Children Act orders verses wishes and feelings; how young people can successfully challenge final orders

Whilst the welfare checklist is familiar ground for practitioners, two new cases have brought into sharp focus how the views of children can make a real difference to an outcome of the case. The first is *AE* and *JE v M* [2021] EWHC 1957 (Fam) and the second is *Re A & B* (Rescission of Order: Change in Circumstances) [2021] EWFC 76 – in both cases, the children acted as applicants, seeking for a significant change of orders after they had been made.

AE and *JE v M* [2021] EWHC 1957 (Fam)

This matter concerned protracted litigation in both England and Spain[1]. The case involved two children of Spanish parents; *AE*, who was to be 18 in October 2021, and *JE*, who was turning 15 in December 2021.

The lengthy litigation began in 2013 in Spain following which the children moved to England with their mother. Shortly after this relocation, and as Ms Justice Russell sets out at paragraph 5 of her judgment:

"There were then conflicting proceedings concerning the children brought by F in Spain and by M in England during which orders were made awarding F custody in Spain in 2016 and again in 2018. Throughout the children remained living, with their mother, in the South of England".

The mother's subsequent Article 15 application, for the proceedings to be heard in England was refused by the Spanish court. Following the conclusion of the Spanish proceedings, the father then sought for recognition and enforcement of his Spanish custody order in England. This, in turn, was

refused by Ms Justice Russell, a decision which was upheld on appeal to the Court of Appeal on 4 August 2020.

Throughout the proceedings, both children had been clear that they wished to remain living with their mother in England and did not want to live with their father in Spain.

Despite the existence of orders made in this jurisdiction, and the father providing assurances that he would not make any further applications in Spain, he did just that. On 30 July 2020 the father applied to the Spanish court without notice to the mother, and without providing Ms Justice Russell's orders. He was granted an order that the children should be detained and placed in his care if they were to come to Spain, which is exactly what happened when both travelled to the Canary Islands with their mother for a holiday. The Spanish authorities detained the children, separated them from their mother and placed them with their father – all against their expressed wishes.

In an even more extraordinary twist, the children later absconded from their father's care in Spain and travelled via public transport to neighbouring France. They were met by their mother and travelled to Calais with the intention of returning home to England. Their father meanwhile had reported them missing to the Spanish Police who put out an alert and arrest warrant for the mother. Upon being located by the French authorities, *AE* and *JE* were again separated from their mother and were placed in a hostel for unaccompanied migrants in France, before being placed, three days later, with non-Spanish and non-English speaking foster carers. Their mother meanwhile had been arrested.

The Children's Application

AE and *JE* managed to contact a solicitor in England; their urgent application resulted in an order being made for their return to England in September 2020. In subsequent care proceedings in France, the French Court heard from *AE* and *JE* directly before and discharging their protective orders. An order made an order pursuant to Article 20 of BIIA that they were to be returned to mother's care and returned to England.

The Children's Evidence

Each of the two children filed two witness statements within the proceedings, upon which Ms Justice Russell placed a great degree of weight; she described their evidence as *"graphic reading not only as to what happened to them but also as to their feelings at the time and their wishes about what should happen in the future"*

. She also commented that *"their descriptions of what F did to them, and the distress and trauma caused by his actions is at times visceral"* [2]

Final Order

AE and *JE* sought a child arrangements order confirming that they live with their mother; they did not seek any orders relating to time with their father. In relation to this latter position, the Judge stated that *"I accept the submission that their ages and the circumstances of this case require an order reflecting the situation in real terms and releasing the Applicants and their Mother from any legal obligations within this jurisdiction and in the country where they are habitually resident that would have obliged them to spend time with the [children]"* [3].

