doubt given what she reports is the father's unwillingness or inability to fund the school fees (evidenced, she says, by directions he has sought in the ancillary relief proceedings). The consequence, she fears, is that if he remains in the Netherlands H will have to go to a Dutch (and therefore Dutch-speaking) school.

<u>The father's case in detail</u>

27. Mr Glaser's starting point is that the mother's application under Article 15 was considered by the Hague court – the proper court to consider the matter – and rejected following a hearing at which both parties were represented. He points out that the Hague court is still seised of the matter and that H remains habitually resident in the Netherlands and attends school there. If, as the mother asserts, there have been difficulties in relation to her contact with H, this is not, he says, a justification for re-opening the Article 15 issue; on the contrary, any difficulties should be considered by the Hague court as the court properly seised of the issue.

28. So far as concerns the alleged changes in circumstances, Mr Glaser's response to the mother's case is dismissive. He says that there has been no change in circumstances,

and certainly no change in circumstances meriting any reconsideration of the Article 15 issue:

i) First, and so far as concerns the mother's relocation to this country, he points out that this was a matter which the Hague court had very much in mind when coming to its decision. Indeed, its decision sets out that "The wife … intends to move back to England with effect from 1 August 2008." And, as he points out, the Hague court based its decision primarily on the fact that H was living, as he still does, in the Netherlands. So the mother's change of habitual residence is not, he says, a relevant or substantive change of circumstance.

ii) Secondly, and so far as concerns the fact that the divorce and ancillary relief proceedings are now ongoing in this country, he points out that, as can be seen from the passage in its decision which I have already quoted, the Hague court addressed its mind to the implications of the divorce proceeding otherwise than in the Netherlands. So, he says, it is simply wrong for the mother to assert that the continuation of the order made by the Hague court "was dependent on the issue of divorce proceedings in the Netherlands."

iii) Thirdly, and so far as concerns H's education, he says that, even if what the mother says is factually correct (and this is not accepted), the issue is one properly to be ventilated in the Hague court – as the court still seised with the proceedings relating to H – and not one which can justify re-opening the Article 15 issue. After all, he says, a dispute about a child's schooling does not of itself necessarily raise any issue about the child's residence. Using English terms of art, an issue as to schooling is usually resolved by a specific issue order, not by a residence order. In the circumstances of this case, the resolution of any issue about H's schooling is not of itself, he says, going to determine whether H continues to live in the Netherlands with his father or in this country with his mother – and even if this were to turn out to be critical in that connection that is not, of itself, he says, any reason for taking away from the court currently seised of jurisdiction in the matter – the Hague court – the responsibility of determining the issue. And the mere existence of such a dispute cannot, he says, justify re-opening the Article 15 issue, with which, in truth, it has no meaningful connection. The key point is that H remains in and habitually resident in the Netherlands. That fact gave the Hague court jurisdiction in accordance with Article 8 and, to repeat, underpinned its decision as recently as 19 June 2008 to refuse the mother's application under Article 15.

29. Mr Glaser also comments that the mother chose to withdraw her original residence application on 11 July 2008 – while the divorce proceedings were on foot and after the Hague court had given its decision on 19 June 2008. Why, he asks rhetorically, did the mother not at that stage make the application which she is now, belatedly, pursuing under Article 15(2)(c)? In fact he goes further: he says that it is an abuse of the process for the mother to seek to revive an application which she withdrew as recently as July 2008. And, he says, the court cannot and should not permit what are essentially the same proceedings to continue simultaneously in two jurisdictions, least of all in the face of Article 17 of Brussels II bis.

30. Finally, and for good measure, Mr Glaser submits that to accede to the mother's approach would serve only to delay the litigation in circumstances where there is, he suggests, little reason to think that the Hague court would in fact come to any different decision on the Article 15 issue. As he points out, if I go down the route which Ms Segal invites me to travel, there will first have to be a hearing in this court to determine whether it should accede to the mother's request that it makes an application to the Hague court under Article 15(2)(c); there will then, if that application is successful, have to be a further hearing at which the Hague court will have to decide whether or not to accede to the English court's request; and only then would this court, if the Hague court decided to accede to its request, be able to give directions with a view to the substantive hearing of the mother's applications for residence or contact. Such delay, he says, cannot be in H's interests. And, he asks rhetorically, all for what? With, as it seems to me, a degree of understatement, Mr Glaser suggests that it is far from clear that the Hague court would in fact accede to any request from this court; after all, as he points out, H remains in the Netherlands and, as we have seen, the main reason why the Hague court decided as it did on 19 June 2008 was precisely that H "has his place of residence in the Netherlands."

31. Responding to Ms Segal's more general submissions that England is the *forum conveniens* – an issue which, I emphasise, is not, as such, before me – Mr Glaser identifies a number of reasons why, as he would have it, the Netherlands remains the *forum conveniens* and why, in his submission, the Hague court on a practical basis is far better suited than this court to hear the proceedings. More pertinently, perhaps, he speculates as to why it is that the mother wishes the proceedings in relation to H to be heard here rather than in the Netherlands. Does she consider the English court to be more favourable to mothers? Does she consider that the Hague court has made a wrong decision (in which case, as he points out, her remedy is to appeal)? Is it because if the proceedings were in this country it would be easier for her? None of these reasons, whatever their intrinsic merit, is of itself, he submits, a reason for transfer, given the framework of Article 15.

