[2016 Gib LR 286]

IN THE MATTER OF IB (A MINOR)

CARE AGENCY v. FB and KBD

SUPREME COURT (Ramagge Prescott, J.): December 14th, 2016

Family Law—children—parental responsibility—under 1996 Hague Convention, art. 22, court may refuse to recognize parental responsibility obtained in country of child's former habitual residence if manifestly contrary to public policy—interests of child not paramount—art. 22 to be used only in exceptional cases, e.g. trafficked children—acquiring parental responsibility by false representations to foreign authority not manifestly contrary to public policy

The Care Agency applied for a declaration that the respondents did not have parental responsibility in relation to a child and sought a full care order.

The respondents, both of whom were permanent residents in Gibraltar, had married in 2012. The second respondent was Gibraltarian and the first respondent was Moroccan. In September 2015, the respondents had travelled from Morocco to Gibraltar with a child who had been born in Morocco in December 2014. The second respondent applied for a British passport for the child, submitting the child's Moroccan birth certificate which showed the respondents to be his parents. Suspicion was aroused as it was widely known that the second respondent was unable to have biological children and the matter was reported to the police.

Initially, absent any evidence that the respondents were not the child's parents, no intervention had been considered necessary. The first respondent's account was that, in early 2014, whilst temporarily separated from the second respondent, he had had a brief relationship with a woman in Morocco. She had subsequently informed him that she was pregnant with his child. As Moroccan law did not recognize the concept of a single mother, the first respondent had sought to marry her in order to legitimize the child. When he travelled to Morocco, however, she left the child with him and he had been unable to contact her since.

The first respondent had then attempted to register the child in Morocco. As it was not possible to register a child without including the name of the mother, and as a father could not register an illegitimate child, the second respondent had agreed to her name being put on the birth certificate. He also submitted their marriage certificate. According to the Care Agency's expert on Moroccan family law, the Registrar would not

conduct an investigation on an application for registration. Provided that the correct documents were lodged, the information would be taken at face value and a birth certificate issued. Furthermore, in a situation where a couple had produced a marriage certificate and claimed that a baby was theirs but they could not produce the necessary certificate of a doctor attesting to the birth, the position could be legalized by the father making a confession accepting paternity, which the first respondent had done. Although the expert's opinion was that the first respondent's confession was invalid because it named the child's biological mother rather than the second respondent, the child had eventually been registered.

In December 2015, the police shared DNA results which demonstrated that the first respondent was not the child's biological father. The Care Agency applied for an emergency protection order on the ground, *inter alia*, that as the respondents did not have parental responsibility for the child he was at risk of suffering significant harm in their care. The order was granted and since then the child has been in institutional care. The respondents were arrested on suspicion of child abduction and making a false declaration to the Gibraltar passport authorities. It appeared that charges relating to child abduction were not being pursued and the Moroccan authorities did not appear to be concerned with the matter.

The Care Agency sought a declaration that the respondents did not have parental responsibility for the child and a full care order. It submitted that, even if the court were to find that the respondents had parental responsibility, it should be removed pursuant to art. 22 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, as it had been obtained by deceit and was manifestly contrary to public policy. Article 22 provided that "the application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child." Given that the respondents' account contained many uncertainties, it should not be believed and the court should conclude that the child had not come into the respondents' care as they claimed.

The guardian submitted, *inter alia*, that if the respondents had parental responsibility and art. 22 was not engaged, measures should be ordered to protect the child under art. 5 of the Convention.

The Care Agency and the guardian had no concerns as to the respondents' ability to care for the child, to whom they had shown great commitment even after the first respondent had been informed that he was not the biological father.

Held, ordering as follows:

(1) The respondents had parental responsibility for the child. Since the Care Agency had *de facto* parental responsibility under the interim care order, it was an "interested party" able to bring an application under the Family Proceedings (Children) (1996 Hague Convention) Rules 2011,

r.30(1) for a declaration that the respondents did not have parental responsibility. Article 16(1) of the Convention provided that "the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child." It was not in dispute that, prior to arriving in Gibraltar, the child had been habitually resident in Morocco. He had been born there, he had a home and he was being cared for there. He had a birth certificate and passport, both of which were valid and authentic documents issued by the Government of Morocco. The birth certificate endowed parental responsibility on the respondents. In the expert's opinion, even if these documents had been obtained by false declarations or deceit, they were nevertheless valid and Moroccan law would recognize the legal truth as stated therein over the factual truth. Under art. 16(3) of the Convention, parental responsibility that existed under the law of the state of the child's habitual residence would subsist after a change of habitual residence to another state. The respondents, who had parental responsibility under Moroccan law, continued, therefore, to have parental responsibility for the child in Gibraltar (paras. 47–50).

(2) The respondents' parental responsibility would not be removed by virtue of art. 22 of the Convention. Article 22 of the Convention provided that the application of the provisions under which parental responsibility had been established could be refused only if the application would be manifestly contrary to public policy, taking into account the best interests of the child. The interests of the child were not paramount but merely an element to be taken into account in the assessment of what was manifestly contrary to public policy. Article 22 was to be used sparingly, only in exceptional cases and only where to allow the foreign rule, law or judgment would result in a breach of a rule of law that was manifestly offensive to public policy. Given that the article was to be applied purposively and sparingly, any alleged affront to public policy would have to be clearly and conclusively established. If the child had come into the respondents' care as a result of child trafficking, that would have been so serious and so abhorrent as to qualify as one of those extremely rare situations that would be manifestly contrary to public policy in Gibraltar. The Care Agency had not, however, satisfied the court on the balance of probabilities that the respondents had been involved in the trafficking of the child. Although there were uncertainties in the case, mere suspicion did not suffice. There was no reason why the first respondent's account as to how the child came into his possession could not be true. It was not for the respondents to prove that the child had come into their care as they alleged and no alternative scenarios had been put to them (paras. 53–62; para. 69).

(3) Nor would the respondents' parental responsibility be removed on the basis of their false representations when registering the child. It was more likely than not that the first respondent had made some kind of false

representation to the official at the Registry in Morocco that he and the second respondent were the child's biological parents. At the very least, he had submitted their marriage certificate in support of his application for the birth certificate and thereby misrepresented the facts. In addition, on the balance of probabilities, the second respondent had been complicit in that course of action. However, it did not follow that, because the respondents had lied about the second respondent's maternity to the Registry, they had lied about everything. People lied for many reasons and the reason in this instance was that the respondents had known that, because the child's biological parents were not married, the first respondent could not register the child, who would be illegitimate. The first respondent's motivation had been to secure the legitimacy of a child he believed to be his and to offer him a home and family with his wife. The court did not condone the first respondent's actions but neither was it persuaded that every aspect of the respondents' account was false or that they were guilty of child trafficking. The making of a false declaration before the Registry as to a child's natural mother was a criminal offence punishable with imprisonment under Moroccan law but that was a matter for the Moroccan law enforcement agencies. The irregularity in the process of registration in Morocco, albeit by deceit, did not make the matter so manifestly contrary to public policy as to engage art. 22. The birth certificate and passport were valid authentic documents and the child was a Moroccan citizen. The Moroccan authorities and courts would not look behind the legality of the documents and charges in relation to child abduction were not being pursued (paras. 63–68).

