



**THE COURT OF APPEAL**

Neutral Citation Number: [2020] IECA 100

**Record No. 2019/434**

**Whelan J.  
Costello J.  
Noonan J.**

**IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION (EC) 2201/2003  
- AND -  
IN THE MATTER OF FOREIGN PROCEEDINGS BEARING NO. PO17P00941  
- AND -  
IN THE MATTER OF M.D. A CHILD BORN IN MAY 2012  
- AND -  
IN THE MATTER OF E.W. A CHILD BORN IN AUGUST 2014  
- AND -  
IN THE MATTER OF R.E. A CHILD BORN IN SEPTEMBER 2017**

**BETWEEN/**

**HAMPSHIRE COUNTY COUNCIL**

**RESPONDENT**

**-AND-**

**C.E. AND N.E.**

**APPELLANTS**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 9th day of April 2020**

**Introduction**

1. This is an appeal against the order of Binchy J. perfected on the 27th September 2019, following delivery of a written judgment (*Hampshire County Council v. C.E.* [2019] IEHC 641) on the 30th July 2019, refusing to grant certain consequential relief sought by the appellants arising out of orders made by him on the 12th April 2019 in earlier proceedings between the same parties (*Hampshire County Council v. C.E.* [2019] IEHC 340). In the said earlier proceedings, the trial judge allowed the appeal and set aside the order made *ex parte* by Creedon J. on the 21st September 2017 (“the Recognition Order”) recognising and enforcing the order of the High Court of England and Wales made on the 8th September 2017 (“the Return Order”) pursuant to Chapter III of Council Regulation (EC) 2201/2003 (“the Regulation”) in relation to the three children named in the title hereof.
2. The appellants contended that the vindication by restitution of their constitutional rights, particularly to a family life with the said children, pursuant to Bunreacht na hÉireann, required the High Court to consequentially direct the return of the said children to this

jurisdiction and further direct the transfer of any substantive proceedings now extant before the courts of England and Wales concerning the children, as fell within the scope of the Regulation, pursuant to Article 15.

## **Background**

### **Events leading to the family's arrival in Ireland and return of the children to England**

3. There is a complex litigation history to these proceedings, which have been the subject of determinations and judgments, *inter alia*, in this court, the High Court and the Court of Justice of the European Union ("CJEU") including as follows:
  - (i) decision of Creedon J. in the High Court on the 21st September 2017;
  - (ii) decision of Reynolds J. in the High Court on the 18th January 2018, holding that an application to appeal the order of 21st September 2017 had been lodged out of time;
  - (iii) appeal to the Court of Appeal, judgment dated 17th May 2018 (*Hampshire County Council v. C.E.* [2018] IECA 154), wherein the court referred certain questions to the CJEU;
  - (iv) thereafter, the appellants made a further application to the Court of Appeal resulting in a further judgment and referral of a further question to the CJEU (*Hampshire County Council v. C.E.* [2018] IECA 157);
  - (v) opinion of Advocate General Kokott, delivered on the 7th August 2018 (EU:C:2018:654);
  - (vi) decision of the CJEU on all the questions referred to it, delivered on the 19th September 2018 (*Hampshire County Council v. C.E. (Joined Cases C-325/18 PPU and C-375/18 PPU)* EU: C:2018:739);
  - (vii) judgment of the Court of Appeal, delivered on the 28th November 2018 (*Hampshire County Council v. C.E.* [2018] IECA 365);
  - (viii) judgment of the High Court, delivered on the 12th April 2019 (*Hampshire County Council v. C.E. and N.E.* [2019] IEHC 340), wherein Binchy J. allowed the appeal against the order of Creedon J. of the 21st September 2017.
4. The appellants are UK nationals who arrived in this State on the 5th September 2017 with three young children aged five years, three years, and an infant born in the UK two days before. The first appellant is the mother of all three children. The second appellant is the father of the youngest child, R. The three children were, at the date of the hearing of this appeal, aged seven and a half years, five years and three months, and two years and two months respectively. At all material times they resided in England. The appellants married in 2017. The appellants have no previous connection to this State and acknowledged that they travelled here for the primary purpose of preventing the children being taken into the care of the respondent.

