Neutral Citation Number: [2013] EWHC 2336 (Fam)

Case No: IL13C00144

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2013

Before :

THE HONOURABLE MR JUSTICE BAKER

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF YC, PC AND KM (Minors)

- -

Between :

	THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CAMDEN	**Applicant**
	- and -	
	PURA CARATT (1) **GARY MEEK (2)** **and** **YC (3)** **PC (4)** **KM (5)** **(by their Children' Guardian)**	**Respondents**

- -
- -

Sarah Forster (instructed by **Local Authority Solicitor**) for the **Local Authority**

Victoria Green (instructed by **Steel and Samash**) for the **1st Respondent**

Alison Easton (16th July) and **Jane Drew** (18th July) (instructed by **Powell Spencer and Partners)** for the **2nd Respondent**

Anne Spratling (instructed by **TV Edwards**) for the **3rd, 4th and 5th Respondents, by their children's guardian**

Hearing dates: 16th and 18th July 2013

- -

Judgment

This judgment is being handed down in private on 31st July 2013. It consists of 7 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the

judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

The Honourable Mr. Justice Baker :

Introduction

1. This judgment addresses the question whether the provisions of article 15 of Council Regulation(EC) Bo 2201/2003, commonly known as Brussels II Revised and hereafter "BIIR", may be used to facilitate a transfer of proceedings between jurisdictions within the United Kingdom.

Background

2. The issue arises in care proceedings brought by Camden social services in respect of three girls, Y (aged 11), P (10) and K (4). Their mother lived originally in Venezuela where she gave birth to Y and P. According to the mother, the girls' father died when she was expecting P, and in about 2005 she took the girls to Spain where she was allowed to stay as her grandmother came from Catalonia. In 2007, she started a relationship with a Scotsman, GM, who was living in Spain and the following year they were married, and the family moved to Nairn in Scotland.

3. The mother alleges that, after she became pregnant again in 2009, her relationship with GM deteriorated and she was subjected to abuse and violence. The couple separated and, following K's birth, a sheriff in Inverness granted the mother a residence order and permission to remove K from Scotland to Spain. In the event, the mother stayed in Scotland living initially in the former matrimonial home, but in 2011, having been evicted from that property, which was apparently owned by her former mother-in-law, she moved with the girls to Edinburgh where they were accommodated with the assistance of the National Asylum Support Service.

4. In February 2013, however, they travelled to London, and applied to Camden Council for emergency housing. They were placed temporarily in a refuge but the following week the mother returned to Scotland, allegedly to attend a court hearing, leaving the girls in the care of another resident at the refuge. The children were taken into police protection and placed in foster care.

5. On 18th February, the local authority started care proceedings and the following day the family proceedings court placed the children under interim care orders. The mother returned to London, and had supervised contact with the children during which she seemed very tired and in a low mood. Assessments disclosed concerns about the mother's mental health and parenting capacity. She made a series of allegations that the

children had been ill-treated in foster care. In April, the mother moved back to Scotland and has not seen the children for three months. Meanwhile, K's father has contacted social services wishing to care for his daughter and alleging that he had a residence order in his favour made by a Spanish court in 2009.

6. In June, the mother's solicitor filed an application in the care proceedings seeking transfer of the case to Scotland. On 4th July, District Judge Harper sitting in the Principal Registry directed that her application be listed before a judge of the Family Division, and at the same time gave directions timetabling the case though to an issues resolution hearing in the Registry in September.

The relevant provisions of BIIR

7. Jurisdiction to make orders under Part IV of the Children Act – placing a child in the care of or under the supervision of a local authority – is now derived from the rules set out in Chapter 2, Section 2 of BIIR, which, as an EU regulation, is directly applicable in Member States and prevails over domestic law. The basic rule is set out in article 8.1 which provides that "the courts of a Member Stare 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". Article 13.1 provides: "where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of article 12 [prorogation], the courts of a Member State shall have jurisdiction." It is accepted by the mother that the courts of England and Wales currently have jurisdiction in this matter.