(4) No measures were required to protect the child under art. 5 of the Convention. Article 5 was not engaged by the respondents' past actions; the child trafficking allegation had not been made out and the impact on the respondents' evidence of their dishonesty in the registration process was limited. Nor were there any concerns as to the respondents' ability to care for the child if he were returned to them (paras. 70–71).

(5) It was not in the child's best interests to remain in institutional care for the indefinite period that he would likely face if a care order were made. A care order would deprive the child of the chance to spend his early, formative years in a loving family unit as well as cause him psychological damage. The only justification for that would be if it had been proved that the respondents had acted in a way that was manifestly contrary to public policy and therefore that their parental responsibility should be removed, which was not the case (paras. 73–77).

Cases cited:

(1) *AS* v. *TH*, [2016] EWHC 532 (Fam); [2016] 3 F.C.R. 327, applied.

(2) *Bamberski* v. *Krombach*, [2001] Q.B. 709; [2001] 3 W.L.R. 488; [2000] E.C.R. I-1935; [2001] All E.R. (EC) 584, considered.

(3) *LAB* v. *KB (Abduction: Brussels II Revised)*, [2009] EWHC 2243 (Fam); [2010] 2 FLR 1664; [2010] Fam. Law 933, applied.

(4) *R.* v. *Lucas*, [1981] Q.B. 720; [1981] 3 W.L.R. 120; [1981] 2 All E.R. 1008; (1981), 73 Cr. App. R. 159; [1981] Crim. L.R. 624, referred to.
(5) *S (Brussels II: Recognition: Best Interests of Child) (No. 1)*, *Re*, [2003] EWHC 2115 (Fam); [2004] 1 FLR 571; [2004] Fam. Law 19, applied.

Legislation construed:
Family Proceedings (Children) (1996 Hague Convention) Rules 2011, r.30(1): The relevant terms of this sub-rule are set out at para. 47.

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (The Hague, October 19th, 1996), art. 5: The relevant terms of this article are set out at para. 70.
art. 16(1): The relevant terms of this paragraph are set out at para. 48.
art. 16(3): The relevant terms of this paragraph are set out at para. 50.
art. 22: The relevant terms of this article are set out at para. 51.

J. Fernandez and *M. Zammitt* for the applicant;
C. Finch for the first and second respondents;
G. Guzman, *Q.C.*, for the guardian *ad litem*.

1 **RAMAGGE PRESCOTT, J.:** This is an application by the Care Agency for a declaration that the respondents do not have parental responsibility in relation to a child, IB, pursuant to r.30 of the Family Proceedings (Children) (1996 Hague Convention) Rules 2011 and art. 16 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention"), and for a full care order in respect of IB. Alternatively, should the court find that the respondents have parental responsibility, the applicant seeks a declaration that pursuant to art. 22 of the 1996 Convention, the application of the law designated by the provisions of Chapter III be refused on the grounds that the application would be manifestly contrary to public policy.

2 At the conclusion of this hearing, the guardian *ad litem* appointed to represent IB conceded that the respondents have parental responsibility but joined the applicant in seeking a declaration pursuant to art. 22 and, in addition or in the alternative, submits that art. 5 is engaged.

Background

3 The respondents married on June 8th, 2012 in Marrakech, Morocco. IB was born in Morocco on December 13th, 2014. In September 2015, IB came to Gibraltar under the care of the respondents. He travelled on his own Moroccan passport, which had attached to it a visa allowing him to remain in Gibraltar for a period of 6 months. The respondents are both permanent residents in Gibraltar. KBD is of Gibraltarian nationality and

FB is of Moroccan nationality. On September 30th, 2015, KBD applied to the Civil Status and Registration Office (CSRO) for a British passport for IB. In support of the application, KBD submitted a copy of his Moroccan birth certificate. Staff at the CSRO became suspicious because the birth certificate identified KBD as the child's mother and staff who knew her believed that KBD could not have biological children. The CSRO thereafter reported the incident to the police.

4 On October 28th, 2015, a strategy meeting was held between the Royal Gibraltar Police ("RGP") and the Care Agency; absent any evidence that the respondents were not IB's birth parents, no intervention was considered necessary. Thereafter, both respondents were interviewed under caution by the police. FB stated that, whilst in Morocco, he had had an extra-marital affair with a night club waitress who told him she had become pregnant with his child. She subsequently gave the child into his care and disappeared. KBD acknowledged she was not the child's biological mother. A second strategy meeting was held on December 1st, 2015, a third on December 3rd, 2015, and a fourth on December 21st, 2015. At the meeting on December 21st, 2015, the police shared DNA results which demonstrated that the first respondent was not the child's biological father.

5 On December 22nd, 2015, the applicant filed an application for an emergency protection order pursuant to s.94 of the Children Act 2009 on the grounds that, given that *prima facie* the respondents did not have parental responsibility, the child was at risk of suffering significant harm should he remain in their care because they were unable to discharge any rights, duties, powers, responsibilities and authority which by law a parent was able so to exercise. The emergency protection order was granted and since then the child has been subject to various interim care orders pursuant to s.84 of the Children Act.

6 Whilst there are some facts which are not in dispute, the crucial elements in this case, which I define as being how IB came to be in the care of the respondents and how he came to be registered as their child, remain the subject of some uncertainty even after lengthy oral evidence. As a starting point, I propose to summarize the position as the respondents claim it to be in their written statements and from the interviews which FB gave to the RGP and then I shall discuss this in light of the oral evidence given in cross-examination as well as the expert evidence.

7 FB was interviewed twice by the RGP. The first interview was on November 3rd, 2015 and lasted 8 minutes, and the second was on December 21st, 2015 and lasted 24 minutes. FB made one witness statement, dated July 2nd, 2016, which he adopted as his evidence-in-chief. KBD made one witness statement, dated July 15th, 2016, which she adopted as her evidence-in-chief.

8 FB's interview of November 3rd was essentially a "no comment" interview save for the fact that FB asserted he was IB's biological father and he consented to provide a non-intimate sample for DNA testing.

9 In his interview of December 21st, 2015, FB set out his account. It was this. In the beginning of 2014, some time between January and March, whilst on a separation from his wife, KBD, he met a girl in Morocco by the name of Malak who was a waitress in a night club called "Must." He went out with her between two and four times, and had sexual relations with her three or four times. After some two to three months, when he was back in Gibraltar reunited with his wife, Malak called him and told him she was pregnant by him. FB said that KBD had given him permission to marry Malak and that he had been looking for Malak in order to marry her so that he could register the baby in both their names because in Morocco the concept of a single mother did not exist. He said that he had been looking for Malak to "get agreements there and is put in the baby there in office legalisation." FB then confirmed that the last time he saw Malak before the baby was born was to enter into a typed agreement with her in relation to IB which was lodged in a court office but which he has been unable to retrieve. There has been no evidence as to what precisely the purpose or content of this "agreement" was or that it has been relied on in any way in the process of registration.

10 When the baby was born in December 2014, FB was contacted by Malak and he went to Morocco. Malak gave him the baby and left. He took the baby to his mother's house for her to care for him. He began the process of registration for the child in his and KBD's name.

