[2017 Gib LR 52]

IB (by his Guardian) v. CARE AGENCY, KBD and FB

COURT OF APPEAL (Dudley, C.J., Moore-Bick and Goldring, JJ.A.): April 4th, 2017

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 first respondent had applied for a declaration that the second and third respondents did not have parental responsibility in relation to the appellant.

The second and third respondents, both of whom were permanent residents in Gibraltar, had married in 2012. The second respondent was Gibraltarian and the third respondent was Moroccan. In September 2015, they had travelled from Morocco to Gibraltar with a child (the appellant) 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 second and third 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 second and third respondents were not the child's parents, no intervention had been considered necessary. The third 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 third 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 third 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.

In December 2015, the police shared DNA results which demonstrated that the third 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 second and third 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 the child was placed into care. The second and third 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 second and third respondents did not have parental responsibility for the child and a full care order. It submitted that, even if the Supreme Court were to find that they had parental responsibility, it should be removed pursuant to arts. 22 and 5 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."

The Supreme Court (Ramagge Prescott, J.) dismissed the application and declared that the second and third respondents had parental responsibility for the child. 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." The second and third respondents had parental responsibility under Moroccan law and continued to have parental responsibility in Gibraltar. The judge found as a fact that the third respondent had believed the child to be his son. She considered that there was insufficient evidence that the child was the victim of child trafficking and refused to remove the second and third respondents' parental responsibility pursuant to art. 22 of the Convention. The court did not consider that measures to protect the child were required pursuant to art. 5 of the Convention (that decision is reported at 2016 Gib LR 286).

The child (acting through his guardian) appealed. He did not challenge the judge's decision that, subject to the operation of art. 22 of the Convention, the second and third respondents had parental responsibility, but he did challenge the decision that the recognition of their parental rights acquired under Moroccan law would not be manifestly contrary to public policy. He submitted that (a) the judge had erred in her approach to the public policy by holding that art. 22 of the Convention would not be engaged unless the second and third respondents were guilty of child trafficking (which she had not defined), and that she should have taken a

broader approach in her interpretation of this provision; (b) the judge was wrong to find that art. 22 was not engaged in the circumstances; and (c) the judge should have exercised the discretionary power conferred by art. 18 of the Convention to remove the second and third respondents' parental responsibility (it was acknowledged that this had not been raised in the Supreme Court). Article 18 provided that "the parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention."

Held, dismissing the appeal:

(1) The purpose of the Convention was to avoid conflict between the legal systems of signatory states, so that easy reliance on different public policy considerations arising from cultural differences between one contracting state and another ought to be avoided as otherwise it would defeat the purpose of the Convention—hence the high threshold apparent from the use in art. 22 of the expression "manifestly contrary to public policy." The court had not been asked, on this appeal, to reverse the findings of fact based upon the evidence that had been heard by the judge below. It was apparent that the judge had been aware that Moroccan law (subject to challenge by an interested party) gave primacy to legal certainty over biological fact and that the third respondent had made a false representation when registering the birth, to which the second respondent was complicit. However, given her finding that at the time the third respondent had believed that he was the child's biological father, she determined that the child had not been the subject of child trafficking. It did not matter that she had not defined child trafficking, given that it was implicit in her finding that the child had not been "acquired" though monetary arrangements, force or (subject to the manner of the birth registration) deceit. In those circumstances and taking into account the best interests of the child, the judge had been entitled to determine that the high public policy threshold in art. 22 had not been made out. Whether the decision-making process should be described as an exercise of discretion or an evaluative exercise, it was one with which the present court should not interfere (paras. 23–24).

(2) Article 18 of the Convention simply recognized the rule that parental responsibility might be determined or the conditions of its exercise modified by measures taken under the Convention to protect a child's person or property. It did not give the courts a free-standing discretion to terminate parental responsibility. Such an interpretation would give the courts an exceptionally broad discretion in respect of children caught by the Convention, which it did not have generally in respect of children within the jurisdiction. There was nothing in the Convention to suggest that that was intended and such a proposition could not be sustained. There was no error of principle in the judge's reasoning and the appeal would be dismissed (paras. 26–27).