8. Article 15, headed "Transfer to a court better placed to hear the case", provides as follows:

> "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 in accordance with paragraph 4, or
>
> (b) request the court of another Member State to assume jurisdiction in accordance with paragraph 5.
>
> 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 the 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 the 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.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.

If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with articles 8 to 14.

5. The courts of that other Member State may, where, due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or (b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with articles 8 to 14.

6. The courts shall cooperate for the purpose of this article, either directly or through the central authorities designated pursuant to article 53."

9.It has been recently held by judges at first instance in this jurisdiction that article 15 applies to public law as well as private law proceedings: see *Re T (A Child) (Care Proceedings:*

Request to Assume Jurisdiction) [2013] EWHC 521 (Fam) per Mostyn J, *Re LM, HSE for Ireland v AM and others* [2013] EWHC 646 (Fam) per Cobb J.

10. Article 2 provides that the term "Member State" means all the Member States of the Union except Denmark, and the term "court" shall "cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this regulation …." Article 66, however, provides:

> "With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this regulation apply in different territorial units:
>
> (a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
>
> (b) any reference to nationality, or in the case of the United Kingdon 'domicile', shall refer to the territorial unit designated by the law of that State;
>
> (c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
>
> (d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked."

Does article 15 apply to transfers within the UK?

11. The orthodox view is that BIR does not apply to the determination of jurisdiction between the different units of the United Kingdom. There is nothing in either the preparatory report by Professor Algeria Borras prior to the passing of the regulation nor in the Practice Guide published by the European Commission to suggest that it was intended to determine jurisdiction for disputes arising within Member States. The orthodox view has recently been approved by the Court of Appeal in *Re W-B (Family Jurisdiction: Appropriate Jurisdiction within the UK)* [2012] EWCA Civ 592, [2013] 1 FLR 394. That case concerned a private law dispute between a mother living in Scotland and a father in England. It was suggested shortly before the start of the hearing at first instance that BIIR might apply but, by the conclusion of that hearing, all parties agreed that the regulation was irrelevant to the issue. Before the Court of Appeal (Thorpe, Hughes and McFarlane LJ), all parties maintained that agreement, and McFarlane LJ observed (at para 10):

> " The issue of jurisdiction that fell for the recorder to determine was between England and Wales and, on the other hand, Scotland, but both of those jurisdictional entities are part of one Member State, namely the United

Kingdom, and BIIR, therefore, is to no effect."

12. Notwithstanding this clear statement of principle, Miss Victoria Green submits on behalf of the mother that article 15 can be used to facilitate the transfer of proceedings between England and Scotland where the court is satisfied that the provisions of the article are satisfied. She submits that the combined effect of articles 2 and 66(c) is that, in countries involving more than one territorial unit, references to a "court of a Member State" mean the court of a territorial unit and that, as a result, article 15 includes transfers between different territorial units. She submits that the power to stay proceedings under jurisdictional rules under the residual domestic law set out in s.5 of Family Law Act 1986 (which come into consideration when BIIR does not apply) is not available in public law proceedings since the rules under that statute only apply to applications for a "Part 1 order" as defined in s.1 of the 1986 Act, a definition which only extends to certain private law orders. Miss Green submits that it would be illogical for there to be a power to transfer proceedings between EU Member States (such as between the UK and Slovakia, as in *Re T*, supra, or between Ireland and the UK, as in *Re LM*, supra) but not between the different territorial units within the UK.

13. In support of her submission, Miss Green draws my attention to an article by Kisch Beevers and Professor David McClean, "Intra-UK Jurisdiction in Parental Responsibility Cases: Has Europe Intervened?" [2005] IFL 129. The authors accept that the orthodox view is that national law supplements the allocation by BIIR of jurisdiction to the courts of Member States and determines the allocation of jurisdiction as between their territorial units. They suggest, however, that "it is … certainly arguable that effect of article 66 (c) is that any reference to a court of a Member State must be read as a reference to a court of a territorial unit within that State which is concerned" and that "there is a strong case for saying that the Council Regulation operates to allocate jurisdiction as between England and Scotland and between similar territorial units in other Member States".

