RE RC AND BC (CHILD ABDUCTION) (BRUSSELS II REVISED:ARTICLE 11(7))

Family Division

Singer J

27 July 2008

Abduction – Brussels II Revised – Non-return order – Judgment requiring return of child – Whether available if non-return based on Art 3 – Court first seised of parental responsibility application

The Portuguese parents had been living in England with the two children for over a year when the father took the elder child to Portugal and failed to return. The mother issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). On the mother's application the English court made residence orders in the mother's favour, made the elder child a ward of court, ordered the father to return the elder child to the mother's care and prohibited the father from removing the younger child from England. However, in the Hague proceedings the Portuguese court refused to return the child to England, on the basis that, although the father had removed the child without notifying the mother, the removal had not been wrongful under Art 3 because the father shared parental responsibility with the mother and was therefore entitled to custody of the child. The mother was refused permission to appeal in Portugal, on the basis that the public prosecutor, not the mother, had conducted the Hague proceedings. Portuguese proceedings were instituted concerning 'the regulation of parental authority' in relation to the elder child. The mother applied to the English court for an examination of the custody issues concerning the elder child, pursuant to Art 11(7) of Brussels II Revised with a view to securing an order for the elder child's summary return. Shortly afterwards the mother had contact with the elder child for the first time in almost 2 years and was given permission to pursue her Portuguese appeal in the Hague proceedings. Subsequently, the elder child travelled to England for staying contact with the mother, on the basis of a Portuguese order that also provided for the younger child to travel to Portugal for staying contact with the father.

Held – dismissing the mother's Art 11(7) application; making directions in wardship proceedings concerning both children –

(1) The document transmission requirements imposed on the receiving state by Art 11(6) of Brussels II Revised, and the notification and submission invitation requirements on the court or central authority of the home state contained in Art 11(7) arose only if 'a court has issued an order on non-return pursuant to Art 13 of the 1980 Hague Convention.' Therefore, only if the child's non-return was pursuant to Art 13 of the Hague Convention, was the home court competent to examine the question of custody of the child, under Art 11(7) of Brussels II Revised and only such a welfare-based enquiry could lead to a 'judgment which requires the return of the child', summarily enforceable (see paras [35], [36]).

(2) Notwithstanding that the Portuguese decision not to return the child had been based on an astonishing series of propositions which, if adopted more generally, would frustrate the objectives of the Hague Convention, the mother was not entitled to apply to the home state, England, under Art 11(7), because the Portuguese court's non-return order had not been based upon a Hague Convention, Art 13 refusal, but upon a finding that the retention of the child by the father was not wrongful in terms of Art 3 (see paras [17], [21], [38]).

Per curiam: judicial co-operation was being attempted via the European Judicial Network, and discussions were underway with a first instance judge of the Lisbon Court of Appeal to attempt to limit the litigation frenzy in the case (see para [41]).

Statutory provisions considered
Supreme Court Act 1981
Child Abduction and Custody Act 1985
Children Act 1989, s 2(1)
Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 13, 16
Council Regulation (EC) No 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 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 8–12, 40(1)(b), 42
Portugal: Civil Code, Art 1901.1

Marcus Scott-Manderson QC and *Geraldine More O'Ferrall* for the applicant mother
Teertha Gupta for the child RC (represented by his Cafcass guardian)
The respondent father did not appear and was not represented

