Neutral Citation Number: [2014] EWCA Civ 680

Case No: B4/2013/3643

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION
MR JUSTICE MOSTYN
FD12P01563

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2014

Before :

LORD JUSTICE RIMER
LADY JUSTICE BLACKand
LORD JUSTICE McFARLANE

- -

Between :

	RE	
	G	
	(a child)	

- -
- -

Mr Tim Amos QC & Ms Victoria Miller (instructed by **Stowe Family Law LLP**) for the **Appellant**
Mr David Williams QC (instructed by **The International Family Law Group LLP**) for the **Respondent**

Hearing date : 8th April 2014

- -

Judgment

LADY JUSTICE BLACK:

This appeal is but a small part of extensive litigation which has been going on in Italy, England and Finland in relation to a 5 year old boy, G. The questions that require determination are a) whether Mostyn J was right to stay the Children Act proceedings brought by G's mother (M) under Art 19(2) of Council Regulation (EC) No 2201/2003 (hereafter Brussels IIR) and b) whether he erred in ordering that M take G to Italy on or before 18 December 2013.

At the conclusion of the argument, we indicated that we would dismiss the appeal against the stay and give our reasons for that decision later. We reserved our decision as to the order that M take G to Italy on or before 18 December, explaining that we would give it, with reasons, in writing. This judgment is intended to fulfil those various purposes.

Chronology

It is important to have in mind the essential chronology of events, and in particular the litigation chronology, but I will omit the detail. It will only serve to confuse an already complex picture and, in any event, there is dispute about many things, including many of the facts. Where there is disagreement or uncertainty, I have had to develop a working hypothesis as to what the facts are but it should not be thought that this court has made definitive factual findings.

Both G's parents are Italian. They met in London and lived here and also in Italy where they were married and G was born. The family moved to England in January 2009 but the parents separated in June 2010. Divorce proceedings were commenced by the father (F) in the Canterbury county court.

On 10 July 2012, M commenced an application in the Family Division of the English High Court under the Children Act 1989 for a residence order and for leave to remove G from England and Wales to Qatar, where she was to work, until September 2013.

Decree absolute of divorce was pronounced in the county court on 18 July 2012.

An interim order was made in the Children Act proceedings in the Family Division on 7 August 2012, giving listing directions in relation to what were now cross-applications for residence orders and M's application for leave to remove G from the jurisdiction.

The parties thereafter managed to agree upon arrangements so on 18 September 2012 an order was made by District Judge Aitken by consent. As one of the issues in the appeal

turns on the terms of this order, I will set out quite a lot of it here; M is referred to in it as "the Applicant". There are a number of recitals which include:

> "And Upon it further being agreed that it is the Applicant's intention as at this date that upon the Applicant's return to the jurisdiction in September 2013 care arrangements to be on alternate week basis between each party. In the event that the Respondent is away from home due to travelling to work, the Applicant will provide alternate care for G" (sic)

The order continues:

> "By consent the court orders that:
>
> 1. The Applicant be granted temporary leave to remove G ….from the legal jurisdiction of England and Wales to Qatar until 30th September 2013.
>
> 2. G is to be returned to the legal jurisdiction of England and Wales by the Applicant no later than 1st October 2013.
>
> 3. There be Shared Residence Order to the Applicant and the Respondent.
>
> 4. The child will be cared for by the Applicant and the Respondent on the following basis:
>
> i. By the Respondent in London for a period of no less than 14 days every two calendar months. The dates and times to be agreed between the parties.
>
> ii. By the Respondent following the Applicant's return from Qatar in October 2013 as indicated in the preamble above.
>
> iii. At all other times by the Applicant.
>
> 5. The parties to pay equally for travel costs during the period that G is flying between Qatar and London during the period of the temporary removal.
>
> 6. No order for costs."

