Neutral Citation Number: [2022] EWCA Civ 904

Case No: CA-2021-003276

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MacDONALD
[2021] EWHC 3240 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 July 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE NUGEE
and
LORD JUSTICE BIRSS

- -

Re:- A (A Child)
(Enforcement of a Foreign Order)

- -
- -

Christopher Hames QC and Margaret Parr (instructed by **MSB Solicitors**) for the **Appellant Mother**
Henry Setright QC and Emma Spruce (instructed by **Access Law**) for the **Respondent Father**

Hearing date : 24 February 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2pm on 1st July 2022.

Lord Justice Moylan:

1. This case concerns an application by a father to enforce a parental responsibility order made by the Court of Appeal in La Réunion, France on 21 October 2020 ("the October 2020 Order"). Réunion is a French overseas department and is part of the EU. The application predates the UK's withdrawal from the EU and is, therefore, governed by Brussels IIa (Council Regulation (EC) No 2201/2003) pursuant to the provisions of article 67 of the UK/EU Withdrawal Agreement.

2. The October 2020 Order was registered by District Judge Alun Jenkins pursuant to the provisions of Part 31 of the Family Procedure Rules 2010 ("the FPR 2010"). That was essentially an administrative process from which there was a right of appeal. The mother's appeal was determined by MacDonald J ("the Judge") on 3 December 2021. He dismissed the mother's appeal and also summarily dismissed her application which had been issued under the Children Act 1989 ("the CA 1989") on 17 July 2019 for a child arrangements order.

3. The effect of the Judge's order is that the parties' child, A, now aged 5, who has lived with the mother in England since February 2019, having been given permission by the High Court in Réunion to relocate with A to England, is to move to live with her father in Réunion.

4. The mother appeals from that decision and advances four grounds of appeal:

   (1) the Judge was wrong to find that the court in Réunion remained seised of proceedings as at 17 July 2019 which took precedence over the mother's application and was, therefore, wrong to find that the lis pendens provisions of BIIa applied;

   (2) the Judge was wrong summarily to dismiss the mother's application under the CA 1989 and should have undertaken a welfare inquiry to determine what order was in A's best interests leading, potentially, to the application of article 23(e) of BIIa;

   (3) the Judge should have decided that article 23(a) of BIIa applied because the October 2020 Order was manifestly contrary to English public policy;

   (4) the Judge wrongfully elided the registration of the October 2020 Order with its enforcement and, as a result, failed to consider A's welfare when determining how it should be enforced.

5. The mother is represented by Mr Hames QC, who did not appear below, and Ms Parr. The father is represented by Mr Setright QC and Ms Spruce who both also appeared below.

Background

6. A detailed account of the relevant history is set out in the judgment below: *G v K* [2021] EWHC 3240 (Fam). I propose, therefore, only to set out a summary in my judgment.

7. The mother is English. Her immediate family all live in England. The father was born in South Africa but is a Dutch national. He has family living in Europe, including in England. Their relationship started in 2010 when the father was living in Belgium and the mother in England. The father then obtained employment in Réunion and the parties

moved there in 2012. Their only child, A, was born there in October 2016. The parties' relationship ended in August 2018.

8. The parties commenced parental responsibility proceedings in the High Court of Saint-Denis, Réunion. As part of these proceedings, a "social investigator" prepared a welfare report dated 22 January 2019. This was a detailed report based on the social investigator having undertaken inquiries including by meeting the parents and the child. At that time the father was living alone and was "not currently in a relationship of any kind". The conclusion of the report was: "A's age, the fact that her mother has always taken care of her, and the close bond that exists between them, would make it difficult, from the point of view of the child's stability, to separate her from her mother".

9. The Family Court Judge of the High Court gave her decision on 6 February 2019. She decided that A should live with her mother and she gave the mother permission to relocate with A to England. Her order also contained provisions for contact between the father and A, including 15 days in Réunion every two months, with the father being responsible for travelling with A between Réunion and England. The order provided, somewhat surprisingly, that this was to end when A was 5 on the basis that this was the age at which airlines accept children travelling alone.

10. The mother and A duly moved to England on 9 February 2019.

11. The mother issued an application in England on 14 March 2019. She asserted that there was a risk of abduction. The application was dismissed by the court as set out in the judgment below, at [9]-[11].

12. The father and A had contact for two weeks in England in March 2019 and for two weeks in Réunion in June 2019. That was the last time that A has been to Réunion. Since then, at [14] of the judgment below, "beyond a short contact on 25 June 2021, the father has now had no substantive direct contact with A since October 2019".

13. On 17 July 2019 the mother issued another application in England seeking to vary the contact provisions in the French court's order. As set out in the judgment below, at [12]: "The grounds of the mother's application were that the order of 6 February 2019 was not working, was too vague and was having an emotional and physical impact on A's welfare based on her alleged response to contact with her father in March 2019".

