RE S (BRUSSELS II: RECOGNITION: BEST INTERESTS OF CHILD) (NO 2) [2003] EWHC 2974 (Fam)

Family Division

Holman J

8 December 2003

Brussels II – Enforcement – Extent of power to vary foreign order – Extent of discretion to enforce foreign order partially

On the divorce of the Belgian father and the mother, a citizen of both the UK and Italy, the Belgian court made an order which provided that the child's main residence would be at the mother's address in England, but granted the father regular staying contact in Belgium for periods of up to a fortnight, relatively evenly spaced throughout the year. The child, aged less than a year at the time of the separation, had never been apart from the mother. The mother opposed the father's subsequent application to the English court for recognition, registration and enforcement of the order under 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), partly on the basis that the Belgian court lacked jurisdiction, but also on the basis that the regime for contact was contrary to the best interests of the child, who was now 2 years old. The court granted the father recognition of the order and set a further hearing date on the issue of enforcement, noting that the Belgian order had not sufficiently taken account of the child's very young age or of the fact that he had never been separated from the mother, and inviting the parents to agree a modified contact timetable.

Held – making an order for contact which specified more limited contact than that provided for in the Belgian order over an 8-month 'phasing in' period, but which was thereafter in the terms of the Belgian order –

(1) There was, under Art 21, an overriding duty to enforce a foreign order previously recognised under Brussels II. Art 24 provided that there could be no review as to its substance and only limited discretion under Art 24(2) to refuse to enforce the order for the reasons specified in Arts 15, 16 and 17. There was no variation power. The court had some discretion to 'phase in' the foreign order if and to the extent that phasing in would eventually best make the foreign judgment happen, but no more, as the moment the court exercised any more general discretion it would be reviewing the foreign judgment as to its substance or exercising a discretion outside the scope of Art 24(2). The target had to be to make the foreign judgment happen as soon as that could effectively be achieved. The position of the child and adults and the well-being of the child were all relevant, but welfare was not paramount or even the primary consideration (see para [14]).

(2) The court had only a limited discretion under Art 29 to order partial enforcement. Art 29(2) gave an applicant a discretion to seek only partial enforcement, and, by implication, the court a discretion to enforce only in those respects requested by the applicant, but where the applicant had requested enforcement of the whole, the court was required to enforce everything save any element which it was impossible to enforce (see para [11]).

(3) Had the welfare of the child been the paramount consideration, the court would have inclined to a gradual and progressive build up of contact leading at most to a one week staying visit in Belgium in the first summer. However, the terms of the Belgian order required contact to progress at a faster pace, and (following several once-monthly weekend staying visits first in England and then in Belgium) a week's staying contact in late April, followed by a further week in mid-July, plus an extended

fortnight at the end of August, would be acceptable. After that the Belgian order must be applied and obeyed according to its letter unless the parents agreed to vary it (see para [15]).

(4) There was nothing in the Belgian order to require that the father's contact must be in Belgium, and the court was therefore not justified in restricting the father's contact specifically to Belgium and France as the mother requested. But in order to give effect to the requirement of the Belgian court that the father return the child to the mother, the father's contact would be restricted to any country which was a Member State of the European Union, and was a Contracting State to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (see para [17]).

(5) The reasons for non-recognition specified in Art 15(2) were capable of reconsideration at the enforcement stage, however, in this case an order for enforcement with some phasing in was not manifestly contrary to English public policy (see para [18]).

Statutory provisions considered

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), ss 1 'Recognition', 2 'Enforcement', Arts 3, 13, 15, 16, 17, 21, 23, 24, 29

Hague Convention on the Civil Aspects of International Child Abduction 1980

Henry Setright QC for the father
Mark Everall QC and *Marcus Scott-Manderson* for the mother

HOLMAN J:

[1] This has been the restored hearing following my judgment of 3 September 2003[1] and as provided for in para 3 of the order of that date. Both parents have attended as I required, but I regret that despite several hours spent in negotiation outside the courtroom they cannot agree on the way forward and I am required to rule.

[2] These continue to be proceedings for the recognition, registration and enforcement pursuant to the provisions of 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) of the order of the Antwerp court of first instance dated 12 July 2002. For the purposes of the present judgment it is necessary to quote in full the material part of that order which provides that:

> '[M's] residence shall be arranged by mutual agreement between the parties and that, failing such mutual agreement, the following residence shall be arranged—
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> – [M] shall stay with petitioner [viz the father]:
> – during summer holidays: from 15 July up to and including 31 July and from 15 August up to and including 31 August, always from and until 12 o'clock at noon;

1 Editor's note: see *Re S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571.

- during Christmas and Easter holidays: always the first week from Sunday noon until Sunday noon, always at 12 o'clock noon;
- during autumn and spring (half-term) holidays (early February): from Sunday noon until the next Sunday noon, always at 12 o'clock at noon;
- one extended weekend in May, ie in the week of Ascension Day, until Sunday noon, always at 12 o'clock at noon.
- [M] shall stay with the defendant [viz the mother] all other days.

