

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

**IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND)
ORDER 1995**

**RE ESJ A MINOR (RESIDENCE ORDER APPLICATION; JURISDICTION
WITHIN UNITED KINGDOM; APPLICABILITY OF COUNCIL
REGULATION (EC) NO. 2201/2003)**

MORGAN J

[1] I have prepared this judgment in an anonymised form so as to protect the child. Nothing should be published which would disclose the identity of the child or her parents.

The background and previous orders

[2] ESJ was born in June 2000. Her parents met in Wales in 1999 and the child resided in Wales with both parents until September 2003. Her parents then separated and the child thereafter lived with her mother. Proceedings in relation to residence and contact ensued and were finalised on 4 October 2005 when Llangefni County Court made a residence order providing that the child live with the mother, a parental responsibility order in favour of the father and a contact order requiring the child to be made available for contact with the father during school holidays and half terms. It seems clear that the background to this order was that the mother intended to return to Northern Ireland which she did later in October 2005. It appears that there were some difficulties in relation to contact and on 12 January 2006 Llangefni County Court made a further order defining contact in respect of various periods during 2006. On 19 April 2006 Caernarfon County Court made an order that a certified copy of the order of 12 January 2006 be forwarded to Belfast

County Court for registration in that court in the prescribed manner. The procedure in relation to registration is set out in section 27 of the Family Law Act 1986.

“27. - (1) A person on whom any rights are conferred by a Part I order may apply to the court which made it for the order to be registered in another part of the United Kingdom under this section.

(2) Application under this section shall be made in the prescribed manner and shall contain the prescribed information and be accompanied by such documents as may be prescribed.

(3) On receiving an application under this section the court which made the Part I order shall, unless it appears to the court that the order is no longer in force, cause the following documents to be sent to the appropriate court in the part of the United Kingdom specified in the application, namely-

(a) a certified copy of the order, and

(b) where the order has been varied, prescribed particulars of any variation which is in force, and

(c) a copy of the application and of any accompanying documents.

(4) Where the prescribed officer of the appropriate court receives a certified copy of the order under subsection (3) above he shall forthwith cause the order with particulars of any variation, to be registered in that court in the prescribed manner.”

Belfast County Court has no record of the registration of any such order in Northern Ireland.

[3] In accordance with the contact arrangement agreed between the parties ESJ was to spend Christmas with her father in Wales in 2007. On 22 December 2007 the mother brought the child to Dun Laoghaire where she was met by the father and his partner. The father’s partner alleges that the child made disclosures that evening alleging that she was beaten and threatened by the mother, that she is always scared at home, that she is being forced to stay with other people while her mother socialises, that there are men she does not know about her mother’s house and parties taking place and that she is being

forced to lie on the phone to her father. The mother disputes the bulk of these allegations and explains some of the others in terms of her social circumstances and the administration of reasonable parental chastisement. The father reported these matters to police and social services in Wales and both have interviewed the child. On foot of this information social services in Northern Ireland have interviewed the mother. The father alleges that the grandmother and maternal aunt of the child who both live in Northern Ireland have made statements damaging to the mother which they both deny. The child has expressed a strong wish to remain with her father in Wales.

[4] On 29 December 2007 the mother contacted the father about the arrangements for the return of the child. The father said that he would get back to her. Thereafter he did not take any calls from the mother and attended on 31 December 2007 with his local police station to report alleged abuse of the child. The mother had been ringing regularly and was becoming anxious. She spoke to the father's sister on 2 January 2008 and his mother the following day. Neither knew anything about the circumstances of the child. She then contacted police in Wales and was advised that the father was not returning the child as he had concerns for her safety in Northern Ireland.