14. This application was adjourned, pursuant to orders made by the English court which referred to, but did not decide, issues of jurisdiction and lis pendens. It was not substantively determined until the hearing before the Judge. Quoting from the judgment below:

> "[12] On 17 July 2019, the day on which the father was due to collect A for summer contact pursuant to the terms of the order of the High Court of Saint-Denis of 6 February 2019, the mother issued a further application in the Family Court sitting at Liverpool, again seeking to vary that order. That application was again made without notice to the father, although the justification for this course taken by the mother is unclear. The mother's application dated 17 July 2019 asserted, in contrast to the earlier without notice application in March 2019, that there had not been

> any form of domestic violence and that there was no risk of child abduction. The grounds of the mother's application were that the order of 6 February 2021 was not working, was too vague and was having an emotional and physical impact on A's welfare based on her alleged response to contact with her father in March 2019.
>
> [13] The statement of the mother in support of her application argued for a wholesale revision of the arrangements for contact put in place by the High Court in Saint-Denis in the order of 6 February 2019. On 17 July 2019 HHJ De Haas QC made a prohibited steps order to maintain the status quo and listed a return date on 18 July 2019 to enable the father to be given notice. In the event, the father was served with the application with insufficient time for him to attend the hearing but was able to speak briefly with the mother's counsel. The father indicated that he wished to secure legal representation and requested an adjournment. Within this context, HHJ De Haas QC adjourned the matter until 16 August 2019 and continued the prohibited steps order preventing the father from removing A from the jurisdiction pending the further hearing. HHJ De Haas QC further directed that each party file and serve Skeleton Arguments addressing the question of whether the English Court had jurisdiction to vary the order made by the High Court of Saint-Denis dated 6 February 2019.
>
> [14] The mother did not facilitate the contact between A and the father in July and August 2019 required by the terms of the order made by the High Court of Saint-Denis. Within this context, beyond a short contact on 25 June 2021, the father has now had no substantive direct contact with A since October 2019, a period of over 2 years. In these circumstances, on 2 August 2019 the father lodged an application in the Family Division of the Court of Appeal of Saint-Denis in Réunion appealing the order of the court in La Réunion made on 6 February 2019. The father contends that this was done in response to the mother's refusal to comply with the contact provisions of that order."

15. On 13 August 2019, the father filed a notice of appeal to the Court of Appeal of Saint-Denis in Réunion from the Family Court Judge's decision of 6 February 2019. It can be seen from the Court of Appeal's judgment that the father argued that "the mother (had) infringed his right to exercise parental authority and disregarded his visiting and accommodation rights". As set out in the judgment below, at [21]:

> "It would appear that the father's appeal to the Court of Appeal in Réunion was by way of a re-hearing, the judgment being expressed as setting aside the judgment of the High Court of Saint-Denis and the Court of Appeal recording itself in its decision to be "ruling again". The appeal appears to have proceeded on submissions only."

16. The mother raised a number of jurisdictional issues, namely that article 9 of BIIa meant that the court in England had acquired exclusive jurisdiction prior to the father's appeal; that the father had accepted the English court's jurisdiction under article 12; and that jurisdiction should be transferred to England pursuant to the provisions of article 15 of BIIa.

17. The Réunion Court of Appeal rejected the mother's challenges to the French court's jurisdiction under articles 9 and 12 on the basis that any such challenge had to "be raised in limine litis" (i.e. at the beginning of the proceedings). It also rejected her request that jurisdiction be transferred to England on the basis that there was "no justification for the French Court to relinquish jurisdiction". Making the October 2020 Order, the court allowed the father's appeal and decided that A should live with him.

18. As referred to above, the Court of Appeal heard no evidence. The substantive part of its short judgment almost exclusively addressed what had happened since the lower court's decision. The Court of Appeal was clearly highly sceptical of the mother's asserted reasons for failing to adhere to the contact provisions in the February 2019 order stating that: "the mother's behaviour actually reveals a plan to be able to return to Great Britain in the best conditions for her" and that "she hastened to refer the matter to the British judge in order to have the father's rights restricted". It concluded that her "behaviour characterises a mother's willingness to restrict the relationship between father and daughter". After referring to the fact that "many young children see their parents separate and even live at a great distance from each other"; commenting that "this has no bearing on depriving the father of his visiting and accommodation rights, especially as (the father's) educational qualities are not seriously called into question"; and noting that "the father's profession as a surgeon should not be an obstacle: he is perfectly capable, and has the material means, to organise himself", the court determined that it was "therefore in the child's interest to have her residence with the father, who appears better able to assume his parental duties and respect the other parent's rights".

19. The mother appealed this decision to the Cour de Cassation in Paris. She sought to challenge the Court of Appeal's decision in respect of article 9 contending that A's lawful move to England, and the elapse of the three month period referred to in that article, meant that the court in England had acquired jurisdiction. Secondly, she contended that the Court of Appeal's decision was wrong because it had demonstrated partiality in its judgment; it had attributed motives to the mother in respect of her behaviour towards the father and contact without giving her the opportunity to explain why she had acted as she had; and it had failed to take into account "the information gathered in the social investigation". The appeal was dismissed on 14 May 2021 because the "grounds … are clearly not such as to allow the decision to be quashed". This meant that "no ruling" was required in respect of the specific grounds of appeal.

20. Returning to the English proceedings, as referred to above, the mother appealed from the registration of the October 2020 Order contending: (a) that the order was manifestly contrary to English public policy as it was made over 18 months after the mother and A had lawfully relocated to England and without any further welfare inquiry; and (b) that the judgment had been given without A having had any opportunity to be heard. She also contended that the court should substantively determine her application under the CA 1989 by undertaking a welfare inquiry.

