

**RE C (COSTS: ENFORCEMENT OF FOREIGN CONTACT ORDER)****[2007] EWHC 1993 (Fam)**

Family Division

Munby J

2 August 2007

*Costs – Contact order – Application for enforcement of foreign order under Brussels II Revised, Art 41 – No defence – Minimum of documentation required*

The father made an application under Art 41 of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised), seeking enforcement of two Italian contact orders. The originating summons had been issued before the necessary certificate had been issued by the Italian court, but both sides were aware that the certificate would be produced in time for the hearing. The mother expected to be able at the hearing to raise the issue whether the court could decline to give effect to the plain requirements of Art 41 if circumstances suggested that the child might be at risk of abuse from the parent seeking to enforce the foreign order, having contacted public authorities in England about possible abuse. However, the approach taken by those authorities had not taken into account the impact of the Brussels regulation on the mother's situation and, after receiving advice from leading counsel, the mother was forced to concede that she did not have any effective answer to the father's application. Substantial costs, including translation costs were incurred, the sums being £18,260.08 and £3,660.66. The father sought an order against the mother for costs.

**Held** – ordering the mother to contribute to the father's costs in the sum of £1,750 –

(1) It was disturbing that an application under Art 41, which provided for automatic enforcement of a foreign order without the need for elaborate process and indeed, without the need even for any declaration of enforceability, had generated vast bundles when it might have been thought that, unless and until some defence was identified in materials filed by the defendant, a very brief formal affidavit, deposing to the fact of and exhibiting the relevant orders of the foreign court and the relevant certificate was all that was required in support of the originating summons. A case based upon Art 41 should proceed with the maximum of despatch and the minimum of delay and, as part of those necessary objectives, the minimum of documentation, unless and until such time as it emerged that the defendant was able to articulate some basis of defence requiring the submission by the applicant of more substantial material (see paras [11]–[13]).

(2) There was no authority or practice regulating the incidence of costs in Brussels II Revised cases. This case had been approached having regard simply to the facts and circumstances, without seeking to lay down any principle or establish any precedent for the future. It was not appropriate to leave the issue of costs for the Italian court, as there was no means of knowing what approach the Italian courts adopted in such proceedings, let alone whether it would be open to the Italian court to embark upon consideration of these costs (see paras [16], [17], [20]).

(3) It was appropriate to make the mother pay only a modest contribution to the father's costs. While the mother's stance, if not doomed to inevitable failure, was one which she had had scant prospect of establishing, there was no reason why she should

have to bear costs that had, in very significant measure, been generated by the preparation of a bundle containing much more material than was probably necessary in the circumstances (see paras [21]–[23]).

**Statutory provisions considered**

Children Act 1989

Hague Convention on the Civil Aspects of International Child Abduction 1980

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1:Arts 24, 41

*Indira Ramsahoye* for the applicant

*Teertha Gupta* for the respondent

*Cur adv vult*

**MUNBY J:**

[1] The parties have reached agreement in relation to all aspects of this matter, save for the question of costs.

[2] This is an application, pursuant to Art 41 of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised), in relation to which the defendant mother has, upon the basis of legal advice, in effect conceded that she does not have any effective answer to the proceedings.

[3] So far as I can see, the issues in this particular case were twofold. First, as a matter of law, does the regulation permit the court, faced with an application supported by the appropriate certificate under Art 41, to decline to give effect to the plain requirements of Art 41 on the basis that there are circumstances suggesting that the child might be at risk of abuse from the parent seeking to enforce the order of the foreign court? Secondly, and assuming that such an argument is possible as a matter of law, were the circumstances in the present case such as to constitute such a case on the facts?

[4] I am not, of course, privy to the basis upon which the mother has been advised, in effect, as I have said, to concede the claim. But one can see that, quite apart from what, no doubt, would have been hotly controverted allegations and disputes in relation to matters of fact, there might well have been significant difficulties in the way of the mother making good the proposition of law which would necessarily underlie her defence.

[5] The mother having conceded and consented to an order, one of the practical consequences of which is that the disputed contact will, in fact, take place, commencing in 2 days' time, the claimant father seeks an order against her for costs, neither party being publicly funded.