Considerable weight was placed on these older children's written evidence, which was also seen in the case of *Re: A & B*

Re A & B (Rescission of Order: Change in Circumstances) [2021] EWFC 76

This matter concerned two Spanish children who are currently residing in Spain, aged 17 ('A') and 12 ('B'). Their Father is Belgian and lives in Spain; their mother is Spanish and lives in the UK. Following the breakdown of the parties' relationship when in England, divorce and children proceedings were commenced. A final child arrangements order was made which provided for the children to live with their mother in London.

Spanish Proceedings

In 2019, *'A'* and *'B'* had travelled with Spain with their mother to visit their maternal grandmother. It was during this trip that *'A'* had a *'serious argument'*;[4] with her mother and had fled her care. *'A'* came to the attention of the Spanish authorities, and she was placed in institutional care. A subsequent Valencian court order made provision for *'A'* to be placed temporarily in her father's care in Madrid, where she has remained since. Her brother, *'B'*, then returned to England in his mother's care.

Rather than issue proceedings under the 1980 Hague Convention, the mother instead issued Children Act proceedings in England for A's return. This application appeared before HHJ Wright who made an order declaring that *'A'* was habitually resident in England and ordered her return. *'A'* was not returned.

Later, in April 2020, *'B'* was in Spain with his mother on holiday when he telephoned his father, alleging that he had been assaulted by his mother. Local police became involved, and *'B'* was moved into the care of the father.

The father then commenced further litigation in Spain; in July 2020, the Appeal Court of Valencia ordered the return of *'A'* to the mother and to England; the Spanish Court subsequently ruled that *'B'* should also be returned to the care of the mother.

Later that year, in October 2020, the children were seen by a judicial examiner who reported that the children wished to remain living in Spain. The Father was then successful in his renewed application for provisional measures to educate *'B'* in Spain for the academic year 2020/21, and he was granted provisional custody of *'B'*. In November 2020, the father was also awarded a provisional order to arrange schooling for *'A'* in Spain.

English Proceedings

The mother then returned to England alone and issued a Specific Issue Order application in the Central Family Court seeking the return of the children from Spain. The matter was heard on 23 December 2020. At a directions hearing, HHJ Wright made findings that the children had been unlawfully retained by the father in Spain, that the retention continued, and that the children were habitually resident in England and Wales. The judge also ordered the children should be returned forthwith and in any event by 28 December 2020.

The later judgment of Mr Justice Cobb further reflects: *"There is nothing in the analysis or findings section of the judgment which reflected how the judge had evaluated, and/or taken account of, the children's views"*.[5]

The father's subsequent appeal of the Court of Appeal was unsuccessful, and the return order remained in force.

A and B's application

Through their solicitor Mr James Netto, *'A'* and *'B'* made applications in the High Court under Part 18, initially seeking disclosure of documents from, and party status in, the existing proceedings between their parents. Their subsequent applications were:

To rescind or vary the order of HHJ Wright
On the basis of the order being rescinded or varied, a transfer of proceeding issued in this country to Spain under Article 15 of Brussells IIa.
In the event that the order is rescinded or varied but the transfer is refused, a welfare-based determination that they remain living in Spain with their father.

Should the order be rescinded?

Sitting in the Family Court, Mr Justice Cobb conducts a detailed assessment of the law in relation to rescission or variation of family court orders at paragraphs 27 – 39 of his judgment, identifying this as being a rare application of rescission of a Family Court order under s31F of the Matrimonial and Family Proceedings Act 1984. The fact that this application was brought by the children themselves following Children Act proceedings was even more striking. The Judge held:

"Section 31F(6) of the 1984 Act [6] is most likely to be deployed in a children's case where the relief sought is rescission of an earlier order (as here) the Family Court has wide powers under the CA1989 to vary or indeed discharge its own order where it can be demonstrated that the circumstances have changed, and the interests of the child require variation or discharge of the court-ordered arrangements" [7]

The children's case was that there had been a material change of circumstances since the order of HHJ Wright on the basis of:

- Their views having hardened on returning to England since December 2020 and this in itself being a material *'change of circumstances'.*
- being unconscionable to uphold the order for *'A''s* return to this country (given her age

of 17) and on that basis, that the separation of siblings was a real possibility which was not considered by the trial judge.