21. The parties filed statements for the purposes of the hearing below. The father's statement addressed the history of the proceedings and of his contact with A. The mother filed a number of statements which addressed the history but also addressed welfare issues. In summary, she relied on the fact that she and A had been living in England for over two years, as a result of which A had a well-settled, integrated and established life here. She has a large family here and has been attending pre-school. The mother considered that it would be "distressing and emotionally damaging" for A to be removed, abruptly, from her home and primary carer to "a country that she does not know". She pointed to the fact that the father's circumstances had changed in that he was living with his partner and her children, none of whom A has met or knows. She also pointed to the difficulties that she would have in travelling to and spending time in Réunion because of her very limited financial resources and her limited immigration rights. She drew a distinction with the father's financial circumstances and his connections with England and Europe more generally.

22. Expert evidence was obtained from a French lawyer. This stated that the French court remained seised of the proceedings until the Cour de Cassation's decision on 12 May 2021. This was because, "as long as appeals are not exhausted, the application is considered to be pending before the French court". This evidence was, at [81], "unchallenged". I would note, in passing, that this evidence was directed solely to the effect of French law, because that is what the expert was asked to address. It did not, therefore, address the broader legal issue of the autonomous effect of the lis pendens provisions in BIIa.

Judgment

23. The Judge, at [78], "found this a very difficult case to decide". He set out his dilemma as follows:

> "By reason of the time that has passed since the original order made by the High Court of Saint-Denis, nearly three years ago, and the opposite order made on appeal by the Court of Appeal in Réunion over one year ago, this court is faced with the choice of enforcing that latter order, with the result that A will now move from her primary carer and a jurisdiction in which she has been settled for nearly three years to a jurisdiction she has not seen since she was two years old and a parent with whom she has had (through no fault of the father) no contact in the manner ordered by the French court; or exercising the welfare jurisdiction I am satisfied that this court now has to make an order that is entirely inconsistent with the order made by a court of competent jurisdiction in another BIIa Member State in favour of a father with whom A has been denied the contact mandated by the order of the French Court. On balance, I am satisfied that the order of the Court of Appeal on Réunion dated 20 October 2021 should be enforced. My reasons for so deciding are as follows."

It might appear from this that the Judge considered that, if he were to exercise the substantive welfare jurisdiction which he undoubtedly had, he would "make an order

that is entirely inconsistent with the" October 2020 Order. Reading his judgment as a whole, I do not think that this is what he meant. Rather, as he said at [98], he was considering whether there had "been a change of circumstances sufficient to justify a different welfare conclusion".

24. The first element of the mother's case was that, at [29], "at the time the Court of Appeal in Réunion made its order on 21 October 2020 it did not have substantive jurisdiction in respect of A but, rather, the English court had jurisdiction". This was based on the contention, at [31], that article 8 "'trumps' the operation of the lis pendens provisions" of article 19(2) and, at [32], that jurisdiction had been prorogued pursuant to the provisions of article 12.

25. The Judge rejected these submissions. He decided, at [80]:

> "I am satisfied that a change of a child's habitual residence for the purposes of Art 8 of BIIa *during* the currency of a *lis* under Art 19 of BIIa does not act to confer jurisdiction on the courts of the child's new habitual residence … just because, as a matter of fact, a child is habitually resident in a country does not result automatically in that country having jurisdiction it can exercise."

He referred to *Re G (Jurisdiction: Art 19, BIIR)* [2015] 1 FLR 276 in which Black LJ (as she then was) noted, at [32], that the application of article 19(2) depended on which court was first *seised* and not on jurisdiction. The issue in the present case was, therefore, when the French proceedings had concluded. The Judge decided, at [81], that, "on the basis of the unchallenged expert report on French law, the *lis* under Art 19 of BIIa continued until the Cour de Cassation handed down judgment on 14 May 2021".

26. Having regard to the terms of the first ground of appeal, it is relevant to set out in full the Judge's summary, at [31], of the mother's case below in respect of articles 8 and 19:

> "The mother further submits that in circumstances where, on the mother's submission, A gained habitual residence in England and Wales upon her lawful arrival in this jurisdiction, the operation of Art 8 of BIIa 'trumps' the operation of the *lis pendens* provisions of Art 19(2) with respect to proceedings relating to parental responsibility, again depriving the Court of Appeal in Réunion of jurisdiction in respect of A as at 21 October 2020. In support of this submission, Mr Gupta and Ms Parr point to the fact that Art 19 is not one of [the] provisions of BIIa to which the operation of Art 8(1) is expressly subject under the provisions of Art 8(2). In the alternative, they submit that it is unclear how Art 8 and Art 19 interact when child's habitual residence for the purposes of Art 8 changes during the currency of the *lis* under Art 19."

It can be seen that no argument was advanced on behalf of the mother as to whether the French court remained seised of proceedings for the purposes of article 19(2) as at 19 July 2019 and as to the effect of the French expert's evidence on the issue of seisin.

27. The Judge, at [82], also rejected the mother's case in respect of prorogation. He decided that there had been no "unequivocal acceptance by the father of the jurisdiction of the English court".

28. The second element of the mother's case below was her contention that the October 2020 Order should not be recognised under articles 23(a) and/or (b) of BIIa. The former was advanced, at [85], "primarily on the basis of an asserted failure by the Court of Appeal on Réunion to consider A's welfare". The Judge decided, at [85]-[87], that that court had taken A's welfare into account and that recognition of its decision did come close to being "manifestly contrary to the public policy" of England and Wales as required by article 23(a).