(3) The appellant, through his guardian *ad litem*, was entitled to have brought this appeal. He had not been merely the subject of the proceedings in the Supreme Court but a respondent to those proceedings, and as a party to the proceedings there could be no doubt that he was entitled to appeal (para. 17).

(4) It could not be said that the appeal was academic and the court should not have entertained it. It was technically correct that the only live issue below was that of parental responsibility, that that had been determined in favour of the second and third respondents and that that part of the judgment was not being appealed. Strictly speaking, the judge should have considered the public policy issue before making a determination in respect of parental responsibility. Instead, she had first considered whether the child was habitually resident in Gibraltar and whether, by virtue of art. 16(3), the second and third respondents' parental responsibility subsisted and then considered whether that should be derogated from on public policy grounds. It was, however, clear that the child was not seeking to challenge the judge's conclusion that the second and third respondents had acquired parental responsibility under Moroccan law, but only her refusal to disregard the rule in art. 16(1) on public policy grounds. The child's case was clear from the notice and the grounds, and the appeal was not academic (para. 18).

Legislation construed:

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. 1: The relevant terms of this article are set out at para. 11.
art. 15: The relevant terms of this article are set out at para. 11.
art. 16: The relevant terms of this article are set out at para. 11.
art. 17: The relevant terms of this article are set out at para. 12.
art. 18: The relevant terms of this article are set out at para. 15.
art. 22: The relevant terms of this article are set out at para. 13.

G. Guzman for the guardian *ad litem*;
J. Fernandez for the Care Agency;
C. Finch for the second and third respondents.

1 **DUDLEY, C.J.:** This is an appeal by IB, who is believed to have been born in Morocco on or about December 13th, 2014, and which is conducted by his guardian *ad litem* under an order of December 14th, 2016, made by Ramagge Prescott, J. (that decision is reported at 2016 Gib LR 286).

2 The application below was brought by the Care Agency ("the Agency") pursuant to the 1996 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"). It was framed as being for a declaration that the second and third respondents ("KBD" and "FB" respectively) did not have parental responsibility in respect of IB. Flowing from such a declaration, the Agency sought a full care order. In the alternative, in the event of the court finding that KBD and IB did have parental responsibility, the Agency sought a declaration pursuant to art. 22 and art. 5 of the Convention that that parental responsibility be removed. In the event, the judge dismissed the application and granted a declaration that KBD and FB did have parental responsibility and that "that responsibility should not be derogated by virtue of either art. 22 or art. 5 of the Convention" (2016 Gib LR 286, at para. 80).

3 IB does not challenge the judge's decision that, subject to the operation of art. 22 of the 1996 Convention, KBD and FB have parental responsibility. He does, however, challenge the judge's decision that the recognition of their parental rights acquired under Moroccan law would not be manifestly contrary to public policy. In its skeleton arguments, the Agency supports IB's appeal; however, in his oral submissions, Mr. Fernandez advanced a more nuanced position and explained that the Agency had not appealed because the basis for its application had been that KBD and FB did not have parental responsibility and that they were therefore unable to exercise their powers and responsibilities *qua* parents, and that upon the finding that they did in fact have parental responsibility, and in the absence of welfare concerns in respect of IB, there was no reason to appeal.

Background and findings

4 KBD is Gibraltarian and FB is a Moroccan national. They married on June 8th, 2012 in Marrakesh, Morocco. The circumstances leading to the making of the application by the Care Agency are set out in Ramagge Prescott, J.'s judgment (2016 Gib LR 286, at para. 3):

> "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."

FB and KBD's case has throughout been that in 2014, whilst he was in Morocco, FB had an affair with a nightclub waitress whose only known

name is Malak, that Malak told FB that she was pregnant with his child, and subsequently she gave IB into his care.

