No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

This Judgment was delivered in private. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to dos so will be a contempt of court.

IN THE FAMILY COURT

Before:

HIS HONOUR JUDGE MORADIFAR

In the matter of:
K -v- S

(appeal against registration of an order of a member state)

Miss Hannah Jones Counsel instructed by IBB Solicitors on behalf of the appellant.

Mr Augustine Otor-Osagie of Dominion Solicitors LLP on behalf of the respondent.

Date of the hearing:

15 August 2019

HHJ Moradifar

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

His Honour Judge Moradifar:

Introduction

1. The case concerns an appeal against the registration of an order that was made by the District Court in Krosno Poland dated 28 July 2010 (the "Polish order"). The provisions of the order include requirements that the Appellant should pay the sum of £300 each month towards the maintenance of the parties' child. I will detail the background to this case below.

2. In summary the parties' respective position may be summarised as follows;

a. The Appellant states that in the circumstances of this case;

i. A competent authority in this jurisdiction has properly exercised its powers on issues pertaining to child maintenance and the subsequent application to register the Polish Order is misconceived and wrong in law as a means by which enforcement of the Polish order can be pursued,

ii. Additionally, and in the alternative, the court should refuse to recognise the Polish order because it would be manifestly contrary to public policy.

b. The Respondent states that the Polish order is a valid order that is not only capable of recognition and enforcement, but that must be enforced. She argues that the combined reading of the relevant

regulatory provisions means that the Polish order must be recognised and declared as enforceable without any "right to a review". Furthermore, any interference by a competent authority must be on an informed basis and if a decision is made without requisite relevant facts, that decision will be invalid and the Polish order will continue to be valid enforceable order.

The law

3. It is common ground that the relevant applicable provisions for recognition and enforcement of orders by a competent court of a member state are set out in the *Maintenance Regulation (EC) No 4/2009*, formally *The Council Regulation (EC) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations European Maintenance Regulations (2011)* (The "Regulations").

4. The first chapter the Regulations sets out the scope and definition as follows:

"SCOPE AND DEFINITIONS

Article 1

Scope of application

1. This Regulation shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity.

2. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies.

Article 2

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

Definitions

1. For the purposes of this Regulation:

1. the term 'decision' shall mean a decision in matters relating to maintenance obligations given by a court of a Member State, whatever the decision may be called, including a decree, order, judgment or writ of execution, as well as a decision by an officer of the court determining the costs or expenses. For the purposes of Chapters VII and VIII, the term 'decision' shall also mean a decision in matters relating to maintenance obligations given in a third State;

2. the term 'court settlement' shall mean a settlement in matters relating to maintenance obligations which has been approved by a court or concluded before a court in the course of proceedings;

3. the term 'authentic instrument' shall mean:

(a) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument, and

(ii) has been established by a public authority or other authority empowered for that purpose; or,

(b) an arrangement relating to maintenance obligations concluded with administrative authorities of the Member State of origin or authenticated by them;

4. the term 'Member State of origin' shall mean the Member State in which, as the case may be, the decision has been given, the court

settlement has been approved or concluded, or the authentic instrument has been established;

5. the term 'Member State of enforcement' shall mean the Member State in which the enforcement of the decision, the court settlement or the authentic instrument is sought;

6. the term 'requesting Member State' shall mean the Member State whose Central Authority transmits an application pursuant to Chapter VII;

7. the term 'requested Member State' shall mean the Member State whose Central Authority receives an application pursuant to Chapter VII;

8. the term '2007 Hague Convention Contracting State' shall mean a State which is a contracting party to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter referred to as the 2007 Hague Convention) to the extent that the said Convention applies between the Community and that State;

9. the term 'court of origin' shall mean the court which has given the decision to be enforced;

10. the term 'creditor' shall mean any individual to whom maintenance is owed or is alleged to be owed;

11. the term 'debtor' shall mean any individual who owes or who is alleged to owe maintenance.

2. For the purposes of this Regulation, the term 'court' shall include administrative authorities of the Member States with competence in matters relating to maintenance obligations provided that such authorities offer guarantees with regard to impartiality and the right of

all parties to be heard and provided that their decisions under the law of the Member State where they are established:

(i) may be made the subject of an appeal to or review by a judicial authority; and

(ii) have a similar force and effect as a decision of a judicial (1) OJ L 299, 16.11.2005, p. 62. authority on the same matter. L 7/6 EN Official Journal of the European Union 10.1.2009 These administrative authorities shall be listed in Annex X. That Annex shall be established and amended in accordance with the management procedure referred to in Article 73(2) at the request of the Member State in which the administrative authority concerned is established.