29. As to article 23(b), the Judge decided, at [89], that, at the age of three, the fact that A had not been given an opportunity to be heard did not violate "fundamental principles of procedure" of England and Wales. This was because:

> "had the proceedings been in this jurisdiction, she would have been considered too young for her wishes and feelings to have been ascertained directly and both parents would have had the opportunity to make such representations as were open to them on the subject of her ascertainable wishes and feelings. Such opportunity was open to the parents in the French proceedings, who were each represented in those proceedings."

30. The third element of the mother's case below was that the Judge should exercise the court's substantive parental responsibility jurisdiction and undertake a welfare inquiry in order to determine what order was in A's best interests. The Judge referred to *Re E (BIIa: Recognition and Enforcement)* [2021] Fam 211 ("*Re E*"). He decided, at [96], that although "the court does have *power* to make welfare orders" it was "*not* appropriate" for this court to embark on a welfare assessment. This was because, at [97], he considered that the mother was inviting him "to embark on a *reconsideration* of the welfare assessment of the Court of Appeal in Réunion" (my emphasis) and that this was not appropriate:

> "beyond the passage of time that has passed as the appellate process in the French courts has been completed, it is difficult to identify any change of circumstances that could ground a proper reconsideration by this court of the French order based on a change of circumstances."

31. As referred to above, at [98], the Judge phrased the issue as being, "whether there has been a change of circumstances sufficient to justify a different welfare conclusion to that reached by the foreign court". His answer was that he was "not satisfied that such a change of circumstances justifying reconsideration of the French welfare order has occurred in this case. In those circumstances, I decline to revisit the French order on welfare grounds".

32. It can be seen from both his analysis of the mother's case and his answer that the Judge considered that he had to decide whether to *reconsider* the October 2020 Order. In my view, this could be said to be equivalent to asking whether he should review that judgment "as to its substance" which is, of course, prohibited by article 26 of BIIa.

33. The Judge accepted, at [99], that moving A "from the care of her mother in this jurisdiction to the care of her father in Réunion … will have a significant, and potentially adverse, impact on A in the short term". Adding:

> "[h]owever, I am further satisfied that it is possible to put in place so called 'soft landing' provisions in the context of A having a pre-existing relationship with her father that has been maintained to a degree by indirect contact and in circumstances where no substantive concerns have been made out regarding the father's parenting capacity. In particular, the parties will obviously wish to consider A being accompanied by her mother to Réunion, a period of gradual transition to the father's care whilst the mother is in Réunion and a clear agreement with respect to future direct contact between A and her mother following her move to the father's care pursuant to the French order which this court is enforcing."

Submissions

34. Mr Hames pointed to the stark effect for A if the October 2020 Order was enforced. She has lived in England since February 2019 and would be removed from her home here and from "her mother who is her sole care-giver and primary attachment figure". She has attended nursery here and has recently started in the reception class of the same school. She would be moving over 6,000 miles away to a place where she has not been since June 2019. She has not met her father's new partner or her children. There is no evidence about the care arrangements which would be put in place for A when her father works very long hours. The mother has no continuing links with Réunion while the father has continuing links with the UK and, again unlike the father, she does not have the financial resources to enable her to travel there. These changes in A's living arrangement were to happen, under the Judge's order, within approximately three weeks of his judgment.

35. Mr Hames also pointed to the absence of any full welfare analysis by the French Court of Appeal. Its decision had been made by reference to what the mother had done in respect of contact since the lower court's decision. No reference had been made to the recommendations of the social welfare report nor to the impact of the proposed change on A. He also challenged the French court's characterisation of the mother's actions in respect of contact and submitted that she had had good reason to question whether the contact as provided for in the French court's order was in A's best interests having regard to the practical experience of their operation. This had been supported by a report from a psychotherapist.

36. As to the first ground of appeal, which challenges the Judge's decision that article 19 of BIIa applied, Mr Hames submitted that the Judge was wrong, at [80], to decide that article 8 did not confer jurisdiction on the English court because of the existence of other proceedings. He submitted that article 19 does not affect the acquisition of jurisdiction but addresses the issue of whether a court should exercise its jurisdiction which, in the present case, depended on whether the French court remained seised of proceedings.

37. Mr Hames submitted that, properly analysed, there was no lis pendens on 17 July 2019 when the mother issued her English application. In support of this submission, Mr Hames sought to challenge the expert evidence, contending that it was wrong, and argued that the Judge did not consider whether the father's appeal notice "somehow extended the French jurisdiction". Further, he submitted that this was not a question of French law but an issue which should have been determined by the Judge "according to the autonomous law of the Council Regulation" and which the Judge had been under an obligation to determine independently of the parties' respective submissions. As to the latter proposition, Mr Hames relied on *Rogers-Headicar v Headicar* [2004] EWCA Civ 1867, [2005] 2 FCR 1 in which Thorpe LJ said:

> "13. It seems to me that the fundamental flaw in Mr Turner's argument, both here and below, is the assumption that the presentation of the case by way of pleading either confers upon the court or denies the court jurisdiction under the Council Regulation. That submission ignores the independent function of the court, the independent responsibility of the court, to investigate and determine, of its own motion, in compliance with the Regulation, whether jurisdiction lies with the court or not."