5. On the 30th June 2017, the respondent had obtained interim care orders in respect of the two older children, M. and E. Those orders conferred parental authority on the respondent in relation to them and, *inter alia*, prohibited their removal from the jurisdiction of the courts of England and Wales. In regard to R., prior to his birth the respondent had indicated an intention to make an application to court for a care order following his birth. In anticipation that this would occur, the appellants travelled to this jurisdiction with the three children on the 5th September 2017.
6. Following their arrival in Ireland on the 5th September 2017, the appellants rented accommodation for the family and immediately disclosed their presence to relevant authorities, including the local area health nurse, and effected registration of the children with a doctor. M. and E. were also enrolled in the local school. The appellants' contention is that they intended to reside in this jurisdiction permanently with the three children.
7. On the 6th September 2017, the respondent applied without notice to the appellants to the family court in Portsmouth seeking approval to certain changes in the interim care plans for M. and E. and an interim care order in respect of R. The respondent was not aware at this point that the appellants were no longer within the jurisdiction of the courts of England and Wales.
8. On the 7th September 2017 the respondent made contact with its counterparts in the Child and Family Agency ("the CFA") regarding the family and became aware of their address in Ireland.
9. On the 8th September 2017 the High Court in Portsmouth made, *inter alia*, the Return Order, an order making all three children wards of court and further directing that the children be returned to the jurisdiction of England and Wales and to the custody of the respondent. No effort was made to serve the appellants or put them on notice in connection with this application prior to the hearing.
10. On the 11th September 2017 the CFA made an unannounced home visit to the appellants' home in Ireland. During the course of this visit, the parents informed the CFA that they had been advised to travel to Ireland to stop the respondent taking the children into care. The appellants were informed of the making of the Return Order in England. Nothing of concern was found by the CFA during the course of either that visit or a subsequent announced visit the following day. During the second visit, the appellants were advised that the CFA would be applying to the District Court for an interim care order based on the concerns and information received from the respondent and that the respondent might apply to have the Return Order recognised and enforced in Ireland and, if successful, the children would then be returned to the UK.
11. On the 14th September 2017, on the application of the CFA, the local District Court granted interim care orders in respect of the three children with the consent of the appellants who had no legal representation. The children were then taken from the appellants and placed in foster care. These orders were expressed to remain operative for twelve days, until the 26th September 2017.

12. On 21st September 2017 the respondent made an *ex parte* application to the High Court pursuant to the Regulation seeking orders for the recognition and immediate enforcement of the English Return Order. Creedon J. granted the orders sought by the respondent having heard legal submissions. That same afternoon the three children were handed over by representatives of the CFA to the respondent and were then returned to the UK. The appellants were oblivious to these events.
13. Upon their return to England M. and E. were placed in the care of E.'s father where they have remained ever since. The new-born R. was placed in foster care. The appellants were notified of this development only after the children had left the State and it is accepted that the respondent had expressly requested the CFA not to inform them on the alleged basis that the appellants were considered to be a flight risk. The execution of the Return Order prior to the service upon the appellants of the order of Creedon J. precluded any opportunity to seek to stay the execution of her order in advance of any appeal being brought against same.
14. The appellants were not served with the *ex parte* order of the High Court until the following day, the 22nd September 2017. Supporting documentation, including the grounding affidavit, the exhibits, the *ex parte* docket and all other relevant material was not served on the appellants until the 25th September 2017.

#### **Proceedings in England and Wales after the return of the children**

15. In England the appellants endeavoured to appeal the wardship order of 8th September 2017 but permission to appeal was refused by the Court of Appeal on the 9th October 2017.
16. In Ireland, the appellants then sought to appeal the Recognition Order. On the 18th January 2018 Reynolds J. held that they were out of time (by two days) to lodge an appeal considering that in light of the provisions of Article 33(5) of the Regulation there was no jurisdiction to extend time for the purposes of such an appeal.
17. The appellants subsequently appealed that decision to this court. In those proceedings the respondent informed this court that it did not intend to participate in the proceedings because of budgetary constraints and also indicated that, in any event, it did not intend to return the children, irrespective of the outcome of the appeal. In its decision, [2018] IECA 154, this court referred certain questions to the CJEU.
18. Thereupon, the appellants made an application for an interlocutory injunction to this court to restrain the respondent from proceeding with the adoption of the three children. In a judgment dated the 7th June 2018, [2018] IECA 157, this court referred a further question to the CJEU. The respondent did not take part in these proceedings but indicated its intention to proceed with the adoption of R.
19. An opinion of Advocate General Kokott was delivered on the 7th August 2018 which was followed by a joint decision of the CJEU on the 19th September 2018 addressing the questions referred to it (*Hampshire County Council v. C.E. (Joined Cases C-325/18 PPU*

and C-375/18 PPU) EU:C:2018:739). During the hearing in the CJEU, the UK Government conceded that if the appellants' appeal in this jurisdiction was successful the return of the children would have to be facilitated.