14. The authors of that article conclude that the apparent defects in the drafting of BIIR, coupled with the defects in the drafting of the Family Law Act 1986, produce "a complex, uncertain and thoroughly unsatisfactory state of affairs." Further academic acknowledgment of the uncertainty is found in articles by Professor Nigel Lowe ("The Current Experiences and Difficulties of Applying Brussels II Revised", [2007] IFL and Janys Scott QC ("Choice of Forum – Jurisdictional Issues within the UK", Law Society of Scotland 2007).

15. I note that judges at first instance elsewhere in the UK have reached different conclusions on this point – compare the Scottish case of *S v D* [2006] Fam LR 66, where the sheriff accepted the combined submission of counsel that the regulation applied to determine jurisdictional dispute between Scotland and England, and the Northern Ireland case of *Re ESJ* [2008] NIFam 6, where Morgan J rejected a submission that article 66 should be interpreted so as to apply BIIR to a jurisdictional dispute between Northern Ireland and England.

Discussion and Conclusion

16.It is widely recognised that the provisions governing conflicts of jurisdiction in children's cases within the UK are, in the words of Thorpe LJ in *Re W-B*, supra, at paragraph 29, "difficult and complicated." He was referring in particular to the provisions of the Family Law Act 1986, but as Miss Green has demonstrated, there is similar difficulty and uncertainty as to the applicability of BIIR to the allocation of jurisdiction within the UK.

17.I agree that the wording of article 66 certainly leaves open the possibility that BIIR could be applied to jurisdictional disputes arising between the jurisdictions within the UK. If, as article 66(a) requires, the phrase "habitual residence in a territorial unit" is substituted for "habitual residence in a Member State" in, for example, article 8, it could be argued that the phrase "the courts of a Member State" must therefore mean "the courts of a territorial unit of a Member State". But the ramifications of such a construction are likely to be far-reaching, and would certainly necessitate more extensive analysis and argument.

18.Given the clear view expressed emphatically by the Court of Appeal very recently in *Re W-B*, I reject Miss Green's submissions and adopt the orthodox view that BIIR does not apply to jurisdictional disputes or issues arising between the different jurisdictions of the United Kingdom. Article 15 could not, therefore, be used to transfer these proceedings from England to Scotland.

19.I do not accept Miss Green's submission that this leave the court without any remedy in these circumstances. I conclude that, in an appropriate case, where an English court is satisfied that the issue arising in care proceedings can and should be litigated in another part of the UK, it has the power – as part of its general case management powers – to stay the proceedings.

20.In this case, however, I am satisfied that there are no grounds for staying or transferring the proceedings. Both the local authority and the children's guardian oppose any stay or transfer. There are at present no care proceedings in Scotland, and no suggestion that any local authority there is minded to start proceedings. This family was largely unknown to social services in Scotland before the move to London in February. The *substance* of the dispute between the mother and social services arose in England when the mother allegedly abandoned the children. The position in this case is therefore very different from the situation in both *Re T* and *Re LM.* In each of those cases, the authorities in the country to which the case was transferred (Slovakia in *Re T*, England and Wales in *Re LM*) had been heavily involved before the mothers moved to the other jurisdiction. .

21.Furthermore, these proceedings are listed for an issues resolution hearing in less than 6 weeks. Any attempt to initiate the article 15 procedure, or any other process of staying these proceedings, to await proceedings in Scotland, would involve a delay which would be harmful to the children's interests. The children are at present settled in foster care and at local schools. Their interests will be best served by the English court reaching a speedy conclusion as to whether the s.31 threshold criteria are satisfied and then determining the orders to be made. As part of that process, the court will of course consider the prospects for family placement, or alternatively a placement of the children outside the family with alternative carers either in England or Scotland. In that context, the mother would be well advised to return to England over the next few weeks so that

she can resume contact with the girls and participate in the assessments.