[5] On 4 January 2008 the mother lodged an emergency recovery order with Larne Family Proceedings Court. That came before the court on 7 January 2008. It appears that at the suggestion of the Resident Magistrate this was amended to an application for a residence order and an ex parte residence order providing that the child should live with the mother was made on that date. All parties agree that the child was habitually resident in Northern Ireland at the time of the making of this order. The order was, therefore, clearly within jurisdiction. It is difficult to see, however, what juridical advantage there was to the mother in obtaining such an order. She already had the benefit of the residence order made in 2005 in Wales. By virtue of section 14 of the Children Act 1989 she was entitled to enforce that order in Wales by seeking a recovery order. Although it would have been necessary for her to apply to the court in Wales to register in Northern Ireland the residence order in her favour made in October 2005 that was not necessary in order to pursue the recovery proceedings. I was minded to strike the Larne order out as an abuse of process but I have decided not to do so in order to ensure that matters concerning the child are dealt with as expeditiously as possible. The effect of the order made by Larne Family Proceedings Court is provided for in section 6 of the Family Law Act 1986.

"6 Duration and variation of [Part I orders]

(1) If a [Part I order] made by a court in Scotland or Northern Ireland (or a variation of such an order) comes into force with respect to a child at a time when a [Part I order] made by a court in England and Wales has effect with respect to him, the latter order

shall cease to have effect so far as it makes provision for any matter for which the same or different provision is made by (or by the variation of) the order made by the court in Scotland or Northern Ireland.

(2) Where by virtue of subsection (1) above a [Part I order] has ceased to have effect so far as it makes provision for any matter, a court in England and Wales shall not have jurisdiction to vary that order so as to make provision for that matter."

The Larne order did not purport to affect the contact arrangements between the child and the father. I consider, therefore, that the effect of the Larne order was to leave in place the contact arrangements within the order of October 2005 but to replace the residence order provisions within that order.

[6] On 9 January 2008 the father brought an application for a residence order before Caernarfon County Court. On 10 January 2008 the mother registered the ex parte residence order made in Larne in the High Court in England and issued an application for a recovery order before Caernarfon County Court. The residence application came before Caernarfon County Court on 11 January 2008. The issue of jurisdiction was clearly considered and the court recorded:

"Upon hearing counsel for both parties;

And upon the court having considered the issue of jurisdiction;

And it being recorded that pursuant to article 15 (b) (*sic*) of Council Regulation (EC) No. 2201/2003 this court will communicate with Antrim Family Proceedings Court in relation to the order made on 7 January 2008 to request that the same is revoked and a further hearing on 7 February 2008 is vacated;

And it being recorded the mother is considering making an application to remove the child from the jurisdiction, to be heard on 4 February 2008."

The court made an interim residence and contact order and gave various directions. Even though there does not appear to have been jurisdiction to make that order the effect of s.23 of the Family Law Act is that the order, if valid, superseded the Larne order. On 24 January 2008 the mother made an application for transfer of the proceedings at Larne Family Proceedings Court to the High Court in Belfast and those proceedings have duly been transferred. The residence application launched by the father on 9 January

came back before Caernarfon County Court on 4 February 2008 where the issue of jurisdiction was once again considered and the order records:

“Upon hearing Counsel for the mother and father

And upon it being recorded that:

1. The court having heard argument by and on behalf of the parties has concluded that the mother has not accepted the jurisdiction of this court expressly or otherwise in an unequivocal manner and therefore the provisions of Article 12(3) Council Regulation (EC) Number 2201/2003 have not been invoked.

2. This court today hereby applies to either (a) The Family Carers Centre, Laganside, Belfast, or (b) the High Court of Justice of Northern Ireland (Family Division), to consider the making of a request under Article 15(1) (b) of Council regulation (EC) number 2201/2003 to this court to assume jurisdiction for the making of a residence order it appearing to this court:

(i) that the father as the holder of a parental responsibility order has his habitual residence in England and Wales;

(ii) that ESJ was habitually resident within England and Wales prior to her residence in Northern Ireland; and

(iii) that this court may be better placed to hear the application and

(iv) this may be in the best interests of the child...”

The court discharged the residence order made on 11 January 2008 and noted that the parties had made arrangements for contact between the mother and child.