38. As to the second ground, Mr Hames submitted that the Judge failed properly to apply the guidance given in *Re E*. The Judge was not being invited, as he considered at [97], "to embark on a *reconsideration* of the welfare assessment of the Court of Appeal in Réunion" (my emphasis). The English court has substantive jurisdiction and the issue was how that jurisdiction should be exercised. The Judge had been wrong to limit his consideration to whether there had been a change in circumstances since the October 2020 Order. He was being invited to determine whether a welfare assessment by this court was justified, by reference to a broad analysis of the circumstances of this case. Having regard to those circumstances, which were not the same as they were in October 2020, and to the evidence which would be available to this court, Mr Hames submitted that a welfare assessment was plainly required to ensure that the arrangements made for A's care were in accordance with her best interests including because, he submitted, the likely outcome would be an order providing for A to remain living with her mother.

39. Mr Hames pointed, in particular, to the fact that there has been no independent evidential inquiry into the child's circumstances since the social welfare report of January 2019. He submitted that it was relevant to consider the welfare evidence available to the French Court of Appeal and the welfare evidence which would be available to the English court. He also relied, as referred to above, on A's further integration in England in the period since the October 2020 Order. A had lived in England for a further year since that date and had become even more integrated in England; a year which in itself represented a significant proportion of A's life. The Judge had been wrong to dismiss this, at [97], as just "the passage of time". The impact of the enforcement of that Order on A now would be profound and no assessment had been undertaken as to whether that was in her best interests or even, if it was, how that should be achieved.

40. As to the third ground, Mr Hames accepted that article 23(a) has a high threshold and acknowledged that this ground presented more of an uphill struggle for him but, nevertheless, he submitted that the threshold had been crossed in this case. He relied, in particular, on what he said was likely to be the harmful effect on A of abruptly leaving

her established home with her mother, and everything that is familiar to her, and moving to a country of which she will have little or no memory where she will be living in "a household of complete strangers" apart from her father. In addition, he contrasted, as referred to above, the mother's lack of financial resources and the difficulties she would encounter in travelling to Réunion with the father's connections with, and his ability to travel to, England because of his "far stronger position financially".

41. On the final ground of appeal, Mr Hames submitted that the Judge did not but should have determined the question of how to enforce the October 2020 Order as a "separate and discrete matter": per Holman J in *Re N (Abduction: Brussels II Revised)* [2015] 1 FLR 227, at [52]. He submitted that recognition does not necessarily result in the simple enforcement of the order but requires the court to determine whether and, if so how, enforcement should take place having regard to the child's welfare interests. He relied on what Peter Jackson LJ said in *Re E*, at [67], as referred to below.

42. Mr Setright submitted that the Judge's decision to enforce the 2020 October Order and not to embark on any further welfare inquiry was correct for the reasons the Judge gave. There was, he submitted, nothing in this case which might justify a different welfare conclusion. The mother was, in reality, only relying on the effluxion of time since the 20 October 2020 Order. He also submitted that, by making her application in 2019, the mother had engaged in the "sort of jockeying" which BIIa sought to inhibit.

43. As to the first ground of appeal, Mr Setright submitted that this was a new case which was "in contradiction" to the mother's position at the hearing below. At that hearing, she had not challenged the French expert evidence but had advanced a case principally based, as referred to above, on the interplay between articles 8 and 19 of BIIa. In those circumstances, he submitted that there had been no need for the Judge to undertake his own legal determination but was entitled to accept the clear conclusion in that report. He also relied on *Singh v Dass* [2019] EWCA Civ 360, at [17], in support of his submission that the mother's new case would require new evidence and/or would have led to the hearing below being conducted differently.

44. In respect of the second ground of appeal, in his written submissions Mr Setright sought to suggest that this was also a new point in that the mother had not submitted that article 23(e) applied in this case as there was no later judgment. In my view, this was rightly not the focus of his oral submissions because the mother had clearly submitted that the English court should exercise its substantive welfare jurisdiction. Whether that resulted in an irreconcilable later judgment would depend on the outcome of that process.

45. Mr Setright submitted that the Judge had correctly decided that he should not embark on a reconsideration of the welfare assessment of the Court of Appeal in Réunion and that, in coming to this conclusion, the Judge had correctly applied *Re E* when determining, at [98], that there was nothing to justify a different welfare conclusion. He submitted that this required a relatively summary determination similar to that involved when a court was considering whether an application had a real prospect of success. He also relied on Peter Jackson LJ's observation in *Re E*, at [67], that the court "will not allow … the inappropriate re-litigation of issues that have already been decided".

46. In respect of the third ground of appeal, Mr Setright submitted that this case did not surmount the high threshold required to establish that enforcement of an order would be manifestly contrary to public policy.

47. As to ground 4, Mr Setright submitted that the judge had been entitled to deal with the practical enforcement of the October 2020 order in the manner in which he did.

Legal Framework

48. The lis pendens provisions of BIIa are contained in article 19:

> "Article 19
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> Lis pendens and dependent actions
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> …
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> 2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before 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.
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> 3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court."

49. The relevant recognition and enforcement provisions are as follows:

> "Article 21
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> Recognition of a judgment
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> 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
>
> …
>
> 3. … any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised …";
>
> "Article 23
>
> Grounds of non-recognition for judgments relating to parental responsibility
>
> A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.";

"Article 24

Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.";

"Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.";

"SECTION 2

Application for a declaration of enforceability

> Article 28
>
> Enforceable judgments
>
> 1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
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> 2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

50. Chapter IV of BIIa contains cooperation provisions in matters of parental responsibility. These include article 55 which provides:

> "The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:
>
> (a) collect and exchange information:
>
> (i) on the situation of the child;
>
> (ii) on any procedures under way; or
>
> (iii) on decisions taken concerning the child …"

51. Whether a court remains seised of proceedings within the scope of article 19 is not solely a matter of domestic law because it is a question of EU law. This was, however, not an issue that was explored below nor, in any detail, at the hearing of this appeal. I do not, therefore, propose to address it in this judgment including because, as set out below, I agree with Mr Setright's submission that it is too late for the mother to seek to raise this issue.