Cur adv vult

SINGER J:
[1] The primary application before me relates to RC, a boy who will be 11 in October. As the case has developed I have also been invited to make orders in relation to his younger sister BC who is nearly 8. Their father (F) and mother (M) who are both Portuguese lived in Portugal until 2003. They married in 1996 and remain married. Both children were born in Portugal but came to join their parents here in about July 2004 when RC was nearly 7 and BC was just 4. BC still lives with her mother in England, but on 25 January 2006 F, in circumstances which were in dispute, took RC to Portugal and did not return him as M claims had been agreed he would at the conclusion of a holiday. Since then F and RC have lived with F's parents in Amadora, a suburb of Lisbon, and M and BC have lived in this country. Until January this year BC had not seen his mother and until very recently indeed the two siblings had not seen each other and have had but scant communication with each other.
[2] Proceedings between the parents commenced with an application M launched in this jurisdiction on 11 April 2006. Since then proceedings in both jurisdictions have continued, and still continue, to take a tortuous path raising jurisdictional issues, in both countries, of considerable complexity. These children's, and their parents', predicament has become something of an object lesson for how one of the international family law instruments with which I have been concerned has not yet proved to be a universal panacea for the pan-European problems it addressed and sought to remedy. That instrument is the Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (to which I shall refer as BIIR).
[3] The substantive application before me concerning RC is one commenced by M on 10 August 2007. She invited the court to 'examine the custody/residence of RC pursuant to art 11(7) of BIIR.' In the title to the

summons reference is also made to the court's inherent jurisdiction, and to an earlier order of the High Court in London requiring F to return RC to England and to M.

[4] Miss More O'Ferrall, led since 22 January 2008 by Mr Scott-Manderson QC, represented M before me initially. RC has been represented in these proceedings by his guardian Mr McGavin who (via the Cafcass High Court team) instructs Mr Teertha Gupta. F has adopted an insular response (or perhaps, given Portugal's Iberian situation it is a peninsular response) to the English proceedings. He has not participated at all although some communications have passed between those acting for M and his Portuguese lawyer Doctor Antonio Andrade.

[5] At an adjourned hearing on 23 January 2008 I was invited also to make protective orders in relation to BC, in the light of developing (but far from complete) understanding of the extent to which she appeared to have become the subject of proceedings in Portugal.

[6] I am concluding the preparation of this judgment over the weekend of 25 July 2008 in circumstances where within the last few days it has become apparent that it probably represents merely a staging post on the way to more litigation yet to come. The judgment will probably be more readily understandable if I explain at the outset that this case was last before me on 23 January 2008 when I reserved judgment in what were then rather imprecise circumstances so far as knowledge of recent events in Portugal was concerned, and indeed the outcome which M hoped to achieve. I invited further written submissions, not least because the stance of M had fluctuated and her final position was far from clear. I received further written submissions on behalf of M (which so far as RC was concerned represented a significant shift of position) at the end of January, and (on behalf of RC) at the end of February. I then became indisposed for a lengthy period. My intended judgment was in a late stage of seriously delayed gestation, therefore, when on Thursday, 17 July 2008, junior counsel for M made a without notice application as a result of which I fixed a further hearing for Wednesday, 23 July 2008 (the subject of a separate and oral judgment delivered on 28 July 2008). The case and this judgment have thus been something of a moving feast with more courses apparently yet to come.

[7] The current position can really only be understood against the background of a detailed chronological exposition of the forensic steps taken in both jurisdictions. So far in particular as what I shall call the domestic (as opposed to Hague) proceedings in the Tribunal Judicial da Amadora, however, both documentation and clear information have been lacking.

[8] According to M she expected RC back in England in early February 2006. On 11 April 2006 M issued an originating summons entitled in the matter of the Child Abduction and Custody Act 1985 and in the matter of the Supreme Court Act 1981. The 1985 Act incorporated into English law the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (to which I shall refer as the Hague Convention). The 1981 Act amongst other things provides for wardship proceedings. The relief sought by M was the immediate return of RC to England and to M, and an order prohibiting F from further removal of the child from England. She alleged in her affidavit sworn in support of the proceedings that F had taken RC to Portugal upon the basis that he would return with him after about a

fortnight's holiday, but that after a week he told her that he was not coming back but intended to live with RC at his parents' home in Amadora. He added (either then or in a later conversation) that he intended to come to England to remove BC and take her to Portugal as well, and that he was making an application to that effect in Portugal. F (as it later transpired) relied upon a document which he said M signed and which authorised RC's removal. M agreed that the signature upon the document was hers, but denied that the text was on the page when she signed it. In any event I observe, having seen a typed translation of the document, that the irrefutable point in M's favour is that it simply purports to authorise F to take RC to Portugal, but is silent as to duration. So it could not be relied upon as any indication of agreement that he was to remain there permanently.