3. For the purposes of Articles 3, 4 and 6, the concept of 'domicile' shall replace that of 'nationality' in those Member States which use this concept as a connecting factor in family matters. For the purposes of Article 6, parties which have their 'domicile' in different territorial units of the same Member State shall be deemed to have their common 'domicile' in that Member State."

5. By operation of Art.76 the relevant provisions of the Regulations came into force on 18 June 2011. Furthermore Art.75 provides that:

"1. This Regulation shall apply only to proceedings instituted, to court settlements approved or concluded, and to authentic instruments established after its date of application, subject to paragraphs 2 and 3.

2. Sections 2 and 3 of Chapter IV shall apply:

(a) to decisions given in the Member States before the date of application of this Regulation for which recognition and the declaration of enforceability are requested after that date;

(b) to decisions given after the date of application of this Regulation following proceedings begun before that date, in so far as those decisions fall with the scope of Regulation (EC) No 44/2001 for the purposes of recognition and enforcement.

Regulation (EC) No 44/2001 shall continue to apply to procedures for recognition and enforcement under way on the date of application of this Regulation. The first and second subparagraphs shall apply mutatis mutandis to court settlements approved or concluded and to authentic instruments established in the Member States.

3. Chapter VII on cooperation between Central Authorities shall apply to requests and applications received by the Central Authority as from the date of application of this Regulation."

6. Chapter II of the Regulations states as follows:

" JURISDICTION

Article 3

General provisions

In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:

(a) the court for the place where the defendant is habitually resident, or

(b) the court for the place where the creditor is habitually resident, or

(c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or

(d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Article 4

Choice of court

1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them:

(a) a court or the courts of a Member State in which one of the parties is habitually resident;

(b) a court or the courts of a Member State of which one of the parties has the nationality;

(c) in the case of maintenance obligations between spouses or former spouses:

(i) the court which has jurisdiction to settle their dispute in matrimonial matters; or

(ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual

residence for a period of at least one year. The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised. The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

2. A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. This Article shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18.

4. If the parties have agreed to attribute exclusive jurisdiction to a court or courts of a State party to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (1), signed on 30 October 2007 in Lugano (hereinafter referred to as the Lugano Convention), where that State is not a Member State, the said Convention shall apply except in the case of the disputes referred to in paragraph 3.

Article 5

Jurisdiction based on the appearance of the defendant

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.

...

Article 8

Limit on proceedings

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

1. Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given.

2. Paragraph 1 shall not apply:

(a) where the parties have agreed in accordance with Article 4 to the jurisdiction of the courts of that other Member State;

(b) where the creditor submits to the jurisdiction of the courts of that other Member State pursuant to Article 5;

(c) where the competent authority in the 2007 Hague Convention Contracting State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or give a new decision; or

(d) where the decision given in the 2007 Hague Convention Contracting State of origin cannot be recognised or declared enforceable in the Member State where proceedings to modify the decision or to have a new decision given are contemplated.".

7. The recognition and enforceability of orders by a member state of the orders made by another are set out in Chapter IV of the Regulations. Art. 21 provides that:

"Article 21

Refusal or suspension of enforcement

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

1. The grounds of refusal or suspension of enforcement under the law of the Member State of enforcement shall apply in so far as they are not incompatible with the application of paragraphs 2 and 3.

2. The competent authority in the Member State of enforcement shall, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action, either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period.

Furthermore, the competent authority in the Member State of enforcement may, on application by the debtor, refuse, either wholly or in part, the enforcement of the decision of the court of origin if it is irreconcilable with a decision given in the Member State of enforcement or with a decision given in another Member State or in a third State which fulfils the conditions necessary for its recognition in the Member State of enforcement.

A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of the second subparagraph.

3. The competent authority in the Member State of enforcement may, on application by the debtor, suspend, either wholly or in part, the enforcement of the decision of the court of origin if the competent court of the Member State of origin has been seised of an application for a review of the decision of the court of origin pursuant to Article 19.

> *Furthermore, the competent authority of the Member State of enforcement shall, on application by the debtor, suspend the enforcement of the decision of the court of origin where the enforceability of that decision is suspended in the Member State of origin."*

Therefore the Regulations create mandatory (Art.21, 2) and a discretionary (art.21, 3) provisions for refusal of recognise a relevant order.

A competent authority is specifically defined in Annex X to include *"in England and Wales and Scotland…the Child Support Agency (CSA) and the Child Maintenance Service (CMS)"*.