11 FB said that Malak was from Safi, a place some 250 km. from Marrakech, but that she was working in Marrakech. He said that the baby was not born in a hospital but at home and that Malak was assisted by a special midwife. He said that post being handed the baby he had tried to contact Malak but had been unsuccessful. He said he had lost his mobile phone in Morocco and he had been trying to call "anybody" to obtain information about her. The only news he had was that she had married a man from Saudi Arabia and had gone to Saudi Arabia with him and this was why she didn't want the baby. He said: "She is getting married with another whatever and she's left Morocco. This is all the news I have about it. This is why I have started my document for him to come here and live with me."

12 FB said he talked to a man who helped him do the paperwork and this man told him that in Morocco he could not register his son without including the name of the mother, so he asked KBD for permission to put her name on the birth certificate. He said: "The man do it for me, I don't know the law about there, I am not dealing with the law, I know nothing

about it, it's only I am asking my father because this is my problem, I need to put my son."

13 In her evidence-in-chief, KBD endorses her husband's evidence; she said that she was asked by FB if she—

> ". . . would consent to bringing up the child as part of our family with me as the mother . . . the registration of the child in Morocco was handled exclusively by F and I took the view that the documents issued for and on behalf of the child were valid and authentic Moroccan documents."

14 In her evidence-in-chief, KBD acknowledges that she has been and is very interested in adoption and in the past she suggested to FB that they approach Social Services to inquire about adoption policies and procedures. She stated she had never had IVF treatment but had consulted on the possibility of doing so and had been approved, provided she first lost some weight. She said that she had lost some weight but was in no immediate hurry to lose it all, and it had been some two years since they had consulted with regard to IVF. When FB was being cross-examined, he stated that he had no knowledge of there being any difficultly conceiving. KBD said this was probably down to the issue with language barriers, because he was aware they had sought IVF advice. When she herself was asked if they had difficulty in conceiving naturally, she also said "no" and then went onto explain that the problem lay not with conception but with her ovaries. One presumes that the problem with her ovaries might have caused the difficulty in conceiving, but her reply is indicative of what she understands conception to mean, and if she is not able to give the term its ordinary meaning one would suppose FB, with his restricted English, would be even less able to do so. KBD agreed that she did want to become a mother and was equally comfortable with it being via the route of biological child or adopted child, and if she could have both all the better.

The issues

15 I have found this an exceedingly hard case to determine, not only because the future of a very young child is at stake but also because of the fact that the crucial elements of this case take place against the backdrop of a culture which is entirely anomalous to ours. Customs, approach to family, inter-couple relationships, legitimacy of children and the requirements of government authorities with regard to registration are all very different. As a result, I have found that a proper understanding of the evidence can only be had by considering it against the practices and culture of Morocco. As MacDonald, J. observed in *AS* v. *TH* (1) ([2016] EWHC 532 (Fam), at para. 24):

> "The decision on whether the facts in issue have been proved to the requisite standard must be based on *all* of the available evidence and

should have regard to the wide context of social, emotional, ethical and moral factors . . .”

An additional difficulty has been FB’s obvious restricted ability to express himself in the English language, as well as his oft times apparent difficulty in understanding the nuances of certain questions which were put to him. I take account of this in my consideration of the evidence. Various matters came to light in the course of the evidence; I cannot deal with them exhaustively but I shall highlight below the most significant.

Before IB was born

16 Both FB and KBD agree that FB told KBD about Malak’s pregnancy soon after he himself found out about it, some five to six months before the baby was born, and that FB told KBD that he would accept responsibility for the child. At that point there was no discussion about KBD being a part of IB’s life, although FB was certain that he would not turn his back on the child. FB said he asked KBD for permission to marry Malak. In cross-examination KBD said that from the time FB told her of the pregnancy to the time that IB was born, there were no discussions between them at all on the subject of the baby. When she was pressed that this seemed odd and reminded that FB had said that he had asked her for permission to marry Malak, this is what she said: “There wasn’t discussions, if there was a question asked there was, there wasn’t discussions about it . . . it wasn’t a conversation it was a simple do you give me permission to get married . . .” She said there was no need for further discussion because she knew that the purpose for the request to marry Malak was because in Morocco it was not “seen well” to have a child out of wedlock.

17 Whilst I do not ignore the fact that in Morocco it is permissible for a man in certain circumstances to take a second wife, it is not a concept that we embrace in this part of the world. KBD is a Gibraltarian, born, raised and educated in Gibraltar. She came across as articulate, strong willed and feisty. The impression I had was that, but for the prospect of her husband having an illegitimate child, she would not have contemplated his taking a second wife. On the one hand, against the backdrop of FB becoming a father via an extra-marital affair and his wish to re-marry, it would not be unreasonable to suppose that there may have been questions to resolve or discuss. That said, every relationship is unique; there is not a rule book by which people can be judged as reacting to any given situation in any given way. KBD had been told her husband had had an affair and that he had engendered a child. Perhaps her way of dealing with the circumstances she found herself in was to disengage from active participation in the pregnancy and its consequences. In cross-examination, KBD admitted that she felt hurt and betrayed by FB’s affair and she said: “I was annoyed at him but at the same time I said that if it was his child he should maintain

it." When she was questioned: "Did you not virtually interrogate your husband as to the details?" she replied:

> "No. Maybe call it, maybe call it guard or something I don't know, I don't know how to explain it pero maybe it's a guard that I put up myself to not suffer any more than what I've suffered. I've been through quite a lot in my life not only this."

After IB was born

18 Thereafter, FB says that in December 2014 he received a call from Malak telling him the baby had been born and this was why he travelled to Morocco at that time, for the specific purpose of meeting the baby. Yet the evidence of KBD is that, as far as she was aware, when FB went to Morocco in December 2014 it was for a regular visit because his mother had not been well since the death of his father and she did not become aware of IB's birth until early January 2015. Thereafter she made arrangements to travel to Morocco and, once there, she fell in love with IB. Her evidence was that, other than the brief conversation concerning the possibility of FB's marriage to Malak and a request from FB to put IB into their family book, there was no discussion at all regarding the baby between the time when she was first told that Malak was pregnant and the time she travelled to Morocco on or about January 14th, 2015, and she stated she "had nothing to do with the documents or anything . . ."

19 The evidence of FB appears to contradict KBD's assertion that FB did not tell her the purpose for his trip in mid-December 2014. He was asked:

> "Mr. Zammitt: Once you decided that you were going to go over to Morocco to see your child what other intentions did you form?
>
> FB: I informed my wife about all the story, if she will accept me with my son or not.
>
> Judge: Your wife K?
>
> FB: KD. If I do any step I will inform her."

It is apparent from FB's evidence not only that he told KBD the reason for his December trip but also that it was his policy to communicate each step to her. I am satisfied that KBD knew of the real reason for FB's trip to Morocco in mid-December.

20 When FB arrived in Morocco, he met up with Malak in a café at a petrol station. His evidence was that Malak had telephoned him and pre-arranged the meeting. FB went with a friend and met Malak and the baby. She told him: "This is your child, get it or leave it, I will not be responsible for the child." FB then took the child to his mother's house and explained all to his mother. At some point after this, he went to seek

Malak out at the address where he knew she lived and found that she had left. FB knew there would be some difficulties with regard to the registration of the child because "there's problems to have a relationship and to have the baby under Sharia Islam . . . Because with the law you cannot have sex without marriage." Having been unable to locate Malak after she had left him the baby, FB began the process of registration.