There is a dispute between the parties as to what happened in the months following this

order. M's stay in Qatar with G did not last as long as anticipated. M's case is that the project for which she had been engaged came to a premature end and she went back to Italy whilst she sought replacement long term employment; F's case is that their relationship had resumed and M decided to give up her job in Qatar and return to Italy to join him. They all seem to have lived in Italy until the summer of the following year, 2013.

Whatever had been the status of the parents' relationship in the preceding months, by the summer of 2013, it was obviously not cordial and, on both their accounts, they were living separately. Soon they were back before the courts with problems to do with G. This time, the litigation was in Italy. At the start of August 2013, M applied to the Tribunale per i Minorenni in Florence for urgent measures when G was unexpectedly not returned to her care by F. F explained his actions as a precautionary measure because he was afraid that M was about to leave Italy with G to move to Finland. On 17 August 2013, the court ordered that G's whereabouts be established and that, should he be located in Italy, he be placed in the care of M at her Italian place of residence as an interim measure until the competent court decided otherwise. It declared that matters relating to any possible custody and visiting arrangements or with regard to authorisation for M to take G to Finland were not within its competency.

Having been served with the court's order, F returned G to M's care on 22 August 2013. He himself then commenced an urgent application in the Tribunale per i Minorenni dated 23 August 2013. He set out that, following G's return to M, he had not received any information as to where she intended to reside with G in Italy and that he was afraid that M intended to remove G from Italy to Finland. He wished to have G traced and measures taken to prevent him being removed from Italy. The Italian court summoned the parties to appear before the judge on 31 August 2013 although, in the event, there may not actually have been a hearing that day. F also commenced an appeal against the order of 17 August 2013.

On 11 September 2013, M issued an application in the Principal Registry of the Family Division for:

> "1) Temporary leave to remain in Finland, pending resolution of these proceedings;
>
> 2) Leave to remove G temporarily from this jurisdiction to Finland for 12 months; and
>
> 3) A prohibited steps order preventing the Respondent from removing G from the Applicant's home or care, other than

for the purposes of agreed contact;

4) Residence Order."

The matter was listed before Mostyn J on 12 September 2013. It was one of a number of the applications that he had to hear that day. Both parties appeared by counsel. The judge declared that the courts of England and Wales were seised of all issues of parental responsibility and the Italian court ought to stay its proceedings "until the challenge by the respondent father to the jurisdiction of this court is resolved on 22 October 2013", although we shall see that he subsequently changed his view on this issue (which I will now call simply "the Article 19 issue"). He made an order permitting M to keep G in Finland pending the hearing scheduled to take place in the Family Division on 22 October.

On 17 October 2013, the Tribunale per i Minorenni made an order in the F's proceedings. The court concluded that it could not make any order in relation to G because he appeared by then to be in Finland with M. It declined to deal with anything further until F notified M of his application, fixing a new hearing on 18 December 2013 at which the parties were summoned to appear.

The English hearing on 22 October was not in fact effective. The question of M's permission to keep G in Finland was considered at a hearing in front of Mostyn J on 25 October 2013. He extended the permission to last until the hearing of the Article 19 issue, setting out that he was now of "the *provisional* view" (my italics) that the courts of England and Wales were seised of all issues of parental responsibility by virtue of the continuance in force of the order of 18 September 2012.

On 7 November 2013, F commenced proceedings under the 1980 Hague Convention in Finland, which later led to an order of the Finnish courts in January 2014 that M return G to Italy.

On 13 December 2013, Mostyn J determined the Article 19 issue, following argument from counsel for both parties. His order provided that M's applications "are stayed pursuant to Article 19(2) …until the Italian Court has determined whether it is first seised and if so whether it has jurisdiction". He went on to grant M permission, "pursuant to Article 20" to remove G from the jurisdiction of England and Wales to Finland until 18 December 2013, providing that she must take him to Italy on or before 18 December "unless prior to [that date] she obtains an order from the Italian Court permitting her not to take him for the hearing on 18 December" ("the return to Italy order"). The order went on to provide that M "must not remove G to another country save for the purposes of

returning him to Finland on 14 December 2013 and taking him to Italy on 18 December 2103 save in compliance with any further order of the Italian, Finnish or English courts".