5 Following the report by the Civil Status and Registration Office to the police, KBD and FB were interviewed by the police under caution and in due course DNA testing of IB and FB was carried out, as a result of which, on December 21st, 2015, it transpired that FB was not the biological father of IB. On December 22nd, 2015, the Care Agency obtained an interim care order and on January 5th, 2016, IB was taken to Tangier View residential home where he remained until he was returned to KBD and FB following the judgment. During the intervening period KBD and FB maintained regular contact with IB.

6 The judge considered in some detail the circumstances surrounding Malak giving IB to FB. I shall return to consider the extent to which they have a bearing on the outcome of this appeal but at this stage it is useful to set out the judge's findings in that regard (*ibid.*, at paras. 58–59):

> "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 . . .
>
> 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."

It is clear that the judge found as fact that FB believed IB to be his biological son and that he wanted to assume responsibility for him. Moreover, and notwithstanding the unjustified criticism directed against the judge for failing to define "trafficking," the inference to be drawn from the judge's findings is that on the evidence before her she did not find that

the child had been acquired through monetary arrangements, force or (subject to the way in which the birth was registered) deceit.

7 A central issue below was how FB obtained IB's birth certificate and its effect and validity in Morocco. The judge below had the benefit of expert evidence of Moroccan law given by a Ms. Imane Amar who was called by the Agency and, having considered the factual evidence and against the backdrop of the expert evidence, she made the following findings (*ibid.*, at paras. 63–64):

> "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."

8 Thereafter, the judge went on to consider the relevance of the false representations in obtaining the birth certificate in the context of the art. 22 public policy considerations (*ibid.*, at paras. 67 and 69):

> "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.'
>
> . . .
>
> 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."

The judge then went on to deal with a submission advanced by the guardian which was premised upon art. 5. Although not the subject of this appeal, the conclusions reached by the judge at para. 71 are instructive in respect of the best interests of the child:

> "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."

The grounds of appeal

9 The grounds of appeal read as follows:

> "**Article 22—Public Policy**
>
> **1.** The learned judge erred in her approach to public policy by holding that Article 22 of the 1996 Hague Convention was not engaged unless [KBD] and [FB] were guilty of child trafficking (a concept which she never defined). She should have taken a broader approach and looked at all the surrounding circumstances.
>
> **2.** The learned judge was wrong to find that Article 22 of the Convention was not engaged in circumstances where:—
>
> a. [FB's] accounts of the events leading to [IB] being placed in his de facto care and control were contradictory and suspicious.
>
> b. No evidence was adduced from I's birth mother either as to the circumstances of I's conception and birth or as to her views on [KBD] and [FB] being declared to be I's parents.
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> c. [FB] had no knowledge (whatever his belief) as to whether or not he was the biological father of [IB]; it transpired that he was not.

d. [FB] and [KBD] both [knew] that [KBD] was not the birth mother of [IB].

e. [FB] and [KBD] jointly practised a deception on the Moroccan registrar of birth (amounting to a criminal offence under Moroccan law) by misrepresenting that they were the biological parents of [IB].

Article 18—Discretion

3. The Guardian will seek permission at the hearing of the appeal to argue that the learned judge should have exercised the discretionary power conferred by Article 18 of the 1996 Hague Convention to terminate [FB's] and [KBD]'s parental responsibility in the light of the circumstances summarised in 2 above. It is acknowledged that this was not raised in the court below."

The relevant 1996 Convention provisions

10 Although evidently the focus of the appeal was upon arts. 18 and 22, to best understand the decision below and the submissions now being advanced, it is useful to consider other provisions of the Convention.

11 The objects of the 1996 Convention are to be found in art. 1 and it includes, at art. 1(c), "to determine the law applicable to parental responsibility." That provision is to be read in the context of art. 15 which provides:

"(1) In exercising their jurisdiction under the provisions of Chapter II, the authorities of the Contracting States shall apply their own law.

(2) . . .

(3) If the child's habitual residence changes to another Contracting State, the law of that other State governs, from the time of the change, the conditions of application of the measures taken in the State of the former habitual residence."

In turn, art. 16 provides:

"(1) 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.