The process of registration

Expert evidence

21 Before I deal with the respondents' evidence on how they secured the issue of IB's birth certificate, I shall deal with that part of the expert's evidence which relates to the standard procedure for the registration of legitimate and illegitimate children. Thereafter, I shall refer to the evidence of the expert as it appears relevant when I discuss the evidence of the respondents and issues surrounding the relevant documents.

22 The Care Agency called Ms. Imane Amar, a lawyer and an associate of the Casablanca legal firm Bassamat & Associée. Ms. Amar had practised law in France for six years before taking the bar exams in Morocco. She had practised family law in Morocco for a year prior to her involvement in this case. She was not qualified in sharia law but she was familiar with the principles which are contained in the Family Code, given that the Moroccan Family Code is formulated in accordance with sharia law. She confirmed she had provided the original written opinion which had been approved by Ms. Bassamat, who herself had been in practice for 30 years.

23 I remind myself of the principles governing the approach to expert evidence, and I apply them to my consideration of the same.

24 Ms. Amar explained that upon an application for registration the Registrar would conduct no investigation and, provided the correct documents were lodged, he would take the information at face value and issue the birth certificate. She explained that, pursuant to Moroccan law, there are three ways to establish filiation: (i) by conjugal relations; (ii) by mistake; and (iii) by confession.

(i) *Conjugal relations*

25 Ms. Amar stated that the procedure for registering a legitimate child would be for either the father or the mother or uncle (although in the great majority of cases it is the father) to go to the civil officer at the Registry within 30 days of the child's birth and make a declaration before him stating the child's name, the names of the father and mother, and the place and date of birth. The Registrar or someone acting on his behalf would then fill out a form called the declaration paper according to the statement

made by the declarant. In addition, pursuant to Decree No. 2–99–665 of October 9th, 2002, taken for the application of Law No. 37–99, art. 17, such a declaration of birth must be supported by a certificate ("the certificate") issued by an obstetrician, a midwife, or the local authority as well as by a copy of the marriage certificate. She explained that the certificate would have to detail that the child was born to that particular mother on the specific date and place. If neither a midwife nor a doctor was present at the birth then the parents would need to obtain a similar certificate from a public agent from the local authority, which would confirm that the birth occurred from the relevant mother at the relevant date and place. The reason for the requirement of the certificate and the marriage certificate is to prove the presumption of legitimate procreation.

26 The procedure for the registration of an illegitimate child is different. Moroccan law does not recognize illegitimate filiation from the father, although from the mother filiation is always legitimate. Therefore it is only the mother of an illegitimate child who is able to register him. If the mother of an illegitimate child rejected her child, the child would be categorized as an abandoned child. The concept of "abandoned child" in Moroccan law refers to a child of unknown parents, or from a known mother who has abandoned her child. In the latter example, even if the biological father is known and wishes to take responsibility for the child, he would, notwithstanding, be unable to register the child under his name. He could register the child but only under the abandoned child regime and the birth certificate in respect of that child would read "unknown parents."

(ii) *Mistake*

27 This refers to a specific situation where a couple are legally engaged and enter into sexual relations post-engagement but prior to marriage. Upon the consequent birth of a child, the couple can petition the court to recognize filiation but this will only be granted where the engagement is proved to be official.

(iii) *Confession*

28 Pursuant to art. 160 of the Moroccan Family Code, paternity can also be established by the confession of the father who recognizes the child as his own. Pursuant to art. 162, the confession is proved by the written statement by the hand of the person who made it or by deed. My understanding of the expert's evidence is that a confession is used by a father in those circumstances where he has filed a copy of his marriage certificate and he is wishing to register a child belonging to him and his wife but where there is no certificate.

FB's and KBD's account

29 The evidence of FB was that, as soon as he had the baby in his care, he went to the nearest official department and enquired what documents were necessary to register the child in order to have the birth certificate issued; his evidence was that he was told they were: (i) father's birth certificate; (ii) father's ID card; (iii) marriage contract; (iv) proof of residence; (v) certificate of a doctor attesting to the birth ("the certificate"); and (vi) family book. Thereafter, FB collected these documents and took them to the Registry Office. Once at the Registry Office he said that the Registrar observed that, although the certificate stated when the baby had been born, it was silent as to the identity of the mother. Because of this, the Registrar asked FB to produce a further document which we have been referring to as "the confession." FB's evidence was that, as a result of the Registrar's request, he drafted the confession and filed it at the Registry. Those documents which for the purpose of this case are relevant to the issue of registration are (v) and (vi) above as well as the confession and I shall deal with each in turn.

(a) *Certificate and health book*

30 Aside from the family book, there is a health book which FB purchased in a shop below the doctor's surgery and then took up with him on his visit. The same paediatrician who issued the certificate at the same time and on the same visit filled in the health book. FB's evidence was that, two or three days after the child came into his possession, he took him to the doctor for his inoculations and for the issue of the certificate and it was this same doctor, a Dr. Aboulghit, who in fact issued the certificate at that time. Yet the health book records the first consultation as January 26th, 2015, and there is no reference whatsoever to IB having been examined before that, this despite FB's assertion that when the child came into his possession he was in bad health because Malak had been feeding him cow's milk and he required medical attention.

31 FB's position was that the health book would only reflect a record of inoculations and not of visits generally. Drawing from general knowledge, if this health book is something akin to the type of inoculation card used in Gibraltar in respect of babies, then one would not expect to find a record in there of doctors' visits in relation to general health. A record of that, one would suppose, would be in the doctor's own notes. In any event, counsel for the guardian said that it is odd that absent from the health book are a photograph of the child, an entry of the place of his birth, an entry of his gender, first name, last name, age, address, occupation or contact numbers of mother or father. Under the heading "Mode d'accouchement," there are absent any details regarding the delivery and term of pregnancy. FB said this was because the doctor just filled in the child's name and date of birth and told him to fill in the rest. Whilst it is not difficult to suppose that the

doctor might tell FB to affix a photograph of the child and fill in his own details and those of his wife, it is less conceivable that he would expect FB to fill in details regarding the delivery. That said, if FB (as he says he did) told the doctor that he had no details of the delivery, then perhaps it is not surprising that that section would not have been filled in by anyone at all.

32 In relation to the certificate which FB says the doctor issued on this visit, neither the original nor a copy of this certificate has been presented at this hearing. FB seemed to be saying that he had presented that certificate at the Registry but could not retrieve a copy.

33 It is evident from FB's actions and evidence that he believed that the certificate was a necessary document in the process of registration, and in fact he says it is precisely because the authorities found that the certificate he submitted was deficient that he was asked for the confession. In cross-examination it was put to him that this sits a little uneasily with the statement made by him on July 2nd, 2016 and adopted as his evidence-in-chief. At para. 8 he says:

> "I have also asked about the question of a doctor or midwife certificate from my mother and other acquaintances, and I have been informed generally that although this technically is a legal requirement, it is not uncommon in Morocco for this requirement to be overlooked in country and outlying areas in particular. It was not considered necessary in my case I believe as I was registering the birth believing that I was the natural father of the child and confessing to the same."