52. The relationship between an application to enforce a foreign parental responsibility order and a substantive welfare application made under our domestic law was considered in *Re E* in circumstances when, as in the present case, this court had substantive welfare jurisdiction, because the children were habitually resident in England, and the Spanish court was no longer seised. In his judgment, Peter Jackson LJ set out, at [53], that, when "a court is faced with an application for a welfare order in a case where there is an earlier order in another Member State (whether or not that order has been registered)", the following questions arise:

> "(1) whether the court, faced with an enforcement application and a welfare application, was obliged to prioritise the former and stay the latter so that the non-recognition provision of article 23(e) could not be engaged unless and until recognition and enforcement was refused for some other reason; and
>
> (2) if the court had no obligation to prioritise, how it should have approached the two applications."

53. As to (1), he explained why he concluded that there was no obligation to give priority to the enforcement application and that, at [64], a "later judgment" as referred to in article 23(e) is "simply … a judgment of a court with general jurisdiction that is given after the judgment which it is sought to enforce". He gave a number of reasons for this including, at [57], that "the whole tenor of BIIA is to confer equivalence upon orders made in different Member States, not superiority or priority: and, at [61], that: "The importance attached to the views and best interests of children speaks against any interpretation of BIIA that might marginalise these factors". Peter Jackson LJ had also, earlier in his judgment at [21], commented on the "lynchpin of BIIa in relation to parental responsibility (which) is found in Article 8", namely that primary jurisdiction lies with the court of the Member State in which the child is habitually resident. As he noted, this reflects recital 12 which states:

> "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."

54. In the course of his analysis, Peter Jackson LJ referred to passages in Dr Alegría Borrás' Explanatory Report on the 1998 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters. These included her commentary on article 18 of that Convention, the equivalent of article 26 of BIIa (with emphasis from Peter Jackson LJ's judgment):

> "78. The inclusion of this rule in this Convention led to some reluctance by certain delegations in so far as it could mean making the measures adopted in connection with parental responsibility immovable. *The object of the provision is to prevent the measures from being reviewed in the exequatur procedure, although it may in no case lead to their being set in stone*. The basic principle is that the member state in which recognition is sought may not review the original judgment, which is the logical consequence of a double Convention. *However, a change in circumstances may lead to a need for revision of the protective measures, as always happens when we are dealing with situations which, despite having a degree of permanence in time, may need modification*. In that sense, for instance, article 27 of the 1996 Hague Convention makes it clear that the prohibition on review as to substance does not prevent such review as is necessary of the protective measures adopted. In this case too, *the provision in this article must be understood as being without prejudice to the adoption*

> *by the competent authority of a new ruling on parental responsibility when a change in circumstances occurs at a later stage*."

He also referred to *Rayden & Jackson on Relationship Breakdown, Finances and Children* (2016) which, at [47.71], refers to what is said in the Borras Report.

55. I would also refer to the Explanatory Report on the 1996 Hague Child Protection Convention by Professor Paul Lagarde which Convention contains a similar provision in article 23(e). The Report explains, at [126], why the later decision is given priority:

> "In such a case, if the two measures are incompatible, preference will be given to the second, taken by an authority closer to the child and in a better position to assess the child's best interests."

56. In respect of the second question, namely how should the court approach the two applications, Peter Jackson LJ said:

> "[65] The second question concerns the proper approach to be taken where an English court is required to deal with concurrent applications for recognition/enforcement and welfare orders. Where this arises, the power to make welfare orders may, as noted by *Rayden*, be theoretically unfettered, but in practice it is subject to important constraints.
>
> [66] In the first place, the court is required to comply with the recognition and enforcement provisions of BIIa and must recognise and enforce the order unless a ground for non-recognition is established. In approaching the grounds for non-recognition, the court must always recall the principle of mutual trust, or comity, contained in recital (21), and remain mindful that the recognition and enforcement process is not a welfare process.
>
> [67] Further, the grounds contained in sub-clauses (e) and (f) of article 23 differ from the other grounds for non-recognition in that they do not merely involve a process of assessment by the court but can in certain cases be engaged as a result of action taken by the court itself. The scheme and spirit of the Regulation requires the court to act with restraint before exercising its powers in a way that sets up a barrier to enforcement. This is a familiar discipline. To take a purely domestic example, a contact order is made in the Family Court after a substantial hearing. Contact does not take place and an enforcement application is made. It is met by an application to vary the order, without there being any real change of circumstances. The court has the power to hear the variation application but is likely to see it for what it is, namely an attempt to frustrate the enforcement of a valid order. It will not allow it to proceed to a full hearing because that would involve the inappropriate re-litigation of issues that have already been decided; put another way, it would be an

> impermissible review of the substance of the earlier decision. In contrast, where the variation application is based upon some apparently significant change of circumstances, the court may well decide to entertain it on its merits alongside the enforcement application. At all events, neither application has automatic precedence: it will depend on the circumstances. This is a conventional assessment for specialist family judges."