32. In conclusion, he submits that for all these reasons I should dismiss the mother's application here and now. It is, he says, bound to fail. And it would, he says, be a waste of court time and the court's resources to allow it to continue to a further hearing – with the attendant cost to both parties.

Discussion

33. A number of things about Article 15 are quite clear.

34. In the first place, the only court which can make the substantive decision under Article 15(1) is the court "having jurisdiction as to the substance of the matter" – in this case the Hague court. That, as the Deputy Judge observed in *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741 at para [70], is crystal clear from the terms of Article 15 itself. It follows from this that the role of the English court is limited. All it can do is make an application to the Hague court under Article 15(2)(c). It is then for the Hague court to decide whether or not to exercise its powers under Article 15(1). Save in respect of its limited powers under Article 48 (as to which see *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741), the English court will only be able to exercise substantive jurisdiction if either the Hague court exercises its power under Article

15(1)(a) to invite the parties to put the matter before the English court or it exercises its power under Article 15(1)(b) to refer the matter itself to the English court.

35. Secondly, as Article 15(1) makes clear there are three questions to be considered by the court – here the Hague court – in deciding whether to exercise its powers under Article 15(1):

i) First, it must determine whether the child has, within the meaning of Article 15(3), "a particular connection" with the relevant other member State – here, the United Kingdom. Given the various matters set out in Article 15(3) as bearing on this question, this is, in essence, a simple question of fact. For example, is the other Member State the former habitual residence of the child (see Article 15(3)(b)) or the place of the child's nationality (see Article 15(3)(c))?

ii) Secondly, it must determine whether the court of that other Member State "would be better placed to hear the case, or a specific part thereof". This involves an exercise in evaluation, to be undertaken in the light of all the circumstances of the particular case.

iii) Thirdly, it must determine if a transfer to the other court "is in the best interests of the child." This again involves an evaluation undertaken in the light of all the circumstances of the particular child.

At the risk of repetition I emphasise that what I have described as the process of evaluation under Article 15(1) is one that Brussels II bis confides to the court having jurisdiction – here the Hague court – and not to the other court. It is not for this court to evaluate in this context which court is "better placed" to deal with the matter or what is "in the best interests of the child" (or, indeed, to determine the factual issues arising under Article 15(3)). Those are questions for the Hague court, not for this court.

36. Given the use in Article 15(1) of the word "may" rather than the mandatory "shall", the court must exercise its discretion in deciding whether or not to direct a transfer. That said, the ambit of the discretion is likely to be limited in most cases, for the court cannot direct a transfer – see the use in Article 15(1) of the words "if" and "and" – unless all three conditions are met while, on the other hand, since the discretion is exercisable only if the court has satisfied itself both that the other court is "better placed" to deal with the case than it is and that it is in the best interests of the child to transfer the case, it is not easy to envisage circumstances where, those two conditions having been met, it would nonetheless be appropriate not to transfer the case.

37. It is, as it seems to me, against this background that one has to consider the circumstances in which the court of another Member State – here the English court – can properly exercise its power under Article 15(2)(c) to make an application to the court – here the Hague court – having jurisdiction (the topic which was considered in *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741). More particularly, it is against this background that one has to consider the circumstances in which, in a case such as this, the court of another Member State – here the English court – can properly exercise its power under Article 15(2)(c) to make an application to the court – here the Hague court – having jurisdiction where, as here, the court with jurisdiction has

already addressed the Article 15 issue, albeit, as here, on an application made by one of the parties under Article 15(2)(a) (a topic which was not considered in *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741).

38. Ms Segal submits that there is nothing in Article 15 to prevent the English court acting under Article 15(2)(c), nor to prevent the Hague court again considering the matter under Article 15(1), merely because the Hague court has already considered the earlier application made by the mother under Article 15(2)(a). I agree with this as an abstract proposition, whilst emphasising that the circumstances in which it would be proper for the English court to take this step in a case where the foreign court has already ruled on the Article 15 issue are likely to be very few and far between.

39. As Mr Glaser rightly says, although *res judicata* does not strictly apply in proceedings relating to children, the parties cannot re-litigate issues at will. I agree. In particular, I do not think that the English court can properly exercise its powers under Article 15(2)(c) in a case where the foreign court has already considered the issue under Article 15 unless good cause – very good cause – is shown for taking what will, almost inevitably, be an unusual and often exceptional step.

40. The mere fact that the English court may disagree with the decision of the foreign court, the mere fact that, had roles been reversed, the English court might or even would have reached a different decision, surely cannot be enough. After all, as I have pointed out, Article 15 confers the power to make the substantive decision under Article 15(1) on the court "having jurisdiction as to the substance of the matter" – in this case the Hague court – and the other court – here the English court – must not arrogate to itself a function properly within the exclusive jurisdiction of the foreign court. On the contrary, the duty of the English court under the scheme of Brussels II bis is loyally to follow the ruling of the foreign court and not to assert jurisdiction when jurisdiction is vested in the foreign court: see Article 17.