[9] On 21 April 2006 M commenced proceedings in the Lowestoft County Court under the Children Act 1989 to secure BC's position. She sought a residence order, and a prohibited steps order preventing F from removing BC from M's care. On 27 April 2006 that court made a prohibited steps order preventing removal by F, and transferred the application to the High Court in London to be listed together with M's application to that court concerning RC.

[10] On 2 May 2006 those applications came before my colleague Ryder J sitting in the Family Division of the High Court in London. The applications were heard without notice to F (or at least he was neither present nor represented). Ryder J declared that RC's habitual residence was in England and Wales. He made RC a ward of court, and ordered F to return him forthwith to M. He ordered that RC should reside with M until further order, and that F be forbidden from any further removal of RC from either M's care or the UK. So far as BC was concerned, he ordered that she should live with M until further order, and he replaced the Lowestoft County Court order with an order prohibiting F from removing BC from M's care pending the outcome of the proceedings relating to both children. He did not however make BC a ward of court. Although Ryder J's order directed that both applications should be relisted for further consideration in June 2006, it does not appear that that happened. Technically, therefore, either application can be restored and pursued so long as the English court retains jurisdiction.

[11] I pause in the narrative to observe in relation to BC that as of May 2006 there can really be no doubt but that she was habitually resident in England, and that only the English court had jurisdiction in relation to matters of parental responsibility concerning her. Article 8(1) of BIIR lays down as a rule of general jurisdiction that:

> 'The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.'

And none of the provisions of Arts 9, 10 or 12 to which that general provision is subject had any application at that stage, nor indeed has had any since.

[12] On 12 June 2006 M's request under the Hague Convention for a forthwith return order was transmitted by the English Central Authority

(ICACU) to the Portuguese Central Authority (the PCA). It appears that on 13 July 2006 the PCA sent the request to the Lisbon Family Court, the court with appropriate Hague jurisdiction.

[13] On 11 August 2006 the Tribunal Judicial da Amadora directed a social report which is dated 9 October 2006. I observe that it is not immediately apparent from an English perspective why a social report was ordered before the Hague proceedings were concluded in the Lisbon Family Court, having particular regard to the principle that once a Hague application has been received the relevant court should not embark upon a welfare investigation: see Art 16 of the Hague Convention which is in these terms:

> 'After receiving notice of a wrongful removal or retention of a child in the sense of article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.'

[14] Be that as it may, the social report which resulted is dated 9 October 2006 but was not received by ICACU until December 2006. From that report it emerges that F was asserting that he had M's permission to take RC to Portugal. The report reaches the conclusion that RC 'is benefiting from a structured and secure family environment' and that his 'well-being appears to be guaranteed' living with F and his paternal grandparents. The report was prepared without any direct contact being made with M. All that it says about her is 'because it was not possible to speak direct with [M], who is in England, it is difficult to confirm any of the information transmitted by her.'

[15] For reasons about which I know nothing a further 6 months elapsed before the Hague proceedings came to their substantive hearing when, on 27 April 2007, the Lisbon Family Court declined to make an order for return. Meanwhile, however, (as appears from the translated text of the order made on that day, which contains the only available account of what transpired) F and RC had attended a hearing at the Amadora court in August 2006 'when the child stated that he preferred to remain in Portugal with his father.' The document furthermore contains the sentence: 'There are also grounds for regulating the exercise of parental authority; this measure was applied for but is in suspense.'