It could be that FB is saying that in his particular case the certificate was not necessary, that is to say he did not need to produce one at all because he was the natural father and was confessing to that. But, taken in light of the fact that in his evidence FB states he did produce a certificate, I find it more likely means that in first instance a certificate was produced by FB but ultimately was not considered necessary because he submitted a confession and thus substituted the confession for the certificate. Certainly from FB's evidence it seems that the purpose of the confession was to overcome the hurdle of the deficient medical certificate.

(b) *Confession*

34 FB's evidence was that when he submitted the bundle of documents listed at para. 26(i)–(vi) above, the Registrar, upon noticing that the certificate made no reference to the mother's name, asked FB to produce a confession. As with the certificate, FB has been unable to present a copy of the confession which he says was kept by the Registry. He has instead presented a draft of what it was he declared. It is useful to set out that confession document in full:

> "My name is [FB] and I am the undersigned person I declared and witness that this is a true copy of the declaration provided in order to give my son [IB] my family name and register him with my family name and register him within my Family Book.
>
> The standard declaration form states the following:
>
> Mr. [FB] holding ID EE31694. I declared and witness the son [IB] born on 31/12/2014 Belongs to me from miss malak.
>
> I am declare this when I am fully conscious both mentally and physically without being forced to say that he is my son [I] belongs to me and Malak this why he is allowed to have my Surname.
>
> I declare and witness that this is what I have been told and what I believed at the time I registered my son in the Family Book.
>
> This declaration has been done to be used for legal Authorities.
>
> Signed by [FB]
>
> Stamped and legalised by president of the registry office jammaa awelad imeloule Marrakech. Confirming initial signature No 220."

35 The first issue which arises from the confession is this. When applying for IB's birth certificate, as part of the bundle of documents FB had submitted was his marriage contract with KBD. The implication was, therefore, that this child was born from within the marriage of FB and KBD. There has been evidence from the expert that in Morocco great reliance is placed upon the face value of documents and their contents so that, at that stage, there would have been nothing to alert the attention of the authorities that KBD was not the mother. What was missing at that stage was confirmation by the doctor that KBD had given birth to IB. According to the expert, pursuant to Moroccan law, a child is presumed to be a child from a conjugal relationship so that, the marriage contract having been lodged at the Registry Office, the presumption would be raised that KBD was the mother.

36 Ms. Amar stated that, pursuant to art. 160, a confession can be used in Moroccan law to establish filiation between a father and child and that, providing certain conditions (which were not relevant to the facts of this case) were met, it was easy to establish filiation in this way and the courts would not look behind this by asking questions. The reason for this, she explained, was because "the aim of the Moroccan family code is to promote the creation of family units and their maintenance even if the created situation is contrary to the biological reality." Essentially what this means is that, in a situation where a couple have produced their marriage certificate and are saying a baby is theirs but they cannot produce the necessary certificate, the position can be legalized by the use of a confession with the father accepting paternity. This is consistent with FB

having been asked by the authorities to produce a confession to regularize the situation given that the certificate was rejected as worthless.

37 As it turns out, according to the evidence of the expert, the confession as drafted by FB was invalid because it named Malak as the mother and, given that a father under Moroccan law cannot legitimize an otherwise illegitimate child, the confession which mentioned Malak would be of no use. Evidently FB was ignorant of the fact that by naming Malak the confession would be rejected, as his aim was to register the child. In fact this raises the question that, if FB had been trying to conceal the maternal link between IB and Malak, he would surely not have named her in the confession which, as far as he was concerned, was his ticket to registration. What it does suggest is that FB may have been following the instructions of a government official who expected him to have included the name KBD on the confession but FB got things wrong and put down Malak's name instead. It appears that FB was trying to register the child in the name of KBD as opposed to trying to conceal that Malak was the biological mother. Of course this does not explain how the child was eventually registered. The expert can go no further than saying that "if you file a confession stating that the child is yours but it is from an illegitimate procreation, that confession is not valid." What she cannot say is whether, despite its invalidity, this confession was in fact accepted or rejected, or indeed by what process IB was eventually registered.

38 The second issue which arises is that the evidence of FB was that, in order to register the child, he made a written declaration stating that he was the father. It is not clear to me whether the declaration he was referring to was the confession. The expert stated that the "birth certificate could not be issued on the basis of a statement that says that Malak is the mother. If FB is saying that he used the confession to register the child that would not have been accepted because he is not married to Malak." That said, she also stated in her evidence that the father or person registering the birth would make a declaration before the Registrar (see para. 25 *ante*). IB's birth certificate states that it was drawn up "in compliance with the statement by F son of KB . . ." and the birth certificate of FB that also reads that it was drawn up "in compliance with the statement made by . . . his uncle." There is no reason to suppose that FB's birth was registered in reliance on a confession so that it may well be that the statement referred to in both the birth certificates is in fact distinct from any confession that might have been filed. It is entirely possible, therefore, that the statement referred to in IB's birth certificate as having been made by FB is the statement contained in the declaration paper. Of course this would not remove the fact that in that instance FB would be purporting to register the child as a child of his marriage with KBD, but more about that anon.

(c) *Family book*

39 FB stated that he was told by a government department that he required the family book for registration. According to the expert, the family book is not necessary for registration of a birth. Family books are not considered evidence to prove filiation and the book simply reflects what is on the birth certificate.

40 In any event, the child was eventually registered in the names of FB and KBD and remained in Morocco for a period of about nine months and was thereafter brought to Gibraltar. FB said: "I have left the baby for nine months in Morocco just in case she asks for it but she has never asked for it and it is living with my mum for nine months, nine months." It was put to FB that it did not make sense for him to say that he left the baby in Morocco for nine months in case Malak came back "to sort the problem" because, by December 31st, 2014, the child was already registered with KBD as the mother. It was put to him that he continued looking for Malak in order to marry her. I find little merit in that suggestion because by that time FB had already registered KBD as the mother and the only reason why he wanted to marry Malak before the birth was to legitimize IB, which by that time he had already done. FB stated that he waited in Morocco because he wanted to give Malak the opportunity of coming to see the child, and so that he could tell her that the child had been registered, that it was not his intention to keep from IB who his biological mother was. In any event, what FB's actions in waiting nine months before coming to Gibraltar do suggest however, is that he viewed the move to Gibraltar as long term, and that it was his intention to move the child to live in Gibraltar after he had given Malak a reasonable period of time within which to make contact.

Arrival in Gibraltar

41 At the age of approximately nine months, IB was brought to Gibraltar on a six-month visa. It was put to KBD that, by handing in IB's birth certificate at the Civil Status and Registration Office in Gibraltar, she was essentially falsely representing that the child was hers biologically because that is the implication to be had from the birth certificate. KBD's reply was that there would be no point in her trying to pretend that she was the biological mother. Gibraltar as we all know is a very small place and she said that "I think the whole of Gibraltar knows I haven't given birth." Her position was that she was submitting a document which had been issued in Morocco as an authentic Moroccan document which showed she was the legal mother. She said she had never represented to anyone that she was the biological mother, nor had she hidden the fact that she was not the biological mother from anyone, and that in her opinion she had been included in the birth certificate as the legal mother. During her cross-examination she accepted that in February 2015 she had told her boss that

as the result of an extra-marital affair her husband had had a child with another woman, but the child was to belong to her (KBD) and FB and that this was God's way of giving her a child as she could not have any. It is clear that KBD failed (either purposely or ignorantly) to recognize the assumption to be drawn from the information contained in the birth certificate but she did not in any other way attempt to pass herself off in Gibraltar as IB's biological mother.