The issues

[7] The orders of 11 January 2008 and 4 February 2008 made by Caernarfon County Court both proceed on the basis that Council Regulation (EC) No. 2201/2003 applies to disputes as to jurisdiction within the United Kingdom. One issue in this application is whether that is correct and the second is whether either under the Council Regulation or the provisions of

the Family Law Act 1986 that court should be asked to deal with the disputes concerning the child.

Does the Council regulation apply?

[8] The resolution of the applicability of the Council regulation is not strictly necessary in this case since in my view the outcome is the same whether the position is governed by the Council Regulation or the relevant provisions of the Family Law Act 1986 fall to be applied. I consider, however, that the court should indicate the basis upon which it believes itself to have jurisdiction. I am grateful for the helpful written and oral submissions from Ms Keegan QC who led Ms Farrell for the mother and Ms McGreenera QC who led Mr Magee for the father. Since the Council Regulation is an instrument made by the Community I have considered whether I should refer the question of its interpretation to the European Court of Justice. Although references are generally governed by Article 234 EC the position in relation to Brussels II is that it is governed by Article 68 of the Treaty which imposes a duty to refer only where there is no judicial remedy under national law. A right of appeal lies against my decision in respect of this application for residence by the mother. Since as I have said the determination of this question is not critical to my decision and in any event I am anxious to ensure that the position in relation to the child is resolved as quickly as possible I do not consider that a reference is appropriate.

[9] The law as to whether the Council Regulation applies to intra state jurisdictional disputes has been described as complex, uncertain and unsatisfactory. The Regulation derives its validity from the Treaty and the recital refers in particular to Article 61(c) which refers to the power of the Council to adopt measures in the field of judicial cooperation in civil matters as provided for in Article 65. That article refers to measures "in civil matters having cross-border implications... in so far as necessary for the proper functioning of the internal market." That is an indicator against the view that the Regulation should have any effect in relation to matters internal to a Member State. It is also worth noting in the particular context in which this application arises the terms of recital 13:

"(13) In the interests of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court."

That recital again strongly suggests that the provisions in relation to transfer only apply where a transfer is to occur between one Member State and another.

[10] Article 1 of the Regulation gives a wide jurisdiction in relation to matters of parental responsibility including custody and access. Article 2 provides that 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 3 deals with general jurisdiction in relation to divorce, legal separation or marriage annulment and Article 8 provides that the courts of the Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized. That provision is subject to Article 9 which deals with lawful moves from one Member State to another and Article 10 which deals with wrongful removal or retention of a child. Article 15 deals with transfer and provides:

“Transfer to a court better placed to hear the case

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 a 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 a 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 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.”

[11] All of these provisions and in particular the transfer provisions strongly suggest that the Regulation is concerned with jurisdictional disputes between Member States rather than the determination of the particular court within a Member State having responsibility for the matter at issue. It is contended, however, that these provisions are materially affected by Article 66 of the Regulation which states:

“Member States with two or more legal systems

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 Kingdom ‘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."

It is suggested in particular that Article 66 (c) in conjunction with the definition in Article 2 requires the word "authority" to be substituted by the word "courts". In that way it is suggested that Article 15 should be read within the United Kingdom as applying to transfers between different territorial units.

[12] I do not accept that interpretation. In order to engage Article 66 it is necessary to identify the matter which is governed by the Regulation. For the reasons I have already set out I consider that Article 15 of the Regulation applies and applies only to transfers between Members States. Since this case is not concerned with a transfer between Members States Article 66 has in my view no application to the issue of transfer within a Member State. I note that this conclusion is consistent with the Practice Guide to the Regulation which states that Brussels II bis:

"determines merely the Member State whose courts have jurisdiction, but not the court which is competent within the Member State. This question is left to domestic procedural law."