M immediately sought permission from this court to appeal against Mostyn J's order. Macur LJ refused permission in relation to the Article 19 issue but granted permission in relation to the return to Italy order on condition that M apply to the Italian court for an urgent direction that she need not be accompanied by G at the hearing on 18 December. She declined to stay the order at that stage but granted a stay on 17 December 2013, presumably in response to some further communication from M's solicitors.

By this point in the chronology, the die was cast in terms of the issues we have to determine and I do not propose to continue to describe events except to give the broadest of indications as to what has transpired. It is sad, particularly for G, that not much progress has been made. There have been further orders in the Italian courts but it seems that nothing has been resolved. The present state of play is that there are expected to be two hearings in Italy quite shortly. The parties cannot agree what the first one (30 April 2014) is about, M saying it is a criminal process in relation to the allegation that she abducted G to Finland, F saying that it is a welfare hearing about G. The second hearing, which is due to take place on 21 May 2014 is an appeal hearing in relation to the order of the Tribunale per i Minorenni of 20 February 2014. Both parties are appealing that order. As far as I can tell, M is challenging the order made by the court under Article 20 requiring G to be placed in the custody of Italian social services and to live with M in a named locality in Italy, and F is appealing against the court's finding that it did not have competence to determine the application he had originated in August 2013 and that that application had not been served.

As for G, he is living with F in Italy. M has been working in Finland and has not had direct contact with him since mid-March.

Permission to appeal and an allied matter

Some uncertainty developed, for reasons that I need not go into, over whether Macur LJ's permission to appeal against the return to Italy order remained operative. Accordingly Tomlinson LJ was asked to consider that as well as M's renewed application for permission on the Article 19 issue at an oral hearing on 19 February 2014. He granted permission on all the grounds set out in M's grounds of appeal.

I need to say a little more about the ambit of the argument in relation to the Article 19

issue. Paragraph 2 of the grounds of appeal is the relevant paragraph and states:

> "The grant of final and indefinite leave will for the purposes of Article 19 be classified as a final order. However the grant of a temporary time limited leave to remove where the court implicitly retains jurisdiction throughout the period and on the term (sic) cannot be so classified. Mostyn J was wrong in law to reach the contrary conclusion."

From this, it can be seen that the argument that was being advanced turned on the order of 18 September 2012 not being a final order and the English court therefore still being seised of the 2012 proceedings in relation to G when litigation began in Italy in summer 2013. The proposition that the Italian court was not actually seised at all before M began proceedings again in this jurisdiction on 11 September 2013 did not feature as part of M's appeal grounds or skeleton argument. To attempt to advance such an argument at this late stage, as Mr Amos QC (who represented M before us on the appeal) and Ms Miller (who represented M on the appeal and also before Mostyn J) might have liked to do, would have required permission to amend the appeal grounds to add a completely new ground and would have led to very considerable problems. At the suggestion of McFarlane LJ, it was agreed that the right way to proceed was to consider the appeal on the ground for which permission had been granted, putting to one side any possibility that the Italian court was not in fact seised last summer. As I will explain later, if the Italian court were to determine in due course that it was not first seised, M could seek to revive the English proceedings in any event so this course should not ultimately prejudice her significantly.

Article 19(2) and (3); Article 20

Article 19(2) and (3) provide:

> "2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before the courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
>
> 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
>
> In that case, the party who brought the relevant action before the court second seised may bring that action before

the court first seised."

Article 20 provides:

> "1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.
>
> 2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate."