Decide that petitioner shall come and pick up the child and bring him back on the days and at the times specified above.'

[3] So far, since he came to England, M has never stayed overnight with his father at all; has never been with his father on his own, but always accompanied also by his mother; and has not had contact outside England. As I understand it, visiting contact has taken place roughly once every 2 months although there have been longer gaps. In essence, the father seeks a relatively rapid progression to staying contact in Belgium, substantially in accordance with the Belgian order. He proposes a few weekend overnight stays, first in England then in Belgium, leading to one week's staying contact pursuant to the Belgian order during the 'spring (half-term) holidays (early February)' or, at the latest, by the Easter holidays. The mother, on the other hand, feels that there must be a much longer period of 'phasing in'; first in England, then in Belgium with, possibly, one week's staying contact during the 2004 summer holidays. She said in her brief oral evidence that she feels that a gradual build-up would be more beneficial to M, who will be 3 next month. She feels that the whole experience of going to Belgium straightaway could be overwhelming for M. She feels it is very rushed to complete a programme of phasing in by the end of January with a view to staying contact during February. She feels it could be very unsettling for him and she does not want him to lose his stability and relationship with herself.

[4] Apart from the issues as to the timing and pace of 'phasing in' the Belgian order, the mother continues specifically to fear that if M goes to Belgium the father might not return him. Having heard brief oral evidence from both parents, I fully accept that the fear of the mother is a sincere and genuine one, and I understand why she has that fear. But I consider that the objective risk of non-return is a very low one. The Belgian order itself is quite clear, and clearly requires the father to bring the child back to the mother in England at the end of the specified contact periods. The father seeks to enforce the Belgian order but I do not think he would break it. He has offered various undertakings today that will be incorporated in my order today and must be personally signed by him. Belgium is a reciprocating party to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and I am confident that if (which I do not expect) the father were wrongfully to retain M in Belgium, the courts of Belgium would swiftly order and cause his return to England which is manifestly his State of habitual residence. Finally, the father currently lives with and is obviously close to his parents (who have attended this hearing)

and it strikes me as highly unlikely that this whole family would wish to become fugitives from justice.

[5] Before ruling on the issues as to the pace of contact, I must determine and describe the legal framework and test, for this is a case to which Brussels II applies and that regulation is the law which I am bound to apply.

[6] Chapter III of Brussels II is headed 'Recognition and Enforcement'. It is divided into sections. Section 1 is headed 'Recognition' and section 2 'Enforcement' and, as I said in para [36] of my first judgment (*Re S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571), it is plain from that structure that Brussels II draws a clear distinction between the two. It is important to note, however, that section 1, Recognition, applies to judgments generally. As defined by Art 13(1), judgment 'means a divorce, legal separation or marriage annulment … as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings …'. Section 2, Enforcement, however, applies only to 'a judgment on the exercise of parental responsibility …' (see the opening words of Art 21(1) which effectively define the scope of the whole of section 2). The reason for this is made clear by para 80 of the Explanatory Report dated 28 May 1998 (OJ C221/27) by Professor Borras on the Convention which preceded Brussels II. [The content of Brussels II is 'substantially taken over from' but is not in the same terms as the Convention: see para (6) of the preamble to Brussels II.] Professor Borras says of the Article of the Convention (Art 20) which corresponds to Art 21 of Brussels II:

> 'While, for matrimonial matters, recognition procedures are sufficient, in view of the limited scope of the Convention and the fact that recognition includes amendment of civil-status records, rules for enforcement are necessary in relation to the exercise of parental responsibility for a child of both spouses.'

[7] So Brussels II, like the Convention, clearly recognises that in matters of change of status, recognition alone is sufficient; whereas in matters of 'the exercise of parental responsibility' something more, namely rules for enforcement, is required. Note, too, that whereas elsewhere (eg Arts 3, 13 and 15(2)) Brussels II speaks of 'a judgment relating to the parental responsibility of the spouses …' Art 21(1) (and accordingly the whole of section 2) is narrower and speaks of 'a judgment on the exercise of parental responsibility'. In short, it is not to the legal status of parental responsibility that section 2 refers (for status requires only to be recognised) but to its practical exercise.

