[2016 Gib LR 211]

IN THE MATTER OF E (A CHILD—JURISDICTION—PROROGATION)

IN THE MATTER OF J and E (CHILDREN)

CH v. TF

SUPREME COURT (Butler, J.): September 20th, 2016

Family Law—children—contact—if parents expressly accept jurisdiction of Supreme Court on application for contact order concerning Gibraltarian children, court has jurisdiction to hear application to enforce order (Council Regulation (EC) No. 2201/2203)—appropriate for court to do so even if children now habitually resident with father in Spain, father wishes to retract consent, and instituted proceedings in Spain

The applicant sought the enforcement of a contact order.

The applicant ("the mother") and the respondent ("the father") had two children, "J" and "E," both of whom were Gibraltarian, British citizens. The mother lived in Gibraltar. The children lived with the father in Spain. The mother applied to the Supreme Court for a contact order and the father clearly accepted the court's jurisdiction. An interim order was made in April, providing for contact between the mother and the children.

The father moved the children from school and nursery in Gibraltar to school and nursery in Spain. The mother had not been consulted as to the change of school and did not consent to the children permanently attending school and nursery in Spain. The father refused to comply with the interim contact order and brought separate proceedings in Spain for an order relating to contact. He wished to retract his consent to the Supreme Court's jurisdiction on the basis that the children were habitually resident in Spain. He submitted *inter alia* that the matter should be transferred to Spain, and that the mother would find it difficult, if not impossible, to enforce an order of the present court in Spain.

Held, ordering as follows:

(1) Article 12(3) of Council Regulation (EC) No. 2201/2203 provided that the court of a Member State would have jurisdiction in matters of parental responsibility if (a) the child had a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility was habitually resident in, or the child

was a national of, that Member State; and (b) the jurisdiction of the court had been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court was seised and was in the best interests of the child. Article 16 provided that a court would be seised when the document instituting the proceedings or an equivalent document was lodged with the court. If the jurisdiction of the court was accepted in an unequivocal manner when the court was seised, a party could not subsequently change his mind or refuse to comply with an order of the court which had assumed jurisdiction with and on the basis of his consent. Where the circumstances of a case changed very significantly and the court considered that it was no longer in the best interests of a child for it to exercise its jurisdiction, the court had power under art. 15 of the Regulations to transfer the case to another Member State with which the child had a substantial connection. If proceedings relating to parental responsibility with regard to the same child were brought in different Member States, art. 19 of the Regulations provided that the court second seised had to stay the proceedings until it was established whether the court first seised had jurisdiction, and, if that court were found to have jurisdiction, the second seised court had to decline it (paras. 6–9).

(2) The court had jurisdiction to hear the mother's application to enforce the contact order. The court had clearly been first seised of the matter when the mother applied for contact and had remained seised since then. The father had expressly accepted the court's jurisdiction when the court was first seised. Although the children were now habitually resident in Spain, they retained very considerable connection with Gibraltar. They were both Gibraltarian, British citizens, their mother and her family lived here, until recently they had attended school and nursery here, they had friends and social connections here and had enjoyed access to medical care here. It could not be said that the case should be transferred to Spain because it would be difficult or impossible for the mother to enforce an order of the present court in Spain. The Spanish courts would not refuse to enforce a Gibraltarian order made in the best interests of the children with due process and enquiry and after the father had accepted its jurisdiction. The court would not transfer the matter to Spain. The welfare of the children was the paramount consideration. It would not be in their interests for the matter to be transferred to the Spanish court at this stage. It could not be in their interests for the father to be allowed to manipulate the system, unequivocally accepting the jurisdiction of this court and then ignoring the contact order and instituting proceedings in Spain. It would be far easier for the father to travel to this court than for the mother to attend court in Spain. The present court was familiar with and seised of the case, and social services were well aware of the background. Furthermore, the mother had legal assistance in Gibraltar, whereas it would be far more difficult for her to present her case in Spain. A transfer of the matter to Spain would cause delay and the children urgently need the matter to be

resolved. In these circumstances, the present court was the most appropriate to deal with the case and it was in the children's interests for it to do so (paras. 14–21).

Case cited:

(1) *I (A Child) (Contact Application: Jurisdiction)*, *In re*, [2009] UKSC 10; [2010] 1 A.C. 319; [2009] 3 W.L.R. 1299; [2010] 1 All E.R. 445; [2010] I.L.Pr. 19; [2010] 1 FLR 361, applied.

Legislation construed:

Children Act 2009, s.3(1): The relevant terms of this sub-section are set out at para. 5.

Council Regulation (EC) No. 2201/2203 concerning jurisdiction and the recognition of judgments in matrimonial matters and matters of parental responsibility (O.J. 2003, L. 338), art. 9(1): The relevant terms of this paragraph are set out at para. 11.

art. 12: The relevant terms of this article are set out at para. 6.

art. 15: The relevant terms of this article are set out at para. 7.

art. 16: The relevant terms of this article are set out at para. 8.

art. 19: "(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.