The Article 19 issue

The essential question

By now it will be apparent that which court is first seised depends upon the effect of the English order of 18 September 2012. If the English proceedings came to an end with that order, then the Italian court was first seised by virtue of the applications made to it in summer 2013; that is what F contends occurred. If they did not, the English court was still seised when those applications were made in Italy, and was therefore first seised; that is M's proposed analysis. Mr Amos bridled at Mostyn J's focus on whether the 18 September 2012 order was a "final" order. He submitted that the proper question was whether the 2012 proceedings were continuing but I do not see how one can answer that without determining whether the 18 September 2012 order was final. The judge thought it was and that is why he stayed the English proceedings under Article 19(2).

BIIR provisions

International instruments cannot be interpreted as if they were domestic law. They must be interpreted purposively and in accordance with EU law. It would not do, therefore, to determine whether the 18 September order was final by a narrow and blinkered application of the procedural and substantive law of England and Wales. Nor should the question be determined, it seems to me, by the fact that M chose to issue her application in September 2013 on a form C2 which is the form to be used to seek an order or

directions in existing proceedings, any more than by the formulation she chose when indicating on that form what orders she sought.

The context in which we must make our decision is discernible from the recitals at the start of BIIR. Recital (12) and (13) are as follows:

> "(12) 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 a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.
>
> (13) In the interests of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court."

Although there were divorce proceedings between the parents, parental responsibility questions in relation to G have been dealt with in separate free-standing proceedings and it is common ground that it is the jurisdiction provisions contained in Section 2 of Chapter II of BIIR that are relevant, together with the common provisions in Section 3.

Article 8 BIIR contains the general jurisdiction provisions in matters of parental responsibility. This article shows that the question of jurisdiction is determined at the time the court is seised, establishing that (subject to Articles 9, 10 and 12) it is the courts of the Member State where the child is habitually resident when the court is seised that have jurisdiction. Article 9 establishes a limited extension of the jurisdiction of the child's former residence following the child's lawful move to another Member State and acquisition of habitual residence there. Article 10 perpetuates jurisdiction in cases of wrongful removal or retention. Article 12 provides for the prorogation of jurisdiction.

Article 16 defines when a court will be deemed seised. There is no need in this case to descend to the fine detail of that provision. There is no doubt that the English court was seised with the 2012 Children Act proceedings ("the 2012 proceedings") until 18 September 2012 and again on 11 September 2013. The Italian court is taken to have been seised in the summer of 2013. Nothing in Article 16 helps to answer the critical question

of whether the English court remained seised with the 2012 proceedings after 18 September 2012 or not.

Jurisdiction, ignoring the 18 September 2012 order

The obligation of the court second seised to stay its proceedings under Article 19(2) is not dependent on the court first seised actually having jurisdiction. What matters for Article 19(2) is the sequence in which the courts were seised. The question of whether the court first seised has jurisdiction is then addressed in that court and if it is established, the court second seised declines jurisdiction in favour of that court (Article 19(3)).

Nevertheless, it may be useful to consider, as the background to further consideration of the Article 19 issue, whether, putting to one side the possibility that the 2012 proceedings were still extant, the English court had jurisdiction on 11 September 2013 when M's latest application was issued here. Habitual residence is a question of fact and the material facts have not been explored so of necessity it is only possible to take a provisional view, but there is a distinct possibility that it did not. The parties agree that even temporary relocations can on occasion result in a change of habitual residence. Accordingly, following M's return from Qatar to Italy, after which she remained based in Italy until nearly the end of August 2013, she and G may have become habitually resident in Italy. The Finnish courts thought they had done so as they made an order under the 1980 Hague Convention requiring M to return G to Italy. If that is right, in summer 2013, jurisdiction would therefore probably have been in the Italian courts by virtue of Article 8 and it would have been perpetuated under Article 10 because, as the Finnish court found, G was wrongfully removed to Finland. A finding that the previous Children Act proceedings in this country were still extant when M returned to the courts of this country with her application of 11 September 2013, and that the English court thus still had jurisdiction, may therefore produce a different result from the provisions of BIIR otherwise applied, conferring a jurisdiction on our courts which would not otherwise exist.