(2) . . .

(3) 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.

> (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

12 Relying upon art. 16(3), the judge held that KBD and FB having acquired parental responsibility in Morocco, they retained that responsibility after IB became habitually resident in Gibraltar. As aforesaid, that part of the judge's decision is not challenged. By virtue of art. 17 which provides—

> "the exercise of parental responsibility is governed by the law of the State of the child's habitual residence. If the child's habitual residence changes, it is governed by the law of the State of the new habitual residence"—

the exercise of KBD and FB's parental responsibility is now governed by Gibraltar law.

13 Article 22 of the 1996 Convention provides:

> "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."

14 The fundamental issue that fell for determination below was whether the court should refuse to apply the law designated by the provisions of art. 16(1) (in this case the law of Morocco) on the grounds that to do so would be manifestly contrary to public policy.

15 Before this court, an alternative argument is advanced in that it is said that art. 18 creates a free-standing discretion allowing for parental responsibility to be removed which does not engage the "manifestly contrary to public policy" high threshold. It provides: "The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention."

Preliminary arguments

16 Two preliminary objections to the appeal are taken on behalf of KBD and FB. The first relates to the locus of the guardian *ad litem*, and the second to what are said to be inconsistencies between the notice of appeal and the grounds which it is said render the appeal academic, and that consequently the court ought not to entertain it. Both can be dealt with briefly.

17 In circumstances in which the Care Agency has not appealed, it is possibly unusual to have had IB through the guardian appeal the decision. That said, IB was not merely the subject of the proceedings below but was

in fact the first respondent, and as a party to the action there can be no doubt that he is entitled to appeal. Given his age, those proceedings necessarily have to be conducted by the guardian.

18 In relation to the second objection, what is said is that the only live issue below was that of parental responsibility, that this was determined in favour of KBD and FB, and that that part of the judgment is not being appealed. Technically that is correct, because the effect of art. 22 is to allow the court to decline to apply on public policy grounds the rule of foreign law under which a person has acquired parental responsibility. Strictly speaking, therefore, the judge should have considered the public policy issue before making a determination in respect of parental responsibility. Instead she first considered the issue of whether IB was habitually resident in Gibraltar and whether by virtue of art. 16(3) KBD and FB's parental responsibility subsisted, and then went on to consider whether that should be derogated from on public policy grounds. However, having regard to the way in which the matter was dealt with in the judgment, it is clear that IB is not seeking to challenge the judge's conclusion that FB and KBD had acquired parental responsibility under Moroccan law, but only her refusal to disregard the rule in art. 16(1) on public policy grounds. In my view it is clear from the notice and the grounds what the guardian's case is. This appeal is not academic.

The substantive issues

Article 22—public policy

19 It is not in issue that there is a dearth of authority on the interpretation of art. 22 and the judge therefore took account of authorities in which, albeit decided in the context of other EU Regulations, similar wording was considered. She went on to reach the following conclusion (2016 Gib LR 286, at para. 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."

20 Mr. Scott, Q.C. accepts that "manifestly contrary to public policy" is a high hurdle but he seeks to draw a distinction between refusing to apply a rule of foreign law under the 1996 Convention and refusing to recognize a judgment of a court of a Member State in the context of EU Regulations such as Brussels I recast and Brussels II revised, given the principle of EU law that the courts of each Member State must give the fullest possible respect to the decisions of the courts of every other Member State. He

submits that art. 22 is distinguishable in that it is engaged in circumstances where there is no judgment given by the courts of another state to which full deference must be given. That not recognizing the effect of a birth certificate which, whilst valid in Morocco (unless and until it is set aside upon application by an interested party) is factually false, is not as grave a step as refusing to recognize a judgment of a court of another EU Member State.