[6] Ms Ramsahoye, on behalf of the father, produces – albeit later than required by the rules – a statement of costs in Form N260, showing that the father's costs amount to no less than £18,260.08. One of Ms Ramsahoye's submissions in support of the proposition that the mother should pay the whole of those costs is that she climbed down and indicated a willingness to consent only in the course of yesterday afternoon; that against the background

of litigation which, so far as concerns the proceedings under the Children Act 1989, were commenced by the mother on 9 July 2007, and in relation to the proceedings which are now before the court were commenced by the father by originating summons dated 17 July 2007.

[7] That has to be put in context because when the originating summons was issued, the originating summons being explicitly founded exclusively upon Art 41 of the regulation, the necessary certificate was not in existence. The certificate was not, in fact, issued by the Italian court until 24 July 2007. There is dispute before me as to when precisely the certificate was delivered to the mother's legal representatives, but it was, at the earliest, no earlier than Friday, 27 July 2007, though the mother's solicitors, although aware that a certificate was in existence, assert that they did not, in fact, receive it until Wednesday, 1 August 2007.

[8] As against that, this is a case in which both sides were very well aware from the outset that the regulation was almost bound to be in play, and where, whether or not the certificate actually existed, the mother and her representatives can only sensibly have been proceeding on the basis that, barring some miracle, the certificate would be produced in time for the hearing.

[9] What I find somewhat more disturbing is the amount of the costs incurred in this case. I am not disputing that the work which it is said was done, has been done. I express no view about the hourly charging rates and the size of the brief fee, which certainly do not appear to be manifestly excessive, and which, if the matter proceeds further, will be a matter for evaluation by a costs judge.

[10] What does concern me is that, in proceedings which, as I have said are explicitly founded upon Art 41 of the regulation, and which, as the originating summons itself makes clear, seek the enforcement of two orders of the Italian court, bundles as substantial as those which have been produced were generated in anticipation of arguments which the mother might or might not deploy.

[11] It is disturbing, in an application under Art 41 of the regulation, an Article which provides in cases to which it applies for automatic enforcement of a foreign order without the need for elaborate process and indeed, as the Article itself spells out, without the need even for any declaration of enforceability, that vast bundles should be generated in circumstances where it might be thought that, unless and until some defence is identified in materials filed by the defendant, all that is required in support of the originating summons is a very brief formal affidavit, deposing to the fact of and exhibiting the relevant orders of the foreign court and the relevant certificate.

[12] The father is concerned only with two orders of the Italian court running to no more than 20 pages at the most. I draw attention to this matter, not merely because of a generalised disquiet that litigation (which although, as I recognise, it has embraced issues other than Art 41, nonetheless focuses from the father's point of view on Art 41) should generate costs of this level of magnitude, but also specifically because one of the items referred to in the schedule is the sum of £3,660.66, being the costs of translation. Manifestly those are not the costs of translating two Italian court orders and a certificate. It seems that a substantial volume of material was translated in anticipation of defences which the mother might or might not thereafter raise.

[13] Unless and until such time as it emerges that the defendant in his or her own evidence, or otherwise, is able to articulate some basis of defence requiring the submission by the applicant of more substantial material, a case based upon Art 41 should proceed with the maximum of despatch and the minimum of delay and, as part of those necessary objectives, the minimum of documentation. After all, it might be thought, the very purpose of the certificate mandated by the regulation is to avoid the need for the foreign court to embark upon any exploration of the history of the matter. And, moreover, the regulation itself (see, for example, Art 24) precludes this court from embarking upon any review of the jurisdiction of the foreign court.

[14] The normal approach in this country in domestic cases involving children is one in which, whatever may theoretically be the starting point, in practice it is unusual to make orders for costs as between a warring mother and father, merely on the basis that the one has succeeded and the other lost, unless it can be shown that the losing party has been conducting his or her case in a more than usually inappropriate fashion. There are sound reasons for that principle, which is one of long standing. They are familiar to all English family lawyers and I do not take up time going through them.