[16] I have never seen any documentation initiating (apparently on 29 May 2006) the application there referred to, and had assumed that F had made some application relating to the exercise of parental authority over RC (and perhaps BC). In a letter to M's solicitors dated 13 October 2007 and referring to both RC and BC F's advocate Doctor Andrade referred to proceedings with a reference number 2.799/06 which he said 'are ongoing before the Amadora Judicial Court with regard to regulation of paternal authority over both children; however, these proceedings are presently suspended pending the decision to be taken on the appeal' by M against the refusal of permission to appeal the Hague proceedings. However, I was for the first time shown last Thursday an email dated as long ago as 10 January 2008 sent by M's Portuguese advocate Dr Condado to her English solicitors. It has appended

what he describes as 'a small summary of the procedural situation of the two referring existing processes in Portugal' in Portuguese, with his own attempt at a translation into English. Although his command of English is far greater than mine of Portuguese, the sense is not entirely clear. It does however seem to say that the parental responsibility proceedings were instituted not by F, but by the lawyer or State official who represents the interests of the children in the court proceedings. As to those proceedings, I understand Dr Condado to say that an order had by January 2008 been made to suspend them until the decision of what I take to be the Court of Appeal in Lisbon was known (an appeal process to which I shall refer below).

[17] I turn now to the reasoning of the Amadora Court in rejecting M's Hague application, as appears on the face of the translated judgment. The document records as an established fact that F removed RC to Portugal 'without notifying the mother', which (as her evidence makes it clear that she consented to his removal for a holiday) I take to mean is a finding that at the point of departure from England he had not notified her that he intended to retain the child in Portugal on a permanent basis. The conclusion of the court was that 'the taking of the child from his usual country of residence to Portugal cannot be considered unlawful.' Inherent in that is an acceptance that England was RC's country of habitual residence prior to his retention. The reasoning whereby the court concluded that that was not a wrongful retention is based upon what (from an English perspective) is an astonishing series of propositions which, if it were to be established as the approach adopted by the Portuguese courts faced by the unilateral act of a married parent, would frustrate the objectives of the Hague Convention and be contrary to what I believe has become the approach to the interpretation of the Convention shared by all its Member States. I quote from the judgment:

> 'In this case, the child's parents are still married to one another and as such both have parental responsibility authority, both according to English law, in section 2(1) of the Children Act 1989, and according to Portuguese law, article 1901.1 of the Civil Code.
>
> The exercise of parental authority is assigned both to RC's mother and to his father, by both of them jointly. Custody of the child is also assigned to both of them.
>
> The rule is that the parents exercise parental authority by agreement. If they cannot agree the court must intervene. The child's place of residence for the joint exercise of parental authority must be agreed between the parents. If they cannot agree on the child's place of residence the court must intervene.
>
> This being so, the taking of the child by the father to Portugal is not unlawful as RC remains in the custody of one of the persons to whom the law, either that of his usual place of residence or that of the country in which he has gone to live, assigns that custody and the right to decide his place of residence.
>
> The taking of the child from his usual country of residence to Portugal cannot be considered unlawful.
>
> We must also take into account that RC has adjusted well, goes to school and has declared that he wishes to remain in Portugal.

Therefore, if the taking of the child to Portugal is not unlawful, there are no grounds for applying the mechanisms of the Convention and ordering his return to the United Kingdom.

There are also grounds for regulating the exercise of parental authority; this measure was applied for but is in suspense.'

[18] Unsurprisingly M filed an appeal against the Lisbon court's refusal to entertain her Hague application. But on 10 May 2007 the same judge of the Lisbon Court (sitting as a first instance judge in relation to her appeal) ruled that as she was not a party to the proceedings her appeal could not be admitted. This again somewhat astonishing proposition appears to have been based upon the fact that the Portuguese procedure is for the public prosecutor to institute and conduct Hague proceedings. M appealed against that ruling. A letter from Cafcass inquiring why the public prosecutor had not himself taken steps to appeal the decision received no response.

[19] M then on 10 August 2007 commenced the High Court proceedings in London to which I have already referred, inviting the court to conduct an examination of custody issues concerning RC pursuant to Art 11(7) of BIIR, with a view to securing an order for his return to England and to live with her. The consequence of an order made under that provision is that it must without more be enforced by the receiving state, irrespective of its own court's prior Hague decision not to return the child: see Art 11(8) of BIIR and the provisions to which reference is there made.