8. The Regulations alo provide for limited circumstances in which a member state may refuse recognition. These are set out in Art. 24 as follows:

> *"Article 24*
>
> ***Grounds of refusal of recognition***
>
> *A decision shall not be recognised:*
>
> *(a) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The test of public policy may not be applied to the rules relating to jurisdiction;*
> *(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;*
> *(c) if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which recognition is sought;*

> *(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in a dispute involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought. A decision which has the effect of modifying an earlier decision on maintenance on the basis of changed circumstances shall not be considered an irreconcilable decision within the meaning of points (c) or (d).”*

Background

9. The parties are Polish nationals. They met whilst living in Poland and married in Poland on 4 March 2000. They have one child M who is now in her late teens and has finished her full-time education. The Appellant moved to the UK in 2003. The parties separated in 2005. The Respondent and M moved to the UK in 2009. It is agreed that by 2010, the parties and M were habitually resident in the UK.

10. The parties agreed to formally separate and to issue divorce proceedings in Poland. By an order dated 28 July 2010 the District Court in Krosno (the “Polish order”), dissolved the marriage, ordered that the appellant should pay the sum of “£300” each month by way of maintenance for M, that the respondent shall be the primary carer for M and that the appellant should have weekly contact with M. It is common ground that it is customary that the Courts in Poland routinely deal with matter of child maintenance and custody as part of the divorce proceedings.

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

11. The parties have continued to live in the UK. The Appellant continually met his obligations for child maintenance per the Polish order until 2012, when the Appellant applied to the Child Support Agency ("CMS" for ease of reference as it became the Child Maintenance Services in the intervening period) for an assessment of his maintenance liability. On 23 October 2012 the CMS wrote to the Respondent informing her of the application and stating that the CMS has *"… jurisdiction over any child maintenance payments in place as part of a court order."* By November of the same year the CMS assessed the Appellant's liability as significantly less than £300 per month. He stopped paying the amount due under the Polish order. At the same time, he received a hand-written note (possibly at his request) from a Ms K Evans from the CMS stating that the CMS assessment will *"override the court order in Poland".* The CMS also corresponded with the Respondent's previous solicitors in April 2014 during which it made further refence to the Polish order by stating that I did not have the details on its system and consequently did not considered the same when assessing the Appellant's liability. The letter further states that issues of none payment should be referred to the Polish court.

12. During 2015, the respondent appears to have made applications to the Polish courts for enforcement of the Polish order. The precise outcome of that application remains unclear. In the course of his submissions on behalf of the Respondent, Mr Otor-Osagie informed me that the Polish courts had refused her Application as the court held that it did not have jurisdiction.

13. In 2017 the Appellant accumulated a small amount of arears when he stopped paying the sums due under the CMS assessment as these had become subject to new CMS fees. These sums have since been paid and the Appellant has continued to pay child maintenance despite M attaining majority.

No information that is capable of or may lead to the identification of the children or the parties to this case may be published.

14. In October 2017 the Appellant was notified that the Respondent has taken steps to register the Polish order in the UK. Within eight days, the Appellant raised his objections in writing to such registration. The appeal has since proceeded through the courts and comes before me for a final determination of the appeal against registration of the said order.

Analysis

15. The parties have agreed that his hearing may be decided without hearing any evidence and that the matter can be properly disposed of on submissions. I have agreed that this is appropriate course for this appeal. Therefore, I have considered the unchallenged evidence as is presented to me in the court bundle.

16. Poland became a member of the European Community on 1 May 2004. The Regulations came into effect after eleven months after the Polish order on 18 June 2011. Art.75 makes it clear that the relevant parts of the Regulations are the transitional provisions contained in Chapter IV sections 2 and 3. From this point the parties' respective submissions on the law diverge.

17. The Appellant relies on the opinion of a Polish lawyer Mr Jerzy Wolinski who provided his opinion in writing on 2 July 2019. In summary Mr Wolinski state that:

> a. The parties and M are habitually resident in England. Under the Polish *Code of Civil Procedure (17 November 1964)*, domicile or habitual residence in Poland is necessary before a Polish court can exercise its jurisdiction. The parties being habitually resident in England will mean that the matter will have to be settled in accordance with European Law, not Domestic Polish law.

b. Pursuant to Art. 3 of the Regulations, given that the parties and M are all habitually resident in England, the "exclusive" jurisdiction on matters relating to maintenance falls on the competent authority in England that includes the CMS.

c. As such, the Polish courts no longer have jurisdiction and the Polish order is superseded by the decision of the CMS. There is no right or remedy available to the parties in the domestic courts of Poland.