41. I need not consider what other circumstances might justify an application such as that being made here, for in the present case Ms Segal has firmly nailed her colours to the mast in making clear that it is alleged changes in the circumstances that, alone, she relies upon as justifying the mother's application.

42. The question thus reduces itself to this: what changes of circumstance are, in principle, capable of justifying what, as I have said, will, almost inevitably, be an unusual and often exceptional step?

43. In my judgment, proper regard for the requirements of Brussels II bis and a proper adherence to the essential philosophy underlying it, requires that the test to be met is a stringent one. After all, too ready a willingness on the part of the court to accede to an application such as the one currently before me can only be destructive of the system enshrined in Brussels II bis and lead to the protracted and costly battles over jurisdiction which it is the very purpose of Brussels II bis to avoid.

44. It is not, in my judgment, enough to demonstrate that the changed circumstances might persuade the foreign court to relinquish jurisdiction under Article 15. What has to be shown, as it seems to me, is that the circumstances now are such as so entirely to change the aspect of the case as to make it highly probable that the court seised of the case will, despite having already refused an application under Article 15, now come to

a different decision and relinquish the case to the court which has made the request under Article 15(2)(c). In my judgment it must be shown that the change in circumstances is likely to be decisive.

45. I return to the mother's application.

46. In my judgment, and despite everything put so clearly and cogently before me by Ms Segal, the contrary case put by Mr Glaser is really unanswerable. In relation to two of the alleged changes in circumstances he has demonstrated convincingly, and by reference to the Hague court's own reasoning, that they are no such thing. And in relation to the third matter – the alleged change in H's circumstances – he has provided convincing arguments, with which I agree, as to why, even if the mother is correct, these are matters to be ventilated before the Hague court, as the court seised of the proceedings, and not matters which justify re-visiting Article 15. In substance I agree with and accept Mr Glaser's arguments.

47. In my judgment, and even putting the mother's case at its highest, it falls far short of meeting the stringent test which she must meet if she is to justify this court requesting the Hague court to re-visit its decision under Article 15. The changes in the circumstances upon which she relies come nowhere near entirely changing the aspect of the case, and the prospect that the Hague court, if requested to reconsider the matter by this court, would come to any decision different from that which it reached on 19 June 2008 is, in my judgment, small – very small. So the mother fails by a large margin to satisfy the relevant test. I go further. Even if it were enough for the mother to establish that she has a reasonable prospect of persuading the Hague court to that course – and that, I repeat, is not the test – she would not, in my judgment, be able to meet even that much less stringent test.

48. The remaining question is whether I am justified in the circumstances in dismissing the mother's application summarily. In my judgment I am, and the mother will suffer no injustice if I do.

49. Ms Segal very fairly accepts that she was on notice that Mr Glaser would be seeking summary dismissal. The parties were not, in the event, confined to the 30 minutes envisaged by the District Judge and Ms Segal had, I am satisfied, more than adequate time to elaborate her submissions. The fact is that the argument on both sides was, to all intents and purposes, just as detailed as it would have been if I had adjourned matters for the further hearing envisaged by Ms Segal. And Ms Segal was not able to suggest that, were the mother given an opportunity to file evidence, she would be in a position to canvass, except perhaps in slightly more detail, any matters going beyond those which she has in fact put before me. There was, for example, no suggestion that the opportunity to file evidence would lead to the identification of any other changes in circumstances then those relied upon by Ms Segal.

50. What purpose would thus have been served by adjourning the matter? In my judgment, none. This is not a case in which Ms Segal's submissions disclosed matters, whether of fact or of law, which required further exploration or which suggested that the mother, if given more time, would be able to mount a more compelling case. On the contrary, I am satisfied that Ms Segal was able to say everything of substance that the mother, even if given more time, would have been able to say at an adjourned hearing.

51. The simple fact, in my judgment, is that the mother's application, attractively though it was put by Ms Segal, is devoid of any arguable merit sufficient to justify adjourning the matter for a further hearing on evidence. It is properly a case where the court can exercise its powers of summary dismissal. It is a case where the court should exercise that power, for otherwise the court would, in my judgment, be failing in its duty under Brussels II bis. A certain robustness of approach is called for in cases such as this if the court is to avoid becoming complicit in the subverting – whether intentional or otherwise – of the Brussels II bis regime.

Conclusion

52. For all these reasons I agree with Mr Glaser that the mother's application should be summarily dismissed. And it would seem to follow from this that I should not merely dismiss the mother's "preliminary application" but also dismiss or at least stay her substantive applications for residence or contact: see *Re S-R (Jurisdiction: Contact)* [2008] 2 FLR 1741 at para [72]. These are all matters which, until the Hague court determines otherwise (and I am not to be taken as suggesting or even hinting that it should), are properly matters for determination by the Hague court and not by this court.

53. I will ask counsel to draft an appropriate order.