Did the 2012 proceedings end with the order of 18 September 2012?

a) Counsel's submissions together with some comment from me

Counsel have found no authority to assist us directly in determining whether the 18 September 2012 order was or was not final and whether it brought the 2012 Children Act proceedings to an end.

There is reference in Brussels IIR to proceedings pending and to judgments becoming

final. This can be seen in Article 12(2) which speaks of "proceedings in relation to parental responsibility …. pending" and of jurisdiction in particular circumstances ceasing as soon as "the judgment …. has become final" or the proceedings have "come to an end for another reason". There is, however, no definition of when judgments become final nor any guidance as to when proceedings come to an end. Mr Amos criticised Mostyn J for referring to Article 12(2) at all because it is concerned with divorce cases whereas the 2012 application was a free-standing application under the Children Act. I do not consider there was anything inappropriate in the judge's approach however; all he was doing as he examined parts of the regulation and some authorities in the passage of his judgment commencing at §11 was to look for assistance, wherever it might be available, as to what sort of orders might be considered final.

M submitted that the fact that the leave to remove G from the jurisdiction was only for a finite period, as opposed to being an order permitting her to relocate permanently, dictates that the order of 18 September 2012 was not a final order. She submitted that the English court retained control of the case or, as it was put in argument, had continuing "oversight" of it, the September order anchoring matters to this jurisdiction. These considerations were said not only to dictate that the English court remained seised, but also to influence the underlying question of the child's habitual residence which is perpetuated by the continuing link with England and Wales and the obligation on M to return G here at the end of the temporary absence. I think that it was also argued, albeit with a light touch, that the order amounted to an agreement between the parents on the continuation of the jurisdiction of the English court, although that is a separate question, of course, from whether the particular proceedings before the court in September 2012 had come to an end.

In their skeleton argument, Mr Amos and Miss Miller argued that the English court remained seised until the date for return had passed and M had returned the child or, in the event that she failed to do so, until F "had made an application for enforcement, subject to the principles regarding acquiescence" (see §56 of their skeleton argument). I think that Mr Amos modified this slightly in oral argument, accepting that once the return date was passed, the English court would not be seised as a result of the September 2012 order but by virtue of the enforcement application.

It was submitted that there would be adverse practical consequences if F's categorisation of the order is correct. It would, it was said, enable a parent to obtain leave to remove a child temporarily from the jurisdiction, possibly hedged about with undertakings to return, and then to take up residence in another country, jettison the English obligations, and make an application to another court which may be more favourably disposed to whatever longer term applications he or she wished to make. It was said that, in contrast, this forum shopping could not happen if the order is treated as not final and the

proceedings as continuing. Mr Amos and Miss Miller foresaw also that courts will be discouraged from permitting a parent to leave the jurisdiction with their child for a finite period for fear that this will lead to a loss of their power to enforce the order or to make other orders which will protect the child.

M sought to rely, in support of her appeal, upon Mostyn J's change of mind as between his initial judgment and his final decision. I do not consider that there is anything to be gained in pursuing this line of argument. Mostyn J's December judgment is the operative one. In it, he set out the basis upon which he had reached his final view and the answer to the problem in this appeal seems to me much more likely to emerge by concentrating directly on that and on the terms of Brussels IIR and of the September 2012 order.

Mr Williams QC, who has represented F throughout, argued that the September 2012 order determined all the issues then between the parties and therefore was final, notwithstanding the finite period of M's permission to take G to Qatar.

He invited attention to the overall scheme of Brussels IIR which he argued required orders to become final, pointing by way of example to Article 9 which contemplates jurisdiction passing to a new country of habitual residence after a lawful move. This presupposes that the order permitting the move brings the proceedings to an end, he argued, because otherwise jurisdiction would remain in the country where the child was originally habitually resident.