18. The Respondent in turn relies on the legal opinion of Ms Joana M Waraksa who was the attorney instructed by the Respondent in the divorce proceedings and her subsequent application in 2015. In her written opinion dated 22 May 2019, she refers only to the domestic law of Poland and recites the provisions relating to issues of limitation. She suggests that the 2015 proceedings were "discontinued" by the bailiff as they considered enforcement to be "ineffective". She concludes by stating that the parties are Polish citizens and that the Polish order cannot be "… *changed by a judgement of another country".*

19. Mr Wolinski's opinion makes no analysis of the issue of domicile. I also note that neither party has sought to raise the issue of domicile as relevant. Having considered the domestic Polish legal provisions, Mr Wolinski offers his option on the correct provisions of the Regulation. By contrast, Ms Waraksa only refers to the Polish domestic provisions, the operation of the limitation periods and relies on the nationality of the parties in forming her concluded opinion. She demonstrates no regard or appreciation of the impact of the European Union provision and more particularly the Regulations. In so far as

the aforementioned opinions are relevant, I overwhelmingly prefer the analysis of Mr Wolinski.

20. The issue of jurisdiction is clearly set out in Chapter II of the regulations. The combined effect of Art.s 3 and 4 in this context is that the parties may choose the jurisdiction in which the dispute is to be dealt with. The parties in this case properly could exercise their choice as to jurisdiction pursuant to Art. 4(1)(b). However, Art. 4.3 makes it clear that the parties cannot choose their jurisdiction in relation to *"a dispute relating to a maintenance obligation towards a child under the age of eighteen".* I note that the validity of the 2010 child maintenance Polish order has not been put in issue.

21. The construction of the Regulations and particularly Art. 3, gives rise to the concept of "exclusive jurisdiction". The question of jurisdiction relating to *"maintenance obligation in Member States"* jurisdiction is determined by reference to habitual residence [Art.3(a) and (b)] or the court that has jurisdiction by its own laws if matters relating to maintenance (or parental responsibility) that are ancillary to the proceedings before it and jurisdiction is not solely based on the nationality of one party.

22. It follows from these important provisions that the parties were entitled to agree to divorce in Poland and that matters such as child maintenance that were ancillary to the divorce proceedings fell properly in the jurisdiction of the District Court of Krosno. However, the concluding remarks of Ms Waraksa that are based on Nationality of the parties is clearly unsustainable in the face of the provisions of Art.3.

23. The CMS is clearly identified as the competent authority in England (Annex X). The CMS became involved two years after the Polish order was

made. At the time of its involvement the only issue before it was those concerning child maintenance for M. Furthermore, by this stage the parties and M had been habitually resident in England for three years. In my judgment, on any construction of the Regulations, by 2012, jurisdiction in relation to child maintenance was in England and consequently the CMS. This analysis is consistent with the domestic Polish Code of Civil Procedure and the Respondent's concession that in 2015 the Polish courts declined jurisdiction.

24. The Respondent's application to register the Polish order and the subsequent attempt at enforcement came about in October 2017. By now the parties and M had been habitually resident in England for more than eleven years. CMS had exercised its jurisdiction to assess the quantum of the Appellant's child maintenance responsibilities based on his updated income and circumstances. In my judgment any argument that the act of registration in 2017 should give priority to the Polish order or invalidate the decision of the competent domestic authority is unsustainable. Indeed, it would be contrary to the applicable law as set out in the Regulations.

25. The Respondent submits that the combined impact of Art.s 23, 26, 27, 28 and 30 is such that the Polish order is enforceable and should be enforced from the moment that it was made and in the alternative from the moment the notice of registration is given to the Appellant. She argues that by operation of these Articles, there is in fact no right of review but in the alternative, where such a right exists, it should be dismissed by the court given that the order was valid and enforceable form the date it was made. In my judgment, this analysis is fundamentally flawed in the context of the provisions that I have referred to above. In particular, the general provisions that are set out in Art.s 3, 4, 5 and 8 of the Regulations and are discussed in more detail above.

26. Given my analysis set out above, it is unnecessary for me to consider whether recognition should be refused on the grounds of public policy. For completeness, I will observe that the domestic courts of member states are usually very slow indeed not to recognise and enforce the orders of another court of a member state. There are occasions that this may be necessary by operation of law. I note that the Respondent has informed me that the Polish courts have declined jurisdiction. At the heart of the Regulations is the cooperation, recognition and enforcement of orders made in member states. The long-established principles of comity predate the Regulations. However, the Regulations also endeavour to put an end to "forum shopping" or parties making claims for enforcement that would see them make what has been referred to as "double recovery". This is amply illustrated by the Respondent's schedule of arrears that are claimed. However unintentionally the miscalculations where undertaken, there is a clear and obvious element of double accounting of alleged arrears. In recognising the ethos at the heart of the Regulations, upholding the subsequent decision of the Polish courts on the issue of jurisdiction, recognising the domestic Polish laws and recognising the jurisdiction of the competent authorities in England, in my judgement, public policy would demand that the Polish order is not recognised pursuant to art. 24(a).

Conclusion

27. By reason of the aforesaid, the appeal against registration of the Polish order is allowed