[8] The relevant Articles and their provisions are as follows:

> Article 21
> '*Enforceable judgments*
> 1 A judgment on the exercise of parental responsibility in respect of a child of both parties 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.

2 However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.'

Article 23
'*Procedure for enforcement*
1 The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.
2 …'

Article 24
'*Decision of the court*
1 …
2 The application may be refused only for one of the reasons specified in Articles 15, 16 and 17.
3 Under no circumstances may a judgment be reviewed as to its substance.'

Article 29
'*Partial enforcement*
1 Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.
2 An applicant may request partial enforcement of a judgment.'

[9] Neither leading counsel have been able to find any reported authority on the meaning or application of any of these provisions. I make the following comments upon them. Article 21 is unqualified and employs the word 'shall': 'shall be enforced'. Article 24(3) repeats, specifically in relation to the enforcement stage, that 'under no circumstances may a judgment be reviewed as to its substance'. So that embargo is as emphatic in relation to enforcement as to recognition. Article 24(2) imports into the enforcement stage the 'reasons' in Arts 15, 16 and 17. Note, however, that whereas Art 15 employs imperative language ('shall not be recognised'), Art 24(2) is permissive: 'may be refused', although refusal may only be for one of the reasons specified in the stated Articles. It is, however, significant that reference to the Art 15 reasons is repeated in Art 24. The whole of section 2, Enforcement, only comes into operation when a judgment has been declared enforceable/has been registered for enforcement (in the case of the UK). But, as just noted, Art 15(2) is imperative: 'shall not be recognised' if one of the specified reasons applies. It follows that if section 2 and the enforcement stage is reached, the judgment has already been recognised/registered and, accordingly, that it has been concluded that none of the Art 15(2) reasons apply. So the fact that Art 24(2) imports again the Art 15(2) reasons into the enforcement stage must indicate that a decision in relation to those reasons at the recognition/registration stage is not conclusive for the enforcement stage. Paragraphs (b), (c) and (d) of Art 15(2) all relate to past events and, essentially, to matters of fact and it is difficult to see how the reasons in those paragraphs could fall for reconsideration. Clearly, however, the facts under paras (e) and (f), which refer to a later judgment, could change if such a later judgment was given; and it seems to me at least possible that facts could

change between the recognition/registration and enforcement stages such that enforcement would be manifestly contrary to public policy even though recognition/registration was not.

[10] Article 23 is, in my view, strictly procedural. Mr Everall QC submitted that enforcement is a matter for English law, governed by 'English principles and procedures' and relied upon Art 23. I agree that the Article clearly requires that procedure be governed by the law of the State in which enforcement is sought, but I cannot accept that Art 23 imports also the 'principles' of that State. To do so would be, in effect, to undermine the whole thrust and purpose of Brussels II and to substitute at the enforcement stage local 'principles' for the principles and decision of the State of origin. It would infringe the embargo in Art 24(3) against review as to substance, and would substitute local 'principles' as a reason for non-enforcement for the much more stringent reasons under Art 15.

[11] Finally, I comment briefly on Art 29, Partial enforcement, to which Mr Setright QC referred. Clearly Art 29(2) gives a discretion to the applicant to seek only partial enforcement and it is, I think, implicit that the court need not enforce save in those respects requested. If, in the present case, the father requested enforcement of only parts of the Belgian order I would not be bound to enforce it all, for that would be absurd. But where the applicant has requested enforcement of the whole, the scope of Art 29(1) is strictly limited. It applies where enforcement 'cannot' be authorised for all of the matters. Its effect is, in my view, to relieve a court from seeking to enforce that which is impossible, but requires it to enforce the rest. Save for what is impossible, Art 29(1) does not confer any more general discretion partially or selectively to enforce.

[12] What, however, does 'enforce' and 'enforcement' mean in the context of section 2 and Brussels II as a whole? It does not, in my view, carry the narrow meaning of 'apply sanctions', rather it means to give force or effect to the underlying judgment or, in plain language, to make it happen. Child contact involves and depends upon the interaction of human beings, including the child himself, and is almost invariably a process (ie repeated contact over a period) rather than a single event. To apply a sanction at a particular part of the process, or to insist that a particular part of the process takes place, may be to imperil future parts of the process. In short, to make contact happen in the long term may require restraint in the short term. These are truisms of family law. So, as an integral part of the active function of enforcing – ie making happen – the proposed contact in the longer term, a court may have to adapt or show restraint in the shorter term.