21 Against the backdrop of the submission that the judge set the public policy bar too high, Mr. Scott identifies what he says is the relevant public policy, namely the prevention of child trafficking, in the wide sense of that term, and he submits that there is a powerful policy that the international movement of children should be strictly regulated, that whilst the process by which IB came into the de facto care of KBD and FB is not categorized, as a matter of Moroccan law, as an adoption, as a matter of Gibraltar law it has every appearance of an unofficial or quasi-adoption in which FB and KBD obtained the birth certificate on the basis of a deception and with none of the safeguards that are to be found in the adoption process. It is his case that the judge failed to consider the aspects of public policy that were engaged, limiting herself to the Agency having to prove on a balance of probabilities that KBD and FB were involved in the trafficking of IB and that in practice she treated the best interests of IB as the primary consideration rather than simply one aspect of a wider public policy evaluation. He further submits that there is a difference between the policy considerations that apply in Morocco and those that apply in Gibraltar. As explained by the Moroccan law expert and set out at para. 36 of the judgment "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." Mr. Scott contrasts that with what he says are the public policy priorities in Gibraltar, which he says include the rights of both biological parents, the fact that whether parents are married is not important, and the truth about origin is more important than legal certainty. He adds that of particular significance is that children should only be given into the hands of non-parents by due legal process.

22 It is also said by Mr. Scott that the judge failed to properly take into account Malak's shadowy and obscure role and the fact that it is known that KBD and FB were keen to start a family and were frustrated with the difficulties they were experiencing in conceiving naturally. She also failed to take into account the fact that their accounts of how IB came into their care are manifestly inconsistent and inadequate. Given how this appeal is framed and in particular that the findings of fact are not challenged, I do not think these considerations are relevant.

23 Cases may well arise in which differing policy considerations between different signatories to the Convention may be pivotal but it is

evident that cases are fact specific. The purpose of the Convention is to avoid conflict between the legal systems of signatory states, so that easy reliance upon different public policy considerations arising from cultural differences between one contracting state and another ought to be avoided as otherwise it would defeat the purpose of the Convention. Hence the high threshold which is apparent from use of the expression "*manifestly contrary to public policy.*" [My emphasis.]

24 This court is not being asked to reverse findings of fact based upon oral evidence which the judge heard below. It is apparent that the judge was alive to the fact that Moroccan law (subject to challenge by an interested party) gave primacy to legal certainty over biological fact and that FB made a false misrepresentation when registering the birth, to which KBD was complicit. However, given her further finding that at the time FB believed that he was the biological father of IB, she determined that IB had not been the subject of child trafficking and although she may have not defined child trafficking as a concept it matters not, given that it is implicit in her finding that IB was not "acquired" in any of the ways I identify at para. 6. In those circumstances and taking into account the best interests of the child, she was entitled to determine that the high public policy threshold had not been made out. Whether the decision-making process is described as an exercise of discretion or as an evaluative exercise it is one with which this court should not interfere.

Article 18

25 In his skeleton, Mr. Scott submits that art. 18 gives the Gibraltar courts power to terminate parental responsibility which has been, as he describes it, "imported" under art. 16(3), the reference to "measures taken under this Convention" being to the requirement under art. 15(1) that (absent exceptional circumstances) the court apply the *lex fori* (in this case Gibraltar law) when exercising its jurisdiction under the provisions of Chapter II. However, he recognized that the law does not give the court power to terminate the parental responsibility of parents who are married. He therefore submitted that, because the Convention is directly applicable, art. 18 creates a free-standing discretion to terminate parental responsibility.

26 In my view that submission is not well-founded. Article 18 simply recognizes a rule that parental responsibility may be terminated or the conditions of its exercise modified by measures taken under the Convention to protect a child's person or property. To accede to Mr. Scott's argument would result in the court having an exceptionally broad discretion in respect of children caught by the 1996 Convention that it does not have generally in respect of children within the jurisdiction. There is nothing in the Convention to suggest that that was intended and such a proposition cannot be sustained.

27 The judge acknowledged that this was a hard case to determine; however, I find no error of principle in her reasoning and I would therefore dismiss the appeal.

28 **MOORE-BICK, J.A.:** I agree.

29 **GOLDRING, J.A.:** I agree.

Appeal dismissed.