20. Following upon the decision of the CJEU, this court on the 28th November 2018 handed down its decision on the appellants' appeal, [2018] IECA 365. In that decision, the court noted that no explanation had been proffered by the respondent as to why it withheld service of relevant material from the appellants on the 22nd September 2017 at a point when the children had already been removed from the jurisdiction. The court determined that valid service had only occurred on the 25th September 2017 and thus, the appeal of the Recognition Order had been served within time. The matter was remitted to the High Court for determination.
21. An injunction prohibiting the respondent from taking any further steps to advance the adoption of R. was granted by the High Court (Binchy J.) on the 6th December 2018. In light of this appeal, this ongoing injunction was continued and, on the 25th November 2019, the respondent, in response to a motion for continuing injunctive relief, provided undertakings to this court in terms of the existing injunction pending the determination of the within appeal.

**Set aside application and appeal against the Recognition Order**

22. In his judgment of the 12th April 2019, against which the respondent did not appeal, and which was the primary basis for the subsequent application for consequential orders, Binchy J. observed that by the time the respondent was moving the application before the English Court, on the 8th September 2017, it had had contact with the CFA and was aware of the appellants' location in this jurisdiction. He noted that counsel for the respondent had accepted that the urgency on the 21st September 2017 was not driven by concerns for the safety of the children but was driven by the other factors, including that the two older children were, by the actions of the appellants, being removed from the father of E., who is also a father figure to M. In a comprehensive judgment he concluded that the order granted by the High Court on 21st September 2017 for the recognition of the English Return Order was made in circumstances where one or both appellants, having parental responsibility for the children, did not have an opportunity to be heard, as required by Article 23(d) of the Regulation. He allowed the appeal and set aside the order for recognition of the Return Order. The Return Order of 8th September 2017 is as a result not now recognised in this jurisdiction.

**Consequential reliefs sought**

23. Following delivery of the April 2019 judgment determining that the Return Order was not recognised in this jurisdiction the appellants sought consequential orders by two distinct processes; firstly, they delivered points of claim on the 3rd May 2019 within the context of the original set-aside application and secondly, on the 9th May 2019 issued a special summons pursuant to the Guardianship of Infants Act 1964, as amended, and served a notice of motion dated the 16th May 2019 seeking orders pursuant to s. 11 of the said Act and invoking the inherent jurisdiction of the court and, alternatively, Article 15 of the Regulation.

24. Apart from seeking costs, the substance of the consequential reliefs sought included an order directing the return of the three children to this jurisdiction into the care of the appellants in light of the fact that the Return Order is not now recognised in this jurisdiction. In the points of claim, relief was sought on the basis of the decision of Binchy J. of the 12th April 2019, as well as the judgments of this court of the 17th May, 7th June and 28th November 2018 and the judgment of the CJEU of the 19th September 2018. Relief was also sought pursuant to s. 14 of the Guardianship of Infants Act 1964.

**The High Court judgment of the 30th July 2019**

25. The court noted at para. 49 that neither the Regulation nor the decision of the CJEU gave any guidance as to the consequences of a successful appeal pursuant to Article 33 of that Regulation in circumstances where the order has already been executed. Thus, he concluded that the availability of any remedy in these circumstances fell to be determined in accordance with domestic law. He was satisfied, citing the authorities relied on by the appellants, including *The State (Quinn) v. Ryan* [1965] I.R. 70; *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550; *Chafin v. Chafin* 568 U.S. 165 (2013) and *Redmond v. Redmond* 724 F.3d 729 (7th Cir. 2013), that the court did have jurisdiction to make orders of the kind sought by the appellants.
26. In his view, this was a discretionary jurisdiction which should be exercised only where it is appropriate to do so having regard to all the circumstances of the case, and not just the fact of the wrongful behaviour of the party against whom the order is sought alone. If there were other factors which lean against the granting of the orders sought, these too must be weighed in the balance of the court's consideration of the matter.
27. The trial judge relied on the decision of the Supreme Court in *Child and Family Agency v. C.J.* [2016] IESC 51, [2016] 1 I.R. 710 finding it instructive for two reasons: -