He relied upon the decision of the CJEU in Povse-Alpago Case C211/10 [2010] 2 FLR 1343 at §§46-48 for the proposition that an order can be final even where it provides for a subsequent review. He argues that it is the nature of the decision and whether it is provisional and made within ongoing proceedings where the court is continuing to enquire into the situation of the child or whether the issue has been finally determined that establishes whether the decision is final. Once a final judgment has been delivered, the court may have jurisdiction to enforce it but that is a separate process and does not mean that it continues to be seised of the substance of the matter. The effect of M's approach is, he submitted, to create an artificial retention of jurisdiction here in circumstances which are not catered for in Brussels IIR.

Mr Williams said that it is M's categorisation of the September 2012 order that will lead to a forum shopping problem, not F's, because it would enable a party artificially to revive a long extinct application rather than making a new application in the country of the child's habitual residence.

b) Further discussion

As a matter of the domestic law of England and Wales, it is rare for an order relating to a child to be truly final if "final" means ruling out further applications to the court. An adoption order can probably be said to be final in that sense in that it creates a new relationship with the adoptive family and prevents the child's former parents from making further applications qua parents. But an order settling contact, or residence, for example, can subsequently be varied or discharged and new arrangements for the child substituted. That does not, in my view, mean that the order for residence or contact is not final any more than does the fact that proceedings may be taken to enforce the order. Many such orders mark the end of proceedings.

Similarly, an order relating to a child may well regulate future events, notably scheduling contact visits. This does not mean that the order is not final any more than an order in ordinary civil proceedings would be not final if it provided for payment of a sum of money on a future date. Mr Amos accepts that, on behalf of M.

How does one tell, therefore, whether particular proceedings have come to an end? In my view, this is a fact specific question which has to be determined by careful examination of the circumstances in which the order which it is said brought the proceedings to an end was made and its precise terms.

One pointer, in my view, is whether any further hearing date has been set. Section 11(1) Children Act 1989 provides that in proceedings in which any question of making a section 8 order or any other question with respect to such an order arises, the court shall draw up a timetable with a view to determining the question without delay and give directions to ensure that the timetable is adhered to. It is a long standing practice that no judge parts from a children case without first fixing the date of the next hearing. It is noteworthy therefore that the September 2012 order did not include any provision for a subsequent hearing. This tends to support it being a final order.

Does the fact that the permission to remove G to Qatar was a temporary provision, culminating in a return to this jurisdiction in September 2013, dislodge this? In order to answer this, it may be helpful first to divert for a moment to consider a variant on the order in this case. Suppose an order which permits a mother, who already has a residence order, to take the child for a 5 week holiday abroad. I think Mr Amos accepted that that would be a final order. The mere fact that the mother had to return the child to this jurisdiction at the end of the holiday would not mean that the proceedings relating to the child were still pending. If she failed to return the child to the jurisdiction at the end of the holiday, the father would no doubt seek the assistance of the English court but the

availability of that service would not mean that the holiday order was not a final order. The role of the court when F applied to it again would be to enforce the order, which is a separate process.

Why should the September 2012 order be any different? The period of permitted absence is longer and the purpose is for work rather than a holiday but I cannot see that either of these features adds weight to the argument that the proceedings remain pending. Indeed, on the contrary, I think they tend to lend rather more support to the notion that the order is final. Under an order like this one, the parent is permitted to live and work in another country for a year which, it may be thought, could give rise to a change in habitual residence and ultimately, under the Brussels IIR scheme, lead to a change of jurisdiction. A holiday abroad obviously would not change matters in this way. Mr Amos argued that nevertheless an order like the September 2012 order *is* different from a holiday order because the court retains control and might, over the period of a year, have to exercise its jurisdiction to carry out some sort of interim review of arrangements which would be wholly unnecessary during the course of a short holiday. That is not a persuasive argument for viewing the two orders differently in my view. It is artificial and it just leads to a reformulation of the essential question so that it becomes: given that some orders permitting a parent to take a child out of the jurisdiction temporarily are final and some are not, what distinguishes between the two categories? Would it depend on the purpose of the holiday? Or on its precise length, so that perhaps an order permitting 5 weeks absence would be final but not one permitting 5 months?