42 KBD admitted that it was her intention to be IB's full-time mother in Gibraltar. The intention, she explained, was to bring him over on a six-month visa and then apply for British nationality once he became entitled. She explained that the child would live in Gibraltar but would spend a lot of time in Morocco. She said that up to the first three to four years the child was to spend quite a lot of time in Morocco and then go to school here but keep spending time, *i.e.* holidays, in Morocco. She said she had asked for maternity leave for a year so that she could spend part of the time here with IB and part of the time in Morocco with IB. FB said that he wanted the child to be brought up in Morocco with him and KBD going over regularly.

43 There was quite a lot of discussion about whether the child was brought over to Gibraltar with the intention of him living here. From the evidence before me, as I have already said, I conclude that at the time that IB was brought into Gibraltar the intention was that he should have Gibraltar as his permanent home but that he would spend substantial periods of time in Morocco. I base my conclusion not only on my findings at para. 40 above but also upon the fact that—

(i) the respondents both live and work in Gibraltar and their life is here despite their connections with Morocco, which FB still regularly maintains;

(ii) their apartment here was set up with IB having his cot, furniture, toys *etc.* . . .

(iii) KBD attempted to obtain a British passport for IB which would have allowed him to stay in Gibraltar permanently; and

(iv) IB was enrolled in a local nursery upon his arrival.

The law

44 In this hearing, the respondents have quite rightly been taken to task in considerable detail over how they became parents and registered the child. The live evidence has been lengthy and the transcript of the hearing is awash with details of what the respondents did or did not do, what they felt and what they thought from about May 2014 to September 2015. The issues raised have been numerous; let me say this, there are some points upon which I believe the respondents, some points upon which I am not

sure and some points upon which I disbelieve them. In the heat of the hearing it is easy to lose track of what needs to be proved by whom and to what standard, and it is imperative to bear that in mind as the evidence is filtered and assessed.

45 The Care Agency brings this action and it is for it to prove the relevant matters to the necessary standard, which is on a balance of probabilities. The first question to decide is whether the respondents have parental responsibility. If this court finds that the respondents do not have parental responsibility the matter ends there. If this court finds that the respondents do have parental responsibility then the Care Agency asks that the court exercise its jurisdiction to find that the parental responsibility was obtained by deceit and to remove it because to allow it to remain would be manifestly contrary to public policy.

46 The governing law is to be found in the Family Proceedings (Children) (1996 Hague Convention) Rules 2011 and the 1996 Hague Convention.

Do the respondents have parental responsibility?

47 Rule 30(1) of the Family Proceedings (Children) (1996 Hague Convention) Rules 2011 provides that—

> "any interested person may apply for a declaration—
>
> (a) that a person has, or does not have, parental responsibility for a child; or
>
> (b) as to the extent of a person's parental responsibility for a child,
>
> where the question arises by virtue of the application of Article 16 of the 1996 Hague Convention."

The interpretation section offers no assistance in the definition of the term "interested party" but, given that at present the applicant has *de facto* parental responsibility pursuant to the interim care order which is in place, there seems to be little doubt that it has *locus*. Issue is not taken with this.

48 Pursuant to art. 16(1) of the 1996 Convention:

> "The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child."

It is not in dispute that, prior to arriving in Gibraltar, IB was habitually resident in Morocco. He was born there; he had a home and was being cared for there. He had a birth certificate and passport issued by the

relevant Moroccan authorities. In the opinion of Ms. Amar, IB's passport and birth certificate are valid and authentic documents issued by the Government of Morocco. The birth certificate endows parental responsibility on both FB and KBD. In the opinion of the expert, even in the event that these documents had been obtained by the making of false declarations or by deceit, they are nevertheless valid documents. Ms. Amar relied on the provisions of art. 2 of Dahir No. 37–99 for the proposition that Moroccan law will recognize the legal truth as stated in the birth certificate over the factual truth.

49 Ms. Amar explained that although art. 37 appears to temper the probative force of art. 2 in that it provides that if "the act of civil status is deemed flawed by a substantial error if it turns out that one of the entries is contrary to reality," an application can be made to the competent court to rectify the same; that rule was unlikely to succeed, because the Moroccan Family Code favours the legal truth against the biological truth. In any event there has been no challenge to these documents in this case.

50 Pursuant to art. 16(3) of the Convention, "parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State," so that even if IB were held to have acquired a new habitual residence in Gibraltar, the respondents who had parental responsibility under Moroccan law continue to have it in Gibraltar. I am in no doubt that pursuant to Moroccan law the respondents have parental responsibility for IB.

Should that parental responsibility be removed by this court?

51 In the event that this court were to find, as it has, that the respondents had parental responsibility, both the Care Agency and the guardian submit that this court should remove the parental responsibility enjoyed by the respondents because it was obtained on the basis of a deceit and it is manifestly contrary to public policy. They rely on art. 22 of the 1996 Convention, which provides that "the application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child."

52 Counsel for the Care Agency has filed no closing submissions on the interpretation or application of art. 22, nor upon their assessment of the oral evidence tendered in the course of this hearing. Counsel for the guardian has filed closing submissions addressing both the evidence and the law, and I am grateful to Ms. Guzman for her assistance in relation to the interpretation and application of art. 22.

53 Although art. 22 is contained in the body of a Convention which specifically targets international measures designed for the protection of children, it is apparent from the wording of the article and from case law

that the interests of the child are not in this instance paramount but simply an element to be taken into account in the assessment of what is manifestly contrary to public policy. *Re S (Brussels II: Recognition: Best Interests of Child) (No. 1)* (5) was a case concerning the registration and enforcement of an order from a foreign court but, given that the wording of the relevant article is similar, the principles and analysis are applicable. Holman, J. held that, although the best interests of the child had to be taken into account, the consideration of whether (in that case) the recognition was manifestly contrary to public policy was paramount. Holman, J. stated ([2004] 1 FLR 571, at para. 32) that, had he been deciding the case at first instance, he would not have made the order that was made by the court in Belgium because in his personal view that order was not in the child's best interests but, the order having been made by the court in Belgium, he had to—

> ". . . give proper weight and effect to the language that is used. The Article does not refer simply to recognition being contrary to the best interests of the child. It refers, rather, to recognition being contrary to public policy, taking into account the best interests of the child. Merely to reconsider the best interests of the child would be to review the Belgian judgment (which is clearly welfare based) as to its substance, which is forbidden by Art 19. I have to take into account the best interests of M, but ultimately to consider whether recognition is manifestly contrary to English public policy. To say that something is contrary to public policy is a high hurdle, to which the Article adds the word 'manifestly.' This is an international convention and I must apply it purposively, giving appropriate weight to the word manifestly. Indeed, the judgment of the European Court in the case of *Krombach v. Bamberski* . . . given on 28 March 2000, although given in a very different context, affords some guidance. At para. [21] the court said in relation to a similar provision of a similar Convention, although not employing the added qualification of 'manifestly':
>
> > '. . . the court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention . . . With regard, more specifically, to recourse to the public policy clause . . . the court has made it clear that such recourse is to be had only in exceptional cases . . .'"