(3) Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court."

A. Balestrino for the applicant;
C. Pitto for the respondent.

1 **BUTLER, J.:** This ruling may be reported in anonymized form and referred to as "In re E (a child—jurisdiction—prorogation)."

2 I am concerned with the issue of contact between the parties' children ("J" and "E") and their mother. The children are aged six and almost four. On April 13th, 2016, I made an interim order providing for defined contact. At that stage I was initially concerned about this court's jurisdiction, given that the children were living with their father in Spain. The father, however, was represented by experienced counsel and had clearly accepted this court's jurisdiction and continued to do so. The parties both expressed a wish that this court deal with the matter and the order was made by consent. There could hardly have been a clearer or more unequivocal acceptance of this court's jurisdiction. The mother has been resident in Gibraltar at all material times. The children have a very substantial connection with Gibraltar. They are British citizens, born and

registered in Gibraltar, had friends and social activities here and went to school and nursery in Gibraltar. It was clearly most convenient for this court to deal with the mother's application and, especially since both were expressing the wish to re-establish contact with their mother, very much in the interests of the children that the court should accept jurisdiction and make the order desired by all. Since then the situation has changed in a number of ways. The father has (without the mother's consent or even consultation with her) removed J from school and removed E from nursery in Gibraltar. The mother consented to the removal of E on the basis that she would be returned to Gibraltar when eligible (this month) to commence at a Government nursery in Gibraltar. The children now attend school and nursery in Spain, where the father lives with his current partner. For some time, contact has not been taking place between the mother and the children at all and the father appears to have withdrawn his co-operation completely. He has failed to attend further hearings, including this preliminary hearing. His counsel, Mr. Pitto, candidly told me that the father was well aware of the hearing and had indicated to Mr. Pitto during the evening prior to the hearing that he understood the importance of attending and that he would attend. Despite this, he indicated to Mr. Pitto on the morning of the hearing yesterday that he would not attend, allegedly as a result of work commitments.

3 The father recognizes that he did freely give his consent to this court dealing with the issue of contact when my previous order was made but, in his counsel's skeleton argument, it is said that he "wishes to retract his consent on the basis that the children are habitually resident in Spain." In fact, it has always been his assertion that the children were habitually resident in Spain. In short, he has changed his mind and refuses to comply with the contact order. Whether he has good reason for his change in approach to contact will be decided in due course at a final hearing once a final welfare report has been obtained. He was not, in my judgment, justified in simply deciding not to comply with the order without bringing the issue back before this court. He has now brought separate proceedings in Spain for an order relating to contact.

The issues

4 The discrete issues now before me are whether this court has jurisdiction to hear the mother's application to enforce the contact order (or to vary the order if appropriate in the interests of the children) and whether, even if the court does have jurisdiction, it should exercise it in the light of the father's withdrawal of consent and the changed circumstances. On the face of it, the father appears to believe that nothing can be done if he simply ignores the order of this court. If that is his belief, he is mistaken. If it were found to be in the interests of the children, this court could for instance (subject to the issue of jurisdiction) order that they be returned to

Gibraltar if the father were to continue to deny them contact with their mother. The courts in Spain would no doubt enforce such an order in accordance with the relevant provisions in Council Regulation (EC) No. 2201/2203 ("Brussels II Revised"), to which I shall refer later.

The law

5 Section 3(1) of the Children Act 2009 in Gibraltar provides that "*subject to Council Regulation (EC) No. 2001/2003*, a court shall have jurisdiction under this Act if the applicant or the respondent . . . or the child . . . resides in Gibraltar." [Emphasis supplied.]

6 Article 12(3) of Brussels II Revised provides that a court of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State *at the time that the court is seised*. That cannot mean (as is suggested in para. 10 of the father's counsel's skeleton argument) that the court can *only* have jurisdiction when a child is habitually resident in the Member State of that court. That much is clear, since art. 12 of Brussels II Revised (dealing with prorogation of jurisdiction) provides for jurisdiction if the following conditions are satisfied, namely that—

> "(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; and
>
> (b) the jurisdiction of the courts *has been* accepted *expressly or otherwise* in an unequivocal manner by all the parties to the proceedings *at the time the court is seised* and is in the best interests of the child." [Emphasis supplied.]

7 Nor, in my judgment, can it mean that, once the jurisdiction of the court has been accepted in an unequivocal manner when the court is seised, a party can simply decide later at any time to change his mind and not to comply with an order made by a court which has assumed jurisdiction with and on the basis of his consent. Where circumstances have changed very significantly and the court finds that it is no longer in the best interests of a child for the court to exercise its jurisdiction, the court will transfer the case to another Member State with which the child has a substantial connection. Article 15 of Brussels II Revised gives the court such power if the other Member State "would be better placed to hear the case . . . and where this is in the best interests of the child."