[13] There are unhappily conflicting cases in this area but neither addressed the issues which were raised here. In S v D [2006] Fam LR 66 a sheriff had made a contact order in respect of which a variation was sought but the child was no longer habitually resident in Scotland. All counsel proceeded on the basis that the Regulation applied. The sheriff dismissed the variation proceedings on the basis that he did not have jurisdiction. In this jurisdiction Gillen J accepted in Re C and C [2005] NI Fam 3 a submission from counsel that the Regulation had absolutely no application to similar proceedings because it was an intra-UK case and he decided to return the case to England under the Family Law Act 1986.

[14] For the reasons which I have set out I decline to request Caernarfon County Court to assume jurisdiction for the issues relating to parental responsibility by virtue of Article 15(1) (b) of Council Regulation (EC) No.

2201/2203 on the basis that the Regulation does not apply to a transfer between jurisdictions in the United Kingdom.

Should this court decline jurisdiction under the Family law Act 1986?

[15] I now turn to Family Law Act 1986 which has been described by Wall J as a "complex, much amended and thoroughly unsatisfactory statute" (Re G (adoption: ordinary residence) [2002] EWHC 2447). Section 1 of the 1986 Act sets out the orders in respect of which it applies.

"1. - (1) Subject to the following provisions of this section, in this Part ["Part I order"] means-

- (a) a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order;
 - (aa) a special guardianship order made by a court in England and Wales under the Children Act 1989;
 - (ab) an order made under section 26 of the Adoption and Children Act 2002 (contact), other than an order varying or revoking such an order;
- (b) an order made by a court of civil jurisdiction in Scotland under any enactment or rule of law with respect to the residence, custody, care or control of a child, contact with or, access to a child or the education or upbringing of a child, excluding-
 - (i) an order committing the care of a child to a local authority or placing a child under the supervision of a local authority;
 - (ii) an adoption order as defined in section 12(1) of the Adoption (Scotland) Act 1978;
 - (iii) an order freeing a child for adoption made under section 18 of the said Act of 1978;

- (iv) an order giving parental responsibilities and parental rights in relation to a child made in the course of proceedings for the adoption of the child (other than an order made following the making of a direction under section 53(1) of the Children Act 1975);
 - (v) an order made under the Education (Scotland) Act 1980;
 - (vi) an order made under Part II or III of the Social Work (Scotland) Act 1968;
 - (vii) an order made under the Child Abduction and Custody Act 1985;
 - (viii) an order for the delivery of a child or other order for the enforcement of a Part I order;
 - (ix) an order relating to the guardianship of a child;
- (c) an Article 8 order made by a court in Northern Ireland under the Children (Northern Ireland) Order 1995, other than an order varying or discharging such an order."

The parties have accepted before me that the application by the father was for a section 8 order under section 1(1)(a) of the 1986 Act and the application by the mother for an Article 8 order by virtue of section 1 (1) (c) of the Act. Neither party has contended that either application constituted an application for an order varying or discharging the order of October 2005. The jurisdiction of a court in England and Wales is set out in sections 2 and 3 of the 1986 Act.

"2. Jurisdiction: general

- (1) A court in England and Wales shall not make a section 1(1)(a) order with respect to a child unless –
 - (a) it has jurisdiction under the Council Regulation, or
 - (b) the Council Regulation does not apply but –

- (i) the question of making the order arises in or in connection with matrimonial proceedings [or civil partnership proceedings] and the condition in section 2A of this Act is satisfied, or
- (ii) the condition in section 3 of this Act is satisfied].

3. Habitual residence or presence of child

(1) The condition referred to in [section 2(1)(b)(ii)] of this Act is that on the relevant date the child concerned –

- (a) is habitually resident in England and Wales, or
- (b) is present in England and Wales and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below.”

As the child was habitually resident in Northern Ireland throughout the material time these provisions do not give the Welsh court jurisdiction.

[16] The relevant provisions in relation to the proceedings in Northern Ireland are found in sections 19 and 20 of the 1986 Act.