A and B's views

Both *'A'* and *'B''s* views were before the Court by way of the evidence of their solicitor. Mr Justice Cobb confirmed that the court's task was to *"consider whether the articulation of these strongly held views can, in this case, be said to represent a 'change in circumstances' since December 2020"*[8] *. in assessing this, the judge noted a palpable closeness between the children and a real risk of separation. The judge also commented "The validity of their views on the prospect of return was enhanced in my judgement by the fact that their views contained balance: they spoke positively of aspects of their mother and were not uncritical of their father."*

The assessment of the hardening of views was essential to the children's application. The judge held:

"can the hardening of the views of subject children post-hearing represent a change of circumstances such as to justify the deployment of section 31F(6)? The short answer is, in my judgment, yes; and particularly so where the more recently expressed views not only materially challenge the earlier ordered outcome, but also strike (as may be the case here) at the very foundation of the Family Court's jurisdiction to make the order at all." (emphasis added)[9]

Mr Justice Cobb found it extremely difficult to assess their views and whether they had sufficiently hardened since HHJ Wright's decision as there was no clear assessment of this contained within HHJ Wright's judgment. Mr Justice Cobb did however find that the *"dynamic of the case"* had changed such that given *'A''s* very clear views, there was a real prospect of sibling separation. This was not something which HHJ Wright contemplated on the evidence at that time. The return orders were therefore rescinded.

Should there be a transfer of proceedings?

Having rescinded the return order, the Judge then went on to determine the children's application for any further proceedings to take place in Spain, pursuant to Article 15 BIIR. Given that the Children Act proceedings had been commenced in December 2020 in England, they could still be transferred under this provision of Brussels II Revised. Even if BIIR hadn't had effect, this would not

have been the end of the line for this matter, as the Judge noted:

"given that this application seeks the rescission (or variation) of an order made in proceedings which were launched before 31 December 2020, the provisions of Council Regulation 2201/2003 ("BIIR") apply. Had the relevant application been issued after 1 January 2021, broadly similar provisions in Articles 7 and 8 of the 1996 Hague Convention would have applied".[10]

There are three main questions which arise when considering whether there should be a transfer are[11];

- Does the child have a particular connection with the relevant other member state? The child will have a particular connection if his situation falls within one of the situations described in Article 15
- Would the other member state be better placed to hear the case or a specific part thereof?
- Would a transfer to the other court be in the best interests of the child?

The judge concluded that it would be in the children's best interests for there to be an invitation to the courts of Spain to assume jurisdiction under Article 15.

International issues arising

Both cases raise important considerations, not just in relation to international recognition, but also in relation to children acting as applicants in challenging orders. It is the children's wishes and feelings, intensifying over time and borne out of their lived experiences, that have made the real difference in these two cases. The cases do both have slightly unusual factual backgrounds, involving complex and competing proceedings across jurisdictions. Nonetheless, the case law contained within them are important reading for anyone working in complex children matters. The cases also highlight the complex interplay between jurisdictions, and provide much-needed guidance in relation to the provisions of s31F of the 1984 Act. The future may well see this provision being used more and more in children cases.

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Citations

[1] For previous judgments please see [2017] EWHC 2298 (Fam) [2020] EWHC 162 (Fam) [2020] EWCA Civ 1030
[2] Paragraph 9
[3] Paragraph 35
[4] Paragraph 10
[5] Paragraph 18
[6] Matrimonial and Family Proceedings Act 1984
[7] Paragraph 39
[8] Paragraph 45
[9] Paragraph 46
[10] Paragraph 72 of *Re A & B*
[11] Munby J, as he then was in *AB v JLB (BIIR: Article 15)* [2009] 1 FLR 517. This has recently been endorsed by the Court of Appeal in
Re KN (Article 15 Transfer) [2020] EWCA Civ 1002