8 Article 16 reads: "A court shall be deemed to be seised: (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court . . ."

9 In my judgment, art. 19(2) and (3) of Brussels II Revised is designed to resolve any conflicts when proceedings relating to parental responsibility with regard to the same child are brought in different Member States (as now in this case). The court "second seised" *must* stay the proceedings until it is established whether the court first seised has jurisdiction, and if that court does have jurisdiction then the second seised court must decline it. I am told that the matter is listed in the Spanish court for December of this year.

10 The crux of the issues which I now have to determine is contained in art. 15, which allows the courts of the Member State having jurisdiction to transfer the case to another Member State with which the child has a particular connection if it would be better placed to hear the case and is in the best interests of the child.

11 I mention for the sake of completeness that art. 9(1) of Brussels II Revised provides that—

> "where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence."

That provision does not affect my decision in this case.

12 I have been referred to a number of English judicial authorities, which I have read and considered fully. I refer expressly only to paras. 23 and 36 of the judgment of Baroness Hale, JSC in the UK Supreme Court in *In re I (A Child) (Contact Application: Jurisdiction)* (1), with which I agree entirely and which I respectfully adopt ([2010] 1 A.C. 319, at para. 23):

> "The most difficult questions are posed by the words 'at the time the court is seised.' The first is whether they refer to a moment in time or, as held by the Court of Appeal, to any time while the proceedings are continuing. As a general proposition, it should be clear at any particular point during the proceedings, and preferably from the outset, whether or not the court has jurisdiction. Certainly a party who has once accepted jurisdiction should not be able to withdraw it at any time before the conclusion of the case. Acceptance of jurisdiction must include acceptance of the court's decision whatever it may be. Otherwise there would be no point in submitting to the court's jurisdiction."

I add that this, in my judgment, applies even more when the order is made by consent. She also held that acceptance of jurisdiction is not required at the time when the court is seised but suffices if it is given later. That, in my view, must be correct since the respondent to an application may not even know of it at the time that it is filed. The whole purpose of art. 12.3 would be lost if jurisdiction could not be accepted later. Baroness Hale, JSC considered the meaning of "in the best interests of the child" when considering the issue of jurisdiction (*ibid.*, at para. 36):

> "This question is quite different from the substantive question in the proceedings, which is 'what outcome to these proceedings will be in the best interests of the child?' It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor."

Relevant facts of this case

13 I have considered all of the documents contained in the bundle before me and have heard oral evidence from the mother. Neither party has sought an adjournment, though I gave them the opportunity to apply. Ms. Louis, the social worker involved in the case, was unable to attend but neither party wished to ask her (or the social worker who attended in her stead) any questions.

14 I find that this court was clearly first seised of the matter when the mother first made her application for contact and filed it with this court (March 21st, 2016) and was seised at the time of my interim contact order on April 13th, 2016 and has remained seised throughout since then.

15 It is admitted on behalf of the mother that the children are now habitually resident in Spain. It is conceded on behalf of the father that this court was first seised of the matter at least by April 13th, 2016 and is still seised of it. It is also conceded on the father's behalf that the Spanish court must stay the father's application there until this court has determined the issue of whether the case should be transferred to Spain. There is no doubt that the children retain a very considerable connection with Gibraltar. They are Gibraltarian, British citizens, their mother lives here, they attended school and nursery here until removed quite recently to school and nursery in Spain, they have friends and social connections in Gibraltar, and they have enjoyed access to medical care here. Their maternal family, including half-siblings and grandparents, lives in Gibraltar. I do find that the mother consented to the move of E to nursery in Spain towards the end of last year but on the clear understanding and assurance that she would be returned to nursery in Gibraltar in September of this

year. The mother was not given notice of the father's intention to move J to school in Spain and did not and would not have consented to such a move. The father absolutely and unequivocally accepted the jurisdiction of this court when the mother made her application and on April 13th, 2016, and had accepted this court's jurisdiction throughout. He very soon thereafter decided to ignore the order and made his application in Spain.

16 It is said that the case should be transferred to Spain because the mother would find it difficult, if not impossible, to enforce an order of this court in Spain. I do not believe that the courts in Spain would refuse to take steps to enforce an order of this court made in the best interests of the children with due process and enquiry and after the father has accepted its jurisdiction in these circumstances. Article 50 of Brussels II Revised should entitle the mother to legal assistance in Spain for these purposes and I have asked her counsel to make enquiries of the Central Authority in Spain in this regard. She cannot afford to instruct a Spanish lawyer privately and it is important that the Spanish court be kept informed of developments in this court.