“19. - (1) A court in Northern Ireland shall not make a section 1(1)(c) order with respect to a child unless -

- (a) it has jurisdiction under the Council Regulation, or
- (b) the Council Regulation does not apply but
 - (i) the question of making the order arises in or in connection with matrimonial proceedings or civil partnership proceedings and the condition in section 19A of this Act is satisfied, or
 - (ii) the condition in section 20 of this Act is satisfied.

(3) A court in Northern Ireland shall not make a section 1(1)(e) order unless -

- (a) it has jurisdiction under the Council Regulation, or
- (b) the Council Regulation does not apply but
 - (i) the condition in section 20 of this Act is satisfied, or
 - (ii) the child concerned is present in Northern Ireland on the relevant date and the court considers that the immediate exercise of its powers is necessary for his protection.

20.- (1) The condition referred to in section 19(1)(b)(ii) of this Act is that on the relevant date the child concerned-

- (a) is habitually resident in Northern Ireland; or
- (b) is present in Northern Ireland and is not habitually resident in any part of the United Kingdom,

and, in either case, the jurisdiction of the court is not excluded by subsection (2) below."

It appears, therefore, that the Northern Ireland court has jurisdiction to deal with the residence order application before it. By virtue of section 22(2) of the Family Law Act 1986 a court in Northern Ireland may stay proceedings before it in favour of another jurisdiction.

"22. - (1) A court in Northern Ireland which has jurisdiction to make a Part I order may refuse an application for the order in any case where the matter-in question has already been determined in proceedings outside Northern Ireland.

(2) Where, at any stage of the proceedings on an application made to a court in Northern Ireland for a Part I order, or for the variation of a Part I order -

- (a) that proceedings with respect to the matters to which the application relates are continuing outside Northern Ireland, or
- (b) that it would be more appropriate for those matters to be determined in proceedings to be

taken outside Northern Ireland, the court may stay the proceedings on the application; or

- (c) that it should exercise its powers under Article 15 of the Council Regulation (transfer to a court better placed to hear the case),

or (as the case may be) exercise its powers under Article 15.”

The test under s. 22(2) of the 1986 Act is similar to the test under Article 15 of the Regulation and the outcome in this case would in my view be identical. The reference in s. 22(2) of the 1986 Act to the Regulation is not of assistance on the issue of the applicability of the Regulation as the Act in a number of places is merely confirmatory of the fact that the Regulation, if applicable, must take precedence.

[17] The principles applicable in relation to a stay were set out by the Court of Appeal in England and Wales in Re S (a minor) (Stay of Proceedings) [1993] 2 FLR 912 applying the test set out by the House of Lords in The Spilidia [1987] AC 460. It is for the party seeking the stay to establish that is appropriate and that there is another available forum which is clearly or distinctly more appropriate looking in particular at matters such as convenience, expense and availability of witnesses. The father relies upon the fact that the child is now at school in Wales, that her welfare has been the subject of interview by social services in Wales, that she has been interviewed by police in Wales and that he and his partner reside and are habitually resident there. In addition to this both parties were engaged in lengthy residence and contact proceedings in Wales a short number of years ago.

[18] On the other hand I must take into account that this child has been habitually resident in Northern Ireland for more than two years and that habitual residence is the touchstone of jurisdiction under the statute. Social services have been engaged in this jurisdiction and if there is any allegation of a criminal offence committed against the child it will be investigated in this jurisdiction. It seems clear from the disputes between the parties that in addition to the mother there may be other members of her family who may be required to give evidence. The child has been at school in this jurisdiction for a number of years and reports from her teachers may be required. If medical evidence is required in relation to the past it will undoubtedly be sought in this jurisdiction.

[19] I consider that the arguments are finely balanced and in those circumstances I do not propose to accede to the application for a stay. In addition to the arguments advanced on behalf of the mother set out above it

was submitted that I should take into account that this child was detained in contravention of the residence and contact orders made in respect of her. I have not found it necessary to determine the strength of that submission in reaching my conclusion and I leave open the question as to the weight to be given to that factor.