“Firstly, the Supreme Court did not appear to consider that it did not have jurisdiction to make an order for the return of the child. Rather it considered that it should not make such an order because jurisdiction in matters of parental responsibility concerning the child were vested in the courts of Scotland. That was so... because the court found the child to be habitually resident in Scotland at all times. Secondly, although fully satisfied that the High Court should not have made an order directing the return of the child to Scotland, the Court did not consider it appropriate [to] direct the return of the child, notwithstanding that the effect of the order had been to separate mother and child.” (para. 53)

The trial judge found at para. 56 that “the question of habitual residence is central to determination of jurisdiction in matters of parental responsibility for children”.

28. At para. 58 of the judgment the trial judge noted in relation to the circumstances of M. and E. that they: -

“...had always resided in England up until the time that they were brought by the appellants to this jurisdiction. By this time, the Courts of England and Wales were

already seised of proceedings concerning their welfare. Interim care orders had been made, which expressly prohibited the appellants from removing those children from the jurisdiction of England and Wales. Neither child had any connection of any kind with this country, and they were brought here for the dual purposes of avoiding [the respondent] and the Courts of England and Wales.”

29. Applying the test in *Mercredi (Case C-497/10PPU)* [2010] E.C.R. I-14309, EU:C:2010:829 the trial judge held that M. and E. had been habitually resident in England immediately prior to their removal. He observed that following their return to the UK, the courts of England and Wales continued to exercise jurisdiction in respect of them and that final care orders were made placing them in the care of the respondent. They were both subsequently placed in the care of E.’s father.
30. The trial judge found at para. 60 that as a consequence of this, the granting of the orders sought by the appellants would be an “exercise in futility” (citing O’Donnell J. in *Child and Family Agency v. C.J.*). He noted that child care arrangements concerning M. and E. had always been a matter for the courts of England and Wales, which would remain the case even if they were to return to this jurisdiction. For this same reason, the trial judge was satisfied that their return here could not amount to an effective remedy for the purpose of the Charter of Fundamental Rights of the European Union (“the Charter”) since, if the orders sought were granted and the children were returned here, it was “almost inevitable that they would have to be returned at some future date to the courts having jurisdiction in their parental responsibility i.e. the courts of England and Wales”. (para. 60)
31. Following from this conclusion, the trial judge further held that, insofar as the appellants sought reliefs pursuant to the Guardianship of Infants Act 1964, the respondent was correct in arguing that the court should decline jurisdiction in relation to those proceedings, pursuant to Article 17 of the Regulation.
32. In respect of the new-born, R., the trial judge observed at para. 67 that:

“...[i]t is very difficult to imagine that two out of three children could have habitual residence in one country while the third child has habitual residence in another, in circumstances where all three children have always resided together”.

He found that in line with the test laid down by the CJEU in *Mercredi*, it was necessary to consider the reasons of the appellants in moving to this country. He noted that, in light of Recital 12 of the Regulation and Article 24 of the Charter, the court must be guided by the “best interests” principle.

33. The trial judge found at para. 70 that: -

“...it could hardly be in the best interests of children that their parents could avoid the authorities entrusted with safeguarding the welfare of children by effecting a change in the habitual residence of the child or children concerned which has no

other purpose. It is not difficult to see how this is more likely to jeopardise the welfare of children than to promote their best interests.”

Accordingly, he observed: -

“...it is difficult to see how a court could accept that the habitual residence of a child has been changed where the only reason for a change in the residence of the child is to avoid those very authorities entrusted by a member state with the welfare of children.”

34. The trial judge considered that, in circumstances where R. was in this jurisdiction for only fifteen days and the sole reason for his being here was to avoid the respondent, his habitual residence upon his birth must have been that of his parents and half siblings, *i.e.* England. His habitual residence did not change when he was brought here by his parents. The court was satisfied that it ought not make an order for the return of R. to this jurisdiction notwithstanding the highly unsatisfactory circumstances by which he was returned to England and that also, for the like reasons given in respect of M. and E., it should decline jurisdiction in the proceedings issued pursuant to the Guardianship of Infants Act 1964.
35. The court further refused the appellants’ argument that it should therefore request the courts of England and Wales to transfer proceedings in that jurisdiction to this jurisdiction pursuant to Article 15 of the Regulation, finding at para. 72 that: (i) none of the children had a particular connection with this jurisdiction, as required by Article 15.3 of the Regulation, and (ii) there were no proceedings to transfer in the cases of M. and E., while in the case of R., it was unclear if there were any proceedings that could be transferred.
36. The trial judge concluded at para.73 that: -