17 It is little short of scandalous, on the face of it, that the father took steps which resulted in the mother being arrested and kept in prison for a day and a half when she entered Spain following the father's application. The father seems to be intent upon depriving the children and their mother of contact. Whatever differences there may have been between the parents, they should not be the cause of the children losing contact with their mother. That would undoubtedly not be in their best interests. What ought to happen is that the father should come to Gibraltar and co-operate, with the assistance of social services here, in reaching a workable and sensible resolution of any issues between the parties in order to mend the situation and save the children from the inevitable long-term harm which they will suffer if they do not see their mother.

18 In the end, Mr. Pitto accepted that the issue for me now to decide is whether the case should be transferred to the Spanish court pursuant to art. 15. I find provisionally that the father has manipulated the situation in an attempt to avoid the jurisdiction and order of this court and in order to exclude the mother from contact with the children. I shall reconsider that finding if the father attends at the next hearing and contests it. The mother is at this stage unable to care for the children as a result of her own problems including depression but she is able to continue to play an important part in their lives and, unless there is very good reason otherwise, should do so. It will be for me to decide the issue at the hearing which will take place on a date to be fixed as soon as possible. The welfare of the children is and will be the paramount consideration for this court (and, I imagine, that of the Spanish court were it to hear the matter at any stage in the future). In my judgment, it cannot be in the interests of the children that I transfer the matter at this stage. It cannot be in their

interests for the father to be allowed to manipulate the system in this way, accepting unequivocally the jurisdiction of this court and then ignoring the very order to which he consented and attempting to steal a march on the mother by instituting proceedings in Spain. He does not live far from Gibraltar. His only real connection with Spain is that he has moved there in order to live with his current partner and, for the same reason, now works there. It is much easier for him to travel to this court than it is for the mother to travel to the court in Spain. This court is entirely familiar with and seised of the case and social services are well aware of the background. They have dealt with the children and the family over a substantial period of time, the children having been in care at Tangier View. On November 17th, 2015, the Care Agency brokered an agreement between the parents pursuant to which the children would stay with the father in La Linea, attending school in Gibraltar and having access to the health service in Gibraltar. It was not intended that their substantial connection with Gibraltar should be lost to the extent that they would no longer be habitually resident here or that they should lose their valuable rights as residents of Gibraltar, particularly with regards to education and health. The agreement provided for regular, substantial and usual contact with the mother. It was on that basis that the agreement was accepted by the mother. During the course of this year the mother's involvement with the children has declined (against her wishes), as a result of which she made her application to this court.

19 My order dated April 13th, 2016 provided for interim contact pending the preparation of a report by the Care Agency, which had had so much connection with the children and family. On May 18th, 2016, the court welfare officer reported, recommending an increase in contact. The mother filed an application to enforce the April order. On August 9th, 2016, the father did attend a hearing before Ramagge Prescott, J., when an interim order increasing the level of contact was made and the judge emphasized the importance of restoring the children's relationship with their mother. On August 18th, 2016, the mother filed yet another summons to enforce the orders for contact. On September 7th, 2016, in an attempt to begin the re-introduction of the children to the mother, I ordered that there be interim contact, supervised, on Wednesdays from 3 p.m. to 6 p.m. The father did not comply even with that very limited order and I find provisionally that he is clearly determined to remove the mother from the children's lives.

20 The mother has legal assistance in Gibraltar and the father is clearly able to be represented. It would be far more difficult for the mother to present her case in Spain. The social workers who have dealt with the family, including the children, are in Gibraltar. For the proceedings to be transferred now to Spain would cause delay for these children, who urgently need the matter to be resolved.

21 In these circumstances I have no hesitation in finding that it is this court which continues to be the most appropriate to deal with the current situation and that it is in the children's interests for this court to hear the case. This is no reflection on the Spanish court which, I am sure, would also act in accordance with its view as to the welfare of the children if it were to hear the matter.

22 It is possible that after a full hearing this court will decide that thenceforth the Spanish court should deal with any further applications. More likely, this court may wish to see whether the father complies with such further decision as it may make. If the father fails to attend the hearing, he knows that his case may be weakened. Both parties must, in the interests of the children, attend that hearing and participate fully in the preparation of the case and communication with social services. In the meantime the father must comply with the provisions of my order dated September 7th, which are far from onerous and the very least which, in my view, should be done to restore the mother's contact. It is quite likely that at some stage in the future it will be more appropriate for the Spanish courts to deal with disputes concerning the children but I sincerely hope that these parents will find a way of dealing with such issues for the sake of their children without constant litigation and bitterness during the course of their childhood.

23 I am very conscious that I have not set out the whole of the history of this matter in this preliminary ruling, which relates only to the issue of jurisdiction. The history and findings of fact will be dealt with at the next hearing if no agreement is reached.

24 I shall hear submissions as to further directions when I hand down this ruling today.

Order accordingly.