I appreciate that M's argument is actually directed not at the question of jurisdiction but at the question of whether the English court remained seised but her argument that the court has reserved continuing control over the child throughout the term of the permitted removal seems to me, in fact, to introduce a jurisdictional concept which Brussels IIR does not contain. If the English court can ensure in this way that it remains seised, it will preserve its jurisdiction despite the fact that the child's habitual residence may have changed months or years before a parent seeks to revive the English proceedings by making another application. Although Brussels IIR does contain some provisions which reserve jurisdiction, they do not include a provision which would operate in this way. That is perhaps unsurprising given the objective set out in recital (12) to the Regulation that the grounds of jurisdiction be "shaped in the light of the best interests of the child, in particular on the criterion of proximity".

M's submission may perhaps presuppose an orderly scheme in which one order in relation to a child runs its course before another supervenes. But orders regulating arrangements for children who are moving between countries do not always line up tidily, with one country's order being fulfilled before another country takes over jurisdiction and makes another order. That can be seen, for example, from the enforcement provisions of Brussels

IIR which provide that a judgment relating to parental responsibility shall not be recognised if it is irreconcilable with a later judgment given in the Member State in which recognition is sought (Article 23(e) and see also Article 23(f)).

Mr Amos relies upon the fact that the order contained provisions regulating arrangements for G upon M's return to this country from Qatar. That is, in my view, a point against his case rather than for it. The more that is sorted out between the parties by an order, the more final it appears to be. This order left nothing still in issue. No review or follow up hearing was scheduled. True it imposed an obligation upon M to do things in future, particularly to comply with the terms of the shared residence order and to return G to the jurisdiction. If those things were not done, however, the application that F would then make would be an application for enforcement of the order and, stepping back from the narrow domestic perspective and looking at matters from a wider Brussels IIR angle, that process has to be seen as distinct from the original order.

Whether the order of September 2012 was final and brought the proceedings to an end must be determined as things stood at the time it was made and cannot depend on what happened next in the family's life or even on what would be a sensible and practical way of going about things. However, it can be observed that M's analysis produces a result divorced from the realities here. Events have been particularly unpredictable and fluid in this family since the September 2012 order. Within months, the arrangements set up in that order had been abandoned and M was neither in Qatar with G nor in England. The issues that arose in relation to G were recognisable echoes of the issues resolved in September 2012 but they were refashioned by the considerably changed circumstances of summer 2013, by which point all material players were in Italy and had been for some time. To focus back to proceedings in England which resolved issues material in September 2012 when the family was living here instead of on new proceedings in Italy does not immediately strike one as sensible.

It was for all the reasons I have set out that I concluded that Mostyn J's order could not be faulted and the appeal should be dismissed.

The return to Italy order

The judge heard submissions and made the order that M return G to Italy on or before 18 December 2013 after he had given judgment in relation to the stay. Unfortunately, neither note nor transcript of his reasons for making the order were available at the appeal hearing. A transcript has, however, been provided since.

It is important to recognise the limits of the challenge to the return to Italy order. It was

not argued that Mostyn J did not have jurisdiction under Article 20 to make it as a provisional measure. Nor was it argued that as a matter of domestic law, he did not have power to make it, whether under the Children Act 1989 or the inherent jurisdiction. The argument was solely that it was not open to him to make such an order on the facts of this case.