54 In *Bamberski* v. *Krombach* (2), the European Court of Justice said ([2001] Q.B. at 730):

> "Recourse to the public policy clause in article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance

> to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order."

55 More recently the approach of Holman, J. was followed and elaborated on in *LAB* v. *KB (Abduction: Brussels II Revised)* (3). Roderic Wood, J. said ([2010] 2 FLR 1664, at para. 32):

> ". . . I would venture the comment that whilst Holman J accepted that there might be circumstances where the 'order of a foreign court is so strongly contrary to the welfare of the child that its recognition was manifestly contrary to the public policy of our state' I consider that such cases would be extremely rare, and that the consequences for the children of recognition and enforcement, though these are separate stages from each other, would have to be of the utmost seriousness."

56 What emerges as a very clear principle from the case law is that art. 22 is to be used sparingly, only in exceptional cases and only where to allow the foreign rule, law or judgment would result in a breach of a rule of law which is manifestly offensive to public policy. Given that this article is to be applied purposively and sparingly it is vitally important that any alleged affront to public policy be clearly and conclusively established.

57 Having identified the principles which govern the applicability of art. 22, I now turn to consider whether in this case the applicant has proved to the necessary standard that the respondents have committed an act which offends public policy to the extent envisaged by the article. In my assessment of the evidence I do not evaluate the evidence in separate compartments; rather I look at the case as a whole and take account of the whole picture. That said, in my view this case calls for assessment of two distinct issues, the first how the child came into the possession of FB and the second how FB registered him, because a finding on the first issue informs the approach to the second.

58 From the start and throughout, FB has been consistent in his position that he believed IB to be his biological son and that he was registering him in the belief that he was the biological father. It was not until DNA tests were carried out by the RGP that it was established that he was not. His account throughout was that he had an affair with Malak whilst on a separation from KBD and she became pregnant with his child. There was contact with her during the pregnancy and he told KBD that he would be

there for his child. His proposition to marry Malak was not to embark upon a life with her but to legitimize the child. Malak had other ideas and disappeared as soon as she handed the child over to FB. There is no reason why this account could not be true: FB and KBD were on a separation; FB sought company with a waitress; she became pregnant. I am not persuaded by the evidence that it is more likely than not that this is a lie. Of course I am awake to the possibility that this may all be a fabrication, a plan by FB and KBD who could not have children of their own and who wanted to have a family, to become parents. Of course this might raise suspicion. But mere suspicion will not suffice. The Care Agency must prove on a balance of probabilities that this couple were involved in the trafficking of this child. I remind myself of the direction on the burden and standard of proof given by MacDonald, J. in *AS* v. *TH* (1) ([2016] EWHC 532 (Fam), at para. 23):

> "The burden of proving a fact is on the party asserting that fact. To prove the fact asserted that fact must be established on the balance of probabilities. The inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. As has been observed, 'Common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities'. . ."

59 I am not satisfied that the accusation of child trafficking has been made out and the inherent probability must lie against such a possibility.

60 It is of note that the guardian herself, even after having conducted her investigation and after having heard the evidence in court, remained and was still uncertain as to whether the respondents had acted dishonestly. In the section headed "Recommendations," she states:

> "It is still not clear to me whether they acted in a deceitful manner to avoid the appropriate process of adopting a child and falsified documents in order to obtain parental responsibility of I or they genuinely believed the advice given by Moroccan officials to name Mrs. B as the legal biological mother and that Mr. B believed he was I's biological father."

61 The applicant submits there have been many uncertainties and unbelievable aspects to the respondents' accounts, and therefore this couple's story is not to be believed. I am asked to conclude that, on the basis of those uncertainties, IB did not come into the care of the respondents as they say he did. There is a danger that by doing so the applicant is *de facto* shifting the burden on to the respondents and I remind myself that it is not for the respondents to prove that IB came into their care as they allege he did.

62 The applicant disputes that IB came into the care of the respondents as they maintain, but no alternative scenarios were put to them. Is it alleged they bought the child? Is it alleged they found the child abandoned? Is it alleged they made an arrangement with Malak for her to bear them a child? Is it alleged they stole the child? Having heard the evidence and looking at the whole picture, I find that the applicant has not proved that this child was trafficked. I am cognizant that uncertainties remain and that there have been inconsistencies, some of which I have highlighted, but they are not such as to convince me that it is more likely than not that FB and KBD were involved in the trafficking of a child.

63 Having found that the applicant has failed to prove the allegation of trafficking, I approach the issue of registration from the basis that any steps FB took to register the child were on the basis that he believed himself to be the biological father, and this is material, because it means that he acted in the belief that the child was his.

64 Having very carefully considered the evidence, I am satisfied that the applicant has proved that it is more likely than not that FB made some kind of false representation to the official at the Registry either with or without that official's knowledge, that he and KBD were the biological parents. At the very least he submitted his marriage certificate with KBD in support of his application for the birth certificate, and by doing so he misrepresented the facts. In addition I find that on a balance of probabilities KBD was complicit in the course of action to have IB registered under her name.

65 I do not ignore the impact of those misrepresentations upon the credibility of FB's and KBD's evidence as a whole, but the reason for these misrepresentations is material in assessing their credibility. I turn to *R.* v. *Lucas* (4). It does not follow that because the respondents have lied about KBD's maternity to the Registry, they have lied about everything. A person may lie for many reasons, out of fear, desperation, emotional pressure or panic, for example. The reason for the lie in this instance was that the respondents knew that as the child's biological father not married to the biological mother, FB could not register the child in his name and it would become illegitimate. He could offer him a home and a family with his wife and his motivation was to secure the legitimacy of a child he believed to be his. I do not for a moment condone his actions but neither am I persuaded that, because of them, they must be lying in every other aspect of their account, or that because of them they are guilty of child trafficking.

66 Although I have found that FB (and more indirectly KBD) made a misrepresentation to the Moroccan registration authorities, it is evident that they could not have registered the child alone by their own actions. There was a civil officer responsible who must have approved the

registration, either by innocent mistake, or negligence, or because he was involved in some sort of joint enterprise with FB. Precisely how the child came to be registered upon the documents presented has not been established. Holman, J. in *Re S* (5) was of the view that it was not for that court to review the Belgian judgment. In much the same way it is not for this court to review the actions of government officials who were engaged in the registration process of IB. I do not ignore that as we have heard from the expert, under Moroccan law, the making of a false declaration before the Registry as to a child's natural mother is a criminal offence punishable with imprisonment, but that must be a matter for the law enforcement agencies in Morocco. (It would be for them to decide whether there are grounds for an investigation, and therefore whether the result of any investigation gave rise to a suspicion that a criminal offence had been committed, and whether they would act upon it.)