[20] Although there were considerable difficulties in effecting valid service of the proceedings upon H he was well aware of them and chose not to participate, disregarding directions such as that he should file evidence. RC was joined as a party and Mr McGavin appointed his guardian. Mr McGavin made investigations and filed a report dated 9 November 2007. It is a full and sensitive report to the preparation of which F and indeed his parents and other key figures in RC's life all contributed. A number of shortcomings in the boy's upbringing are highlighted, most notably the extent to which he was suffering and will be at increased risk if his expressed hostility to M were to continue to be fostered by his paternal relatives, as well as by the deep sadness caused by his enforced separation from his sister. The guardian recommended that orders should be made to confirm RC's residence with F in Portugal.

[21] The application came before me for directions for the first time on 21 November 2007. I raised what seemed to me to be the fatal flaw in M's Art 11(7) application: that the Lisbon court's non-return order was not based on an Art 13 Hague refusal but upon a finding that the retention of RC by F was not wrongful in terms of Art 3 of the Hague Convention, and the case was adjourned for the lawyers to give consideration to this point. By pure chance I had the previous day given directions in another Portuguese Hague non-return case where Art 12 was the basis of refusal. Article 13 played no part in either decision. It therefore seemed sensible to hear argument on both cases together, and for that purpose they were listed together before me on 17 December 2007. By then M had accepted the thrust of Mr McGavin's report, but complexities had become apparent and developments occurred in each case which made the correct legal solution both less obvious and of wider-ranging ramification. In consequence submissions were not concluded

that day, nor were they by the end of the earliest available adjournment date which was 23 January 2008, by which time events had further developed.

[22] Before however I deal with the jurisdictional point in relation to Art 11(7) of BIIR I will continue with the account of events in the Portuguese courts.

[23] I infer that M at some stage attempted to launch her own application or cross-application in relation to the regulation of parental authority in respect of RC alone, as on 18 December 2007 the Amadora Court held that she could not do so as an action was already in existence for regulation of parental authority in relation to both children. The same judgment or order set 21 January 2008 as the date for a parental conference 'for establishment of provisional access arrangements', which M was required to attend. She did so, and during the 23 January 2008 hearing I was told that she had been able to see RC after that attendance, for the first time in almost 2 years. I was not told that parental agreement as to future access or otherwise was approved and recorded by the court in relation to both children: indeed that did not become apparent until 20 July 2008.

[24] Also on 21 January 2008 the Lisbon Court of Appeal allowed M's appeal against the decision that she had no status to initiate an appeal against the refusal of her Hague application, finding that she did indeed have capacity to appeal against the Hague dismissal. But at the resumed hearing before me on 23 January 2008 the outcome of that appeal was not known.

[25] M's instructions in relation to RC (as relayed to me by Mr Scott-Manderson, who by now was leading Miss More O'Ferrall) were that she no longer wished to pursue the English proceedings in respect of him and accordingly asked me to discharge the orders made by Ryder J on the 2 May 2006. He also suggested that I should take the initiative to make orders in relation to BC to protect her position and to clarify that this court regards her as subject to its own but not to the Portuguese court's jurisdiction.

[26] Later in the day however and after taking further instructions Mr Scott-Manderson told me that, according to M's Portuguese lawyer, Dr Condado, the Amadora court had on 21 January accepted that any proceedings in relation to BC would be in England. I hoped that that was indeed the position as, so plainly to my mind, she has throughout been habitually resident in England. But written confirmation to that effect has recently been repeated by Dr Condado.

[27] M's position had also changed during the course of the day in relation to RC, it appeared, as Mr Scott-Manderson told me that she now wished the English court to take decisions in relation to him, and her instructions were that Mr Scott-Manderson should renew his arguments supporting the existence of such jurisdiction.