Later, at [70], he said:

> "I would also acknowledge the importance of recognition and enforcement decisions being taken without delay, as mandated by article 31. That has not happened in this case, in the first place because of the mother's lengthy appeal in Spain and then because of the unduly protracted process leading to the decision now under appeal. I also recognise that undertaking inappropriate welfare inquiries is likely to build delay into the enforcement process. But that cannot mean that appropriate, tailored, welfare inquiries should not be carried out where there are real issues to be decided"

I would draw attention to the distinction Peter Jackson LJ made between, at [67], "the inappropriate re-litigation of issues that have already been decided" and, at [70], the need for "appropriate … welfare inquiries … [when] there are real issues to be decided."

57. Peter Jackson LJ's conclusions were as follows:

> "[73] Drawing these matters together, where a court is faced with an application for a welfare order in a case where there is an earlier order in another member state (whether or not that order has been registered in this jurisdiction), it should ask itself these questions:
>
> (1) Does the court have the power to make welfare orders on the basis that (a) the child is habitually resident in England and Wales or general jurisdiction arises on some other basis, and (b) the court of the other member state is no longer seised?
>
> (2) If there is a power to make welfare orders, to what extent is it appropriate on the facts of the individual case to embark upon a welfare assessment of matters that were decided by the court of the other member state, taking an earlier domestic order as an analogy?
>
> (3) If a welfare assessment is to be carried out, how can it be case managed to ensure that the issues for decision are clearly set out and that the requirement to determine an enforcement application without delay is observed?

> (4) If the welfare assessment suggests that an order might be made that is irreconcilable with a foreign order, would it be right to make such an order, taking a cautious approach and giving full weight to the conclusions and findings of the foreign court and to the principle of mutual trust that informs BIIa?"

58. Although Peter Jackson LJ's judgment referred, on a number of occasions, to a "change of circumstances", it can be seen from [73(3)] that he phrases the issue generally, namely whether it is "appropriate … to embark on a welfare assessment", reflecting what he said, at [70], about "appropriate … welfare inquiries (being) carried out where there are real issues to be decided". This is a broad test and is necessarily broad because the circumstances which might justify a welfare inquiry are not confined to what might strictly be called a *change* of circumstances. For example, they could include new evidence or the passage of time. The latter might be said to constitute a change of circumstances if that is taken to include the child's situation being sufficiently different from that which existed at the date of the previous order such that further inquiry is needed to determine what order is in the child's best interests. This approach reflects what is said in the Lagarde Report, as referred to above, namely that the rationale underpinning priority being given to a later order is that it has been taken by a court "closer to the child and in a better position to assess the child's best interests". This also ties in with what is said in recital 12 of BIIa, namely that: "The grounds of jurisdiction in matters of parental responsibility … are shaped in the light of the best interests of the child, in particular on the criterion of proximity".

59. This is one of those situations, which are not uncommon especially in child cases, in which there is no formulaic test which can be applied. It requires the court to exercise a broad evaluative judgment which gives appropriate weight to all the relevant factors which will include, but does not give priority to, the foreign court's order and which, ultimately, depends on the court's determination of whether, taking the child's welfare as a primary consideration, the circumstances are such that the exercise by the court of its substantive jurisdiction by undertaking a welfare assessment is justified.

Determination

60. For the reasons set out below, I disagree with the Judge's conclusion that the English court should not undertake a welfare assessment in this case. In part, I consider that the Judge appears to have misapplied *Re E* but, in any event, I consider that the circumstances of this case justify the English court undertaking a welfare assessment to determine what order is *now* in A's best interests.

61. In the course of his submissions, Mr Setright rightly acknowledged that enforcing the October 2020 Order would be draconian in its effect. As described by Mr Hames in his submissions, it would result in A moving from her home with her mother, where she has been living since February 2019, to live with her father 6,000 miles away in a place of which she will have little or no recollection having last been there in June 2019. By the date of the hearing below, A had spent more than half her life living in England and more than 12 months since the date of the October 2020 Order.

62. The nature and effect of an order are clearly relevant factors which the court must take into account. However, in my view, simply stated, the circumstances were sufficiently different in November/December 2021, from those which existed at the date of the

October 2020 order, to justify the English court exercising its substantive jurisdiction by undertaking a welfare assessment to determine what order is now in A's best interests.

63. In summary, this reflects, first, the significant passage of time, from A's perspective, since the French Court of Appeal made its determination. I appreciate that this was due to the time taken to determine the mother's appeal from that order and the time taken before the matter came before MacDonald J. Clearly the court should discourage parents from seeking to gain an advantage by causing procedural delays. However, equally clearly, the court must deal with the circumstances as they are when deciding whether to undertake a welfare assessment. In my view, the Judge wrongly dismissed or diminished, at [97], the effect of "the passage of time" and wrongly considered that the mother had "adduced no additional welfare evidence". For the child, her circumstances had significantly changed from what they were in October 2020 given, in particular, her further integration in England caused by her spending a further substantial part of her life here. The effect of the passage of time was, by itself in the circumstances of this case, sufficient to justify a welfare assessment. There were other significant developments, including the father's changed circumstances in Réunion, the child's increased distancing from her life in Réunion and the mother's ability to maintain a meaningful relationship, which constituted additional welfare evidence which required proper consideration.