67 That there was an irregularity in the process of registration in Morocco, albeit by deceit, does not in my view make the matter so manifestly contrary to public policy as to engage art. 22. As matters stand, the birth certificate and passport are valid authentic documents issued by the Government of Morocco; IB is a Moroccan citizen. The Moroccan authorities and courts will not look behind the legality of documents issued because Moroccan legislation is specifically drafted "to promote the creation of family units and their maintenance even if the situation is contrary to biological reality."

68 There has been evidence by two police officers in this hearing who stated that originally the couple were arrested on suspicion of child abduction and on suspicion of having made a false declaration to the Gibraltar passport authorities. As I understand it, charges in relation to child abduction are not being pursued. In the year since their arrest, the RGP have investigated the matter, they have liaised with Morocco, travelled to Morocco and briefed Moroccan CID and authorities. A letter of request has been submitted through diplomatic channels, although I am ignorant as to the nature of the request. The officers confirmed that despite their investigation and despite the Moroccan authorities having been alerted there has been no indication by the Moroccan authorities that they have any concerns over IB or the B family. The evidence from Officer Finnegan was that the RGP were in the process now of testing the legitimacy of the documents, *i.e.* the birth certificate and passport; he was unaware that the legal expert on behalf of the applicant had already declared those documents to be legitimate.

69 Whilst an irregularity in the process of registration would not engage art. 22, that article would in my view be engaged if IB had come into the care of FB and KBD as a result of child trafficking. That would be so serious and so abhorrent as to qualify as one of those extremely rare situations of the uttermost seriousness which would be manifestly against

public policy in this jurisdiction. It is precisely because "manifestly contrary to public policy" is a such a high hurdle to overcome that this court must be satisfied to the required standard that FB and KBD were involved in the trafficking of IB before it can contemplate invoking art. 22. For the reasons I have given I am not so satisfied and therefore I find that art. 22 has not been engaged.

70 Counsel for the guardian submitted that if the court does not rely on art. 22 it should rely on art. 5 which reads as follows:

> "(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
>
> (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction."

Article 7 relates to wrongful removal and, on the basis that the parents had parental responsibility when they left Morocco, there has been no wrongful removal. Article 7 therefore has no impact upon art. 5. The guardian submits that upon his arrival in Gibraltar the habitual residence of IB changed from Morocco to Gibraltar. I agree.

71 I now turn to consider whether, pursuant to art. 5, I need to take measures directed at protecting IB's person. Given my findings in relation to the insufficiency of evidence regarding the allegation of child trafficking, and my view on the impact of their evidence of any dishonesty by the respondents in the process of registration, art. 5 would not be engaged on the basis of the past actions of the respondents. This leads me to consider whether the child would be in need of protection if he were returned to the care of the respondents and, given that both the applicant and the guardian are of the view that there are no concerns over FB's and KBD's ability to care for the child and parent him in an appropriate manner, there is no reason to suppose that he is in need of protection.

Report of the guardian and proposed care plan

72 As part of my overall consideration of this case I have studied the guardian's report, the reports from the various social workers and the care plan prepared by the applicant, and I am grateful for their guidance.

73 In her report, in relation to the parenting abilities of FB and KBD, the guardian points out that they have shown great commitment towards IB even when FB was informed that he was not the biological father. She reported that both FB and KBD show genuine warmth and love towards IB and both have been committed to contact. Similarly the applicant has no concerns over the respondents' ability to parent IB.

74 Both the applicant and the guardian advocate against returning IB to Morocco. The care plan was prepared in August 2016 and the social worker, Ms. Ingram, spoke about the continuing investigation by the police. She said:

> "The anticipated timescale for this investigation to be concluded is unknown, however information shared from the Royal Gibraltarian Police indicates that it could take up to a year or more. This will leave I in a state of limbo without a clear plan for his future and denying him the opportunity to grow up within a family who will love and care for him and offer him security both emotionally and legally."

75 Ms. Ingram then goes on to explore potential outcomes if IB were to be returned to Morocco; she seems to be of the opinion that once the authorities begin their investigation they may ask for I to be returned. I am not clear upon what basis she comes to that conclusion; in any event she then goes on to discuss the difficulties concerning a placement of IB in a Moroccan orphanage or a placement in a Moroccan family until investigations are concluded. Ms. Ingram then states that if the authorities conclude their investigation and the documents are found to be invalid IB would be rendered stateless, and in her view this would place him at a worrying disadvantage. The end result of this analysis appears to be that until such time as the Moroccan authorities have concluded their investigation no final determination could be made in respect of IB's care and he "will remain in his current placement until a suitable long term placement is identified for him." The concerning reality is that it has been one full year since the authorities in Gibraltar first started looking into this matter, and one year on we do not know whether an investigation in Morocco has commenced, or even if it will ever commence. This would place IB's future in an unacceptable state of uncertainty.

76 Since his removal into care, IB has been cared for by multiple carers. The guardian states:

> "I am concerned especially for I's long term emotional harm at such a crucial time in his development. I's development can become impaired, research suggests that children of I's age begin to develop a sense of trust, if he continues to reside in a residential home with multiple carers this can seriously undermine any potential future relationships. Since December 2015 I has resided at Tangier View Residential Home. The Care Agency have not afforded him an appropriate foster placement as there are no current appropriate foster placements. It is wholly inappropriate for such a young child to be placed in institutional care. Although the home have tried to be consistent with the carers this is not practical and can have a long

term impact on his wellbeing especially in forming appropriate long term relationships."

The guardian went on to say that to maintain the status quo would be for IB to remain in a residential children's home for the foreseeable future.

77 It is apparent to me that it is not in IB's best interests to remain in institutional care for the indefinite period that he would be likely face in the event that a care order were made. Of course I do not decide this case upon where it would be best for IB to live. I decide the case upon the evidence before me which I have discussed at length. That said, the harm that IB is likely to suffer should he remain in institutional care is a factor of which I must be cognizant, and it makes it all the more important for the applicant to prove its case robustly to the necessary standard. The making of a care order would not only likely deprive IB of spending his early formative years in a loving family unit, but also cause him some psychological damage, the only justification for that would be if it were proved that the respondents had acted in a way which was manifestly contrary to public policy and therefore their parental responsibility should be removed.

78 I have been and remain acutely aware that any decision in favour of the respondents might be construed as the court being insufficiently concerned with the trafficking of children. That could not be further from the truth. The trafficking of children is unacceptable and a matter which the court treats seriously and with the utmost of care. In addition this decision should not be construed as condoning the procurement of any document by dishonest means. It is a decision taken upon the facts of this particular and individual case, and each case will be fact specific.

79 By way of final comment I would like to say this. Cases such as these are fraught with emotion and it is not uncommon for people in the shoes of the respondents to harbour some resentment towards the Agency. If that is the case with these respondents I urge them to put that aside and move on with their lives. The Care Agency has acted quite properly in its role to safeguard and protect children and where there is a doubt it is right that it should act. The final decision is of course mine, but I make that decision having all the facts before me, and having had the benefit of hearing all the evidence. I have no doubt that the Agency has put great effort and sincere commitment into doing its job as it is obliged to.

80 I declare that the respondents have parental responsibility for IB and that that responsibility should not be derogated by virtue of either art. 22 or art. 5 of the Convention.

Order accordingly.