I was not persuaded by M's attempt to elevate the question to a point of general importance on the basis that Mostyn J had made an impermissible case management order in favour of a foreign court. Mostyn J's order sought to protect G's interests in the immediate future and the issue was whether the way he did so was outside the scope of what was appropriate on these facts. The argument over the return to Italy order therefore felt distinctly academic because the 18 December is long past, events have moved on in the Italian courts, and Mr Williams rightly accepted that given the stay of the order, there would be little room for contempt proceedings against M for failing to comply with it.

We nonetheless heard the arguments.

Mr Amos argued that the judge went too far in requiring M to take G to Italy when the Italian court had not required his attendance at the 18 December hearing. The power to make an order that G be taken to another country needed to be used cautiously, he said. It was appropriate to exercise it to permit M to return with G to Finland where he and she had been living but not to require her to take him to Italy.

Mr Williams responded that it cannot be shown that the order was a wrong exercise of the judge's power, straying outside the band of permissible orders. Mostyn J was entitled to act under Article 20 because it was urgent that arrangements be made for G for the next few days and the context in which he had to do so was, Mr Williams said, that a) in August 2013 the Italian court had required G to be in Italy and M had broken that order by retaining him in Finland and b) both parents were to attend court in Italy on 18 December so that issues to do with his welfare could be determined. In these circumstances, he submitted, it was unobjectionable for the judge to make the order that he did.

Mostyn J did not give lengthy reasons for his Article 20 order. He proceeded on the basis that G should stay with his mother and there is no argument about that. He had to do the best he could on the limited material before him to cater for the immediate future. Miss Miller had no instructions as to whether M would or would not be attending the hearing in Italy the following week. All she could say was that M was going to need to seek legal advice in respect of that hearing. M's principal anxiety seems to have been to get back with G to Finland and Mostyn J quickly indicated that he would permit that. He then went

on to say:

> "I will also order that she must take G to Italy on 18th December unless, in the meantime, she obtains an Order from the Italian court to contra effect. If her lawyer can approach the Italian court and say that G does not need to attend – or, she does not need to attend, then that is fine……She can take the child to Finland, but she must take the child to Italy for the hearing on 18th December unless, in the meantime, she obtains an Order to contrary effect from the Italian court. I have tried in that Ruling to balance her position as primary carer and her need to be able to pursue her gainful employment with the fact that the Italian court will be making decisions about whether it is seised of the matter and as to jurisdiction, and as to interim arrangements, I have no doubt. It can decide those issues with G being there or if, before 18th December, it decides that G does not need to be there, it can make an order to that effect."

I do not find anything objectionable about either the order that Mostyn J made or his reasoning for it. He was clearly intent on the Italian hearing being effective, which was a sensible objective and undoubtedly in G's best interests. Unproductive litigation around the world is not going to help G. Not having any reliable information as to what the Italian process required, the judge was entitled to err on the safe side and require that G be taken to Italy for the hearing unless the Italian court said that was not necessary. I would therefore dismiss the appeal against the return to Italy order.

Concluding remarks

Accordingly, as we ordered on 8 April 2014, the appeal is dismissed in relation to the stay of the English proceedings which will remain stayed in accordance with Mostyn J's order. The appeal against the return to Italy order is also dismissed for the reasons given in this judgment.

Of course, if the Italian court does ultimately decide that it was not seised in the summer of 2013, whether because of failures of service or competence or for whatever reason, then that would revive the role of the Family Division here. The proceedings were only stayed by Mostyn J, not dismissed. His obligation under Article 19 was, as the court

second seised, to stay them until such time as the jurisdiction of the court first seised is established. If it is established, then the English court must decline jurisdiction in favour of the Italian court and M is entitled to bring the application originally made to Mostyn J in the Italian court. If however the Italian court declines jurisdiction, the next step will be for the English court to consider whether it has jurisdiction to entertain the proceedings. I think it was common ground that that would depend on Article 8 of BIIR, that is to say on whether G was habitually resident in England and Wales on 11 September 2013.

McFARLANE LJ:

I agree.

RIMER LJ:

I also agree.