64. Inevitably, when the court is deciding whether to undertake a fresh welfare assessment, reference is often made to whether there has been a "change of circumstances". This is because the court will typically be considering whether something has changed since the last order was made. However, depending on the nature of the court's decision, the passage of time can itself be considered to be a change in that the child's situation could well be materially different from that which existed at the date of the previous order. As referred to above, the breadth and nature of the evaluative exercise will reflect the nature of the decision being made. It also reflects, as Peter Jackson LJ noted, at [61], in *Re E*, that "In all actions relating to children … the child's best interests shall be a primary consideration".

65. Secondly, the evidence available to this court would be significantly different to that which was available to the French Court of Appeal which, as referred to above, reheard the case, importantly, in the absence of any recent evidence as to, to quote article 55, "the situation of the child". The last such evidence had been provided by the social investigator who had undertaken his enquiries in January 2019. This is not a criticism but an observation as to the evidence which was available to that court and the evidence which would be available now, namely direct professional evidence as to A's current circumstances and the consequences for her of the last 2/3 years.

66. Picking just two of the factors from the welfare checklist listed in section 1(3) of the CA 1989, there would clearly be substantial additional and different evidence addressing both "(b) (A's) physical, emotional and educational needs and "(c) the likely effect on (A) of any change in (A's) circumstances". In my view, these are, to quote from *Re E*, "real issues to be decided".

67. As to the latter of these issues, the Judge accepted, at [99], that moving A to her father in Réunion would have "a significant, and potentially, adverse impact on A in the short term". As a generalisation, this is a clearly supportable conclusion. A "draconian"

outcome, to adopt Mr Setright's word, can be expected to have a significant and potentially adverse effect on a child, particularly a young child. However, with all due respect of the Judge, I do not consider that the evidence available to him enabled him to reach any conclusion either as to the effect such a move would in fact have on A nor that it would be a short-term impact. As referred to by Mr Hames, the mother has always been A's primary carer. The French welfare report stated that "the mother has always taken care of" A and, clearly, since February 2019 the mother has, effectively, been her sole carer. Additional evidence was required before the court would be able to reach any such conclusion as to the effect on A.

68. I also consider that the Judge misapplied *Re E* when, at [98], he phrased the issue as being, "whether there has been a change of circumstances sufficient to justify a different welfare conclusion to that reached by the foreign court". Of course, if a court were to conclude, as suggested by Mr Setright, that the substantive welfare application had no real prospect of success, in the sense of leading to a different order, there would be no justification for undertaking a welfare inquiry. However, the question which the court has to determine, as set out in *Re E*, is not whether a different welfare decision *will* be made but whether the circumstances are such that the exercise by the English court of its substantive jurisdiction by undertaking a welfare inquiry is justified. With all due respect to the Judge, his approach would be putting the cart before the horse.

69. Further, the Judge was also not being asked, as he suggested at [97], "to embark on a reconsideration … of the French order". He was not reviewing or reconsidering that order. He was determining whether the circumstances were such that a welfare inquiry was justified. This approach, as referred to in *Re E*, at [2] and [61], reflects the weight given to the best interests of children when decisions are taken concerning their welfare. This is seen, for example, in recital 33 of BIIa and its reference to article 24 of the Charter of Fundamental Rights of the EU:

> "(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union."

Article 24 provides, among other things, that:

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

70. I make clear that the exercise by this court of its substantive jurisdiction does *not* represent a review of the French court's decision. Nor, I repeat, is the court considering whether to undertake a *reconsideration* of that court's decision and welfare assessment. As referred to above, the court is undertaking its own evaluation of whether the circumstances are sufficiently different and whether the evidence is sufficiently different to justify, giving primary consideration to the child's best interests, undertaking its own welfare inquiry. If the circumstances were not materially different and if the evidence was not materially different then the court would be likely to conclude that such an enquiry "would involve the inappropriate re-litigation of issues

that have already been decided": *Re E* at [67]. But, for the reasons summarised above, that is not this case.

71. For the reasons set out above, it is clear to me that the mother's appeal must be allowed under ground 2 and the Judge's order set aside. I also make clear for the avoidance of doubt that, in my view, if the parties cannot agree, a substantive welfare inquiry is required to determine what order is in A's best interests.

72. In the light of my conclusion as to ground 2, it is not necessary to deal with the other grounds of appeal. I do so very briefly.

73. As to the first ground of appeal, I agree with Mr Setright that this is a new argument which was not advanced below. I also agree that it is sufficiently different from the case which was advanced below, which neither challenged the French expert evidence nor sought to argue that the French court was not seised, that it would not be fair to allow it to be advanced now. Mr Hames may well be right that it is a matter of EU rather than French law but it is clear that this new case would very probably have required further evidence from the expert and/or would have led to the hearing below being conducted differently. I would further reject Mr Hames' submission that the Judge wrongly decided that he did not have jurisdiction to make welfare orders. The Judge did say, at [80], that article 8 did not "confer" jurisdiction but he correctly recognised, at [96], that he did "have *power* to make welfare orders".

74. As to the third ground of appeal, in my view the Judge was plainly right to decide that this case did not cross the high threshold to establish that the enforcement of the order would be manifestly contrary to public policy.

75. As to the fourth ground, I agree that the question of *whether* to recognise an order is separate from the issue of *how* it should be enforced. However, in the light of my decision as to ground 2, I need not consider this any further.

Lord Justice Nugee:

76. I agree.

Lord Justice Birss:

77. I also agree.