[28] I reserved judgment, inviting the parties if they wished to do so to file further submissions, in particular to attempt to clarify the status and progress of proceedings in Portugal, and to confirm M's instructions. Thus it was that at the beginning of February I was informed of the outcome of M's appeal, and that the way forward was now open to launch her substantive appeal against the April 2007 decision dismissing her Hague application which appeal, it was estimated, might take up to 6 months to resolve. I was also informed that the Amadora court had stayed all welfare proceedings relating to RC pending that appeal. In the light of that Mr Scott-Manderson invited me

simply to adjourn the wardship and BIIR proceedings in respect of RC 'so that they remain as continuing proceedings until the outcome of the Hague Convention appeal in Portugal is known.' M envisaged that if RC did not return to England as a result of a favourable outcome to the appeal, then she would seek orders from the English court relying upon wardship and/or (if appropriate) pursuant to Art 11(7) of BIIR. So far as BC was concerned, the same orders were sought as were canvassed at the hearing on 23 January. Mr Gupta effectively agreed when he supplied further written submissions later in the month, with some elaboration in relation to the orders concerning BC.

[29] That then is how matters stood at the end of February. Since resuming court sittings I have finalised (or thought I had finalised) my judgment in the parallel case, but had deferred handing it down until completing (as I thought I would) the judgment in this one so as still to be able to make any adjustments needed to the first. But on 17 July Miss More O'Ferrall appeared before me as a matter of urgency to seek to relist the case in the light of the information which she then gave, unsupported at that stage by any written evidence. Cafcass Legal had been made aware of the situation, but had no wish to be represented at that ex parte hearing.

[30] Miss More O'Ferrall tells me that she had received instructions direct from her client that RC travelled to England on 1 July 2008 for staying contact with M and BC, pursuant to an order made by the Amadora court. Surprisingly no copy of the order was available. I was told that it provides that at the end of the month (which if that literally is the case means imminently) both RC and BC are to go to Portugal where BC will have a month's staying contact with F. Furthermore I was told, on instructions, that since arriving here RC has said that he wishes to remain living with M in England. M therefore wishes Mr McGavin to re-interview RC to ascertain his current wishes and feelings. I was also told that M has serious concerns about allowing BC to travel to Portugal having regard to the circumstances in which RC was retained there, and moreover now that it appears that the Portuguese court may have assumed jurisdiction over her notwithstanding the fact that she is and at all material times has been habitually resident here.

[31] This is a highly unsatisfactory state of affairs. I gave directions designed to ensure that Dr Andrade is apprised of the situation as soon as practicable in the hope that, even now, F may attempt to obtain representation in this country and in these proceedings. I directed M to file an affidavit by noon on 21 July, and that the case be brought into my list on Wednesday 23 July.

[32] I do not propose, at what is now again an interim stage in these proceedings, to make any order confirming or relating to RC's status as a ward. I do not propose in this judgment and at this stage of the case to make any orders in relation to BC. But what I can and should do is to deal with what seemed to me at the commencement of my association with this case, and still seems to me to be the simple question whether there is any jurisdiction to entertain M's application under Art 11(7) of BIIR.

[33] BIIR came into force on 1 March 2005 and is binding on all EU Member States with the exception of Denmark. It is subject therefore to that exception that I use the term Member State in this judgment.

[34] Article 11 of BIIR has the effect of 'complementing' or 'supplementing' practice and procedure in Hague abduction cases between Member States. Paragraphs (2) to (5) of Art 11 relate to the Hague proceedings themselves, conducted in the courts of the Member State to which the child has been removed or where the child is retained (the receiving state). The relevant paragraphs for present purposes are 11(6), (7) and (8) which grafted on a wholly new jurisdictional opportunity for the unsuccessful party to the Hague litigation in the receiving state to re-litigate the question of return to the child's home state in the courts of the home State. The provisions of Arts 11(6) to (8) are as follows:

> '6 If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.
> 7 Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.
>
> Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.
> 8 Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.'

[35] It is, in my judgment, beyond argument that the document transmission requirements imposed by Art 11(6) on the receiving state, and the notification and submission invitation requirements on the court or Central Authority of the home state contained in Art 11(7), only arise where 'a court has issued an order on non-return pursuant to Art 13 of the 1980 Hague Convention': the express opening words of Art 11(6).