[15] It may be that a rather broader view has to be adopted in relation to proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 or – as in this case – under the Brussels regulation, bearing in mind that they are proceedings with an international element, regulated by international conventions and treaties, which are required to be conducted by all courts – in the case of the regulation, all courts within the EU – without paying too disproportionate regard to the particular principles which the court of one member state might apply in the course of a purely domestic case.

[16] I inquired of counsel – Ms Ramsahoye on behalf of the father and Mr Gupta on behalf of the mother, both of whom are highly experienced in matters of this sort – as to whether there was any authority or practice regulating the incidence of costs in Brussels regulation cases. The answer seemed to be that there is not, not least because in many such cases one or other or sometimes both of the parties is in receipt of public funding, so the dilemma with which I am faced presents itself, if at all, in a much less acute form.

[17] I do not propose to lay down any principle as to the incidence of costs in cases of this sort. The only general observations that I wish to make are those which I have already made as to the way in which such cases should, as it seems to me, henceforth be conducted. I propose to approach this particular case having regard simply to the facts and circumstances of this case, without seeking to lay down any principle or to establish any precedent for the future.

[18] I have considerable sympathy with the mother who, as a layman, cannot be expected to understand the minutiae of a regulation, the details of which are, I suspect, even now in significant measure a closed book to large numbers other than expert family lawyers.

[19] There is also the fact that the mother was in communication with public authorities in this country, namely the Thames Valley Police and Reading Social Services, discussing her anxieties about possible abuse. The approach which those public authorities were adopting and which, by implication, they were suggesting the mother should be adopting, was an

approach completely uninformed by the impact of the Brussels regulation, such that when she received the expert legal advice which she has received – including, as I was told, advice from leading counsel – it was a very bitter pill that she had to swallow.

[20] It has been suggested that perhaps I should make no order for costs on the basis that the ultimate incidence of these costs is something which should be dealt with indirectly, as it were, by the Italian court which, as I understand it, is still engaged upon the hearing of what we would call ancillary relief proceedings. That seems to me to be a wholly inappropriate approach for me to adopt, because I have no means of knowing what approach the Italian court adopts in such proceedings, let alone whether it would be open to the Italian court in proceedings of that sort even to embark upon a consideration as to where these particular costs lie. It seems to me that it is a matter that I must deal with.

[21] In all the circumstances, I think that it is appropriate to make the mother pay a modest contribution to the father's costs. I think that if I were simply to make the order which Ms Ramsahoye seeks it would be contrary to the interests of the child, because it would do nothing to make it easier for the mother and the father to work together in the child's interests, in circumstances which are already difficult enough, in particular for the mother.

[22] On the other hand, I think there is some force in the submission which implicitly underlies Ms Ramsahoye's position, as indeed the order, which by consent I am invited to make, demonstrates in the outcome, that the mother's stance, if not doomed to inevitable failure, was one which she had scant prospects of establishing, even if only because of the legal structure of the regulation.

[23] As against that, I see no reason why this mother should have to bear costs which have in very significant measure been generated by the preparation of a bundle containing much more material than was probably necessary in the circumstances. If this was, as Ms Ramsahoye in effect says, a simple case under Art 41 to which there was, in truth, no defence, then why, I ask rhetorically, does the court have a bundle which, occupying the best part of a lever arch file, must run to something of the order of 300 pages? Why, in particular, should the mother be exposed, for example, to footing the bill for translation costs of the magnitude I have already mentioned, where it might be thought that the amount of material that required to be translated and the consequential costs would be modest indeed?

[24] There is inevitably in these circumstances no legal, no scientific, and no mathematical basis to justify a particular figure, rather than a different figure. Any figure which the court selects in these circumstances is bound to be, at best, only a rough approximation of perfect justice and is, in that sense, bound to be arbitrary.

[25] It would be no kindness to either party to direct that these costs are to be the subject of detailed assessment. That would merely perpetuate legal procedures in this country and incur from them yet further costs.

[26] The conclusion to which I have come, in all the circumstances, is that the mother should pay by way of contribution to the father's costs of this litigation the sum of £1,750.00.



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*Order accordingly.*

Solicitors: *Studio Legale Internazionale Lomardo*, Italy, for the applicant  
*Dawson Cornwell* for the respondent

PHILIPPA JOHNSON  
*Law Reporter*