[13] Applying these considerations to section 2, Enforcement, I now consider that I expressed myself too widely in para [36] of *Re S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571 where I said that 'provisionally, it seems to me that the English court, as the enforcing court, will have similar discretions as to the extent to which and terms upon which it enforces the order, as it would have when deciding how far to go in actual enforcement of an order of its own'. When the court enforces an order of its own, one of the powers it may exercise, actually or implicitly, is the power to vary. That power is not available when enforcing under Brussels II. Further, within a purely domestic case the welfare of the child must be paramount even in the enforcement process, although consideration of obedience to court orders is important too.

[14] Under section 2, Enforcement, of Brussels II, however, the duty of, and discretion in, the court are different. Under Art 21 there is an overriding duty to enforce. There can be no review as to substance and only limited discretion under Art 24(2). There is no variation power. The duty is to make the foreign judgment happen and there is only such discretion as fulfilment of that duty requires. I agree with Mr Everall that the court has some discretion to 'phase in', if and to the extent that phasing in will eventually best make the foreign judgment happen. But that is all. The moment the court exercises any more general discretion it would be reviewing the foreign judgment as to its substance or exercising a discretion outside the scope of Art 24(2). The target has to be to make the foreign judgment happen as soon as that can effectively be achieved. The position of the child, and of the adults, and the well-being of the child are all relevant. If, for instance, contact is forced too quickly so the child later refuses to go, that is not effectively to enforce or make the judgment happen. But welfare is not paramount or even the primary consideration.

[15] I now apply that approach to the facts and circumstances of the present case. I have already made plain at para [29] of *Re S (Brussels II: Recognition: Best Interests of Child) (No 1)* [2003] EWHC 2115 (Fam), [2004] 1 FLR 571 my own view about the appropriateness of the pace or timing of the Belgian order. M is only 3 next month. He has always been in the care of his mother. He cannot remember a time when he was alone with his father. His primary attachment must be with his mother, and any attachment with his father must be markedly less strong. His father's use and command of English is limited (he needed an interpreter in court), so there may be a language barrier, too, in communication. I agree with the comments of the mother in her evidence that I quoted in para [3] above. If I was to make the welfare of M paramount, I would incline to a gradual and progressive build-up of contact leading possibly, but only possibly, to a one week staying visit in Belgium next summer at the earliest.

[16] But, I consider, too, that contact can, if necessary, progress at a faster pace. To stay abruptly in Belgium for one week in the first week of the Christmas holidays (ie in only about 2–3 weeks' time from now), as strict application of the order requires, would be a grave mistake and one which the father does not seek or suggest. Nor am I prepared to require a week as soon as 'early February' as the order also requires. But by late April there can have been four of five once-monthly weekends of staying contact, first here and later in Belgium. The pace is still very fast, but I think it is just possible to contemplate a week's stay in Belgium by then, followed by an 'extended weekend' from Thursday to Sunday in the week of Ascension Day in late May. The Belgian order requires a total of 4½ weeks with the father out of 6½ weeks from mid-July to the end of August. That, too, seems so much, when he is still only 3, as to imperil the order as a whole, but he might just be able to manage one week in mid-July and then a 16-day period at the end of August if, meantime, he has had 3 weeks back with his mother. After that the Belgian order must be applied and obeyed according to its letter unless, as the order itself contemplates, the parents mutually agree otherwise.

[17] There is nothing in the Belgian order to require that the father's contact can only be in Belgium and he may wish to take M on family holidays elsewhere (last year he holidayed in Greece). So I am not justified in restricting, or entitled to restrict, the father's contact specifically to Belgium

(and to France, through which he might travel), as the mother requests. But in order to give overall effect to the Belgian order (which requires the return of M to his mother at the end of contact), I will restrict the father's contact to any country which is a Member State of the European Union (to all of which, except Denmark, Brussels II extends) and is a Contracting State to the Hague Convention.

[18] As I have already explained, the reasons for non-recognition specified in Art 15(2) are capable of reconsideration at the enforcement stage. However, for similar reasons that I expressed in my first judgment at the registration stage, I do not consider that an order reflecting the above terms and made in enforcement of the Belgian order is manifestly contrary to English policy nor, I think, did Mr Everall so argue.

[19] For these reasons, and by way of enforcement pursuant to Art 21 of Brussels II of the order of the Rechtbank van Eerste Aanleg of Antwerp made on 12 July 2002, there will be an order in terms that I have already announced. The order will be for contact in accordance with paras [16] and [17] above, with a number of more detailed provisions which I need not explain in this judgment.

Order accordingly.

Solicitors: *Reynolds Porter Chamberlain* for the father
Dawson Cornwell for the mother

PHILIPPA JOHNSON
Law Reporter