[36] Only where the child's non-return is pursuant to Art 13 of the Hague Convention, therefore, is the home court competent 'to examine the question of custody of the child' as envisaged by Art 11(7). And it is only such a welfare-based inquiry which can lead to a 'judgment which requires the return of the child issued by a court having jurisdiction under this Regulation' which

Art 11(8) renders summarily enforceable under the provisions of s 4 (and especially Arts 40(1)(b) and 42, and the certificate to be issued in the Annex IV standard form).

[37] Recital 18 to BIIR refers forward to the Art 11(6) and (7) requirements as obligations which arise 'where a court has decided not to return a child on the basis of art 13 of the 1980 Hague Convention.' The June 2005 updated version of the Practice Guide reflects the same position at para 3 of s VII which (in its relevant parts) reads:

> 'Having regard to the strict conditions set out in article 13 of the 1980 Hague Convention and article 11(2) to (5) of the Regulation, the courts are likely to decide that the child shall return in the vast majority of cases.
>
> However, in those exceptional cases where a court nevertheless decides that a child shall not return pursuant to article 13 of the 1980 Hague Convention, the Regulation foresees a special procedure in article 11(6) and (7).'

[38] My conclusion is therefore that M in this case is not entitled to apply under Art 11(7) of BIIR. In the event no party in this (or in the parallel case) argued to the contrary at the final hearings.

[39] I propose therefore to strike out the application M launched on 10 August 2007. It can serve no useful purpose. If the course of events in Portugal in relation to the Hague appeal leads to a rehearing of the substantive application for a forthwith return order, which is then refused for a reason contained in Art 13 of Hague, then it would be necessary, in my judgment, to issue a fresh Art 11(6) summons in any event. Insofar as the 10 August 2007 summons refers tangentially to the inherent jurisdiction of the High Court that invokes nothing which cannot be achieved in wardship proceedings, assuming that there is residual jurisdiction to entertain them in the light of events as they unfold.

[40] I aim, subject to that dismissal, to retain maximum flexibility at this stage. Subject to submissions and to any points taken on the vexed question whether at this stage England retains any jurisdiction or must defer to Portugal in matters of parental responsibility, I propose to treat the next hearing as an application in his wardship so far as RC is concerned. Subject to similar reservations I propose to treat the application insofar as it relates to BC as an application to make her a ward of court and for consequential directions. I propose also in each case to appoint Mr McGavin as the child's guardian.

[41] I should add that it may still be possible to limit the litigation frenzy in this case and the complexity of the jurisdictional and juridical issues to which it gives rise if judicial co-operation between our two countries can be achieved. In the first instance that must be a matter for investigation through the offices of Thorpe LJ, the Head of International Family Justice for England and Wales, who will communicate to the extent that he regards as appropriate with Portugal's contact point for the European Judicial Network, Judge Carlos Marinho. I have therefore adopted what is described as 'the preferred route for contact' (see the note at p 514 of the current edition of the *Family Court Practice*), and with the swift and effective intervention of Thorpe LJ and

Judge Marinho have had discussions (relevant only to the issues canvassed on 23 July, and thus not recited here) with Judge Augusta Palma, a first instance judge of the Lisbon Court of Appeal. I am encouraged as a result of our conversations to believe that a way through may be found as each court arrives at a better understanding of what the other hopes to achieve. Certainly I would not for a moment discourage a well-motivated attempt to cut through the legal thicket and to concentrate, I would hope co-operatively, on re-establishing sound and secure contact between the members of this hitherto riven family.

[42] This judgment in this form supersedes that which I circulated to the parties on 20 July, to take account of the clarification since then achieved about some of the procedural uncertainties in the Portuguese proceedings. No reliance should be placed on that earlier version of the judgment.

Order accordingly.

Solicitors: *Goodwin Cowley* for the applicant mother
Cafcass High Court team

PHILIPPA JOHNSON
Law Reporter