“...it remains open to the appellants to apply to the courts of England and Wales for the discharge of the existing care orders in relation to the children... the CFA may well be able to render some assistance to the appellants in making such an application, most particularly in relation to [R.], since he is the child of both appellants and the full sibling of the child most recently born to them. If it is indeed the case that the CFA is satisfied that the appellants are discharging their parental responsibilities satisfactorily in respect of their new born child, and that the CFA would have no concerns as regards the return of any of the other children to the appellants, then in my view this is something that the CFA should communicate to the respondent, and it should support the appellants in any way it reasonably can in whatever applications they may make to court in England. It would in my view be incumbent on the CFA to provide such assistance (assuming it has no concerns about the appellants) having regard to the role played by the CFA in the return of the children to the United Kingdom.”

**Notice of Appeal**

37. The appellants’ notice of appeal encompasses the following grounds: -



- (i) The trial judge erred in the exercise of his discretion as to whether or not to make consequential orders arising from the order made by the High Court dated the 12th April 2019. In particular he erred:
  - (a) in finding that it was not appropriate to so order having regard to the circumstances of the case;
  - (b) in having insufficient regard to the wrongful behaviour of the respondent;
  - (c) in his assessment of the relevance of the Regulation and particularly so in circumstances where he determined that the circumstances of the present case were not addressed in the Regulation and the matter had to be addressed by domestic law; and
  - (d) in finding that habitual residence was relevant to the exercise of that discretion.
- (ii) Even if the question of habitual residence was relevant to the exercise of discretion, the trial judge was not in a position to make any finding in relation to habitual residence in circumstances where he had not indicated that it was a relevant consideration to the appellants who thus made no arguments or had any opportunity to adduce evidence as to habitual residence.
- (iii) If the trial judge was in a position to make a finding as to habitual residence, he was wrong in his determination of the applicable principles and/or application of same, in particular he erred in finding that the youngest child could not have a habitual residence which is separate to that of his siblings.
- (iv) The trial judge was wrong in his finding that the habitual residence of a new-born child in the sole lawful custody of both his married parents could not change immediately.
- (v) The trial judge was incorrect in his interpretation of Recital 12 of the Regulation in considering that the principles of "best interest" were relevant to the issue of change of habitual residence.
- (vi) The trial judge erred in considering the habitual residence of M. and E. insofar as he considered same as at the time when they left England, as opposed to the time of their removal from this jurisdiction.
- (vii) The trial judge erred in conflating the requirements of an effective remedy with the concept of jurisdiction under the Regulation.
- (viii) The trial judge erroneously made negative findings as to the effect of a transfer to this jurisdiction upon them and/or made further inappropriate assumptive findings about their return to England.
- (ix) The trial judge erred in his finding that there was no connecting factor which would allow him to make a request pursuant to Article 15 of the Regulation.

- (x) The trial judge was incorrect in refusing the order for costs in relation to this application as it was a necessary hearing ancillary to the order for non-recognition and set aside and it was an application arising in circumstances of an egregious, unconstitutional and wrongful act.

The appeal was opposed by the respondent.

### **Submissions of the appellants**

- 38. The appellants submit that throughout these proceedings the respondent has been guilty of abuse of process and has treated the Irish courts with contempt. This conduct includes the respondent's attitude to the non-return of the children in the case of a potentially adverse decision from this court, the withholding of information from the appellants and the relevant court, and the immediate enforcement of the judgment of Creedon J. The appellants note the fact that the actions of the respondent have been the subject of considerable criticism in the decisions of the courts of this jurisdiction referred to above and by Advocate General Kokott in her opinion of the 7th August 2018, whose view was that, when read in light of Article 47 of the Charter, enforcement before service breached Article 33(1) of the Regulation. This view was endorsed by the CJEU in its judgment.
- 39. The appellants contend that the rights of the family as protected by Articles 41 and 42 of the Constitution are also engaged and as there is no order in this jurisdiction that any person other than the first appellant (with respect to M. and E.), and both appellants in respect of R., is entitled to their care, there is a duty on the court to take action to secure their return. In this regard, reliance is placed on the decision of the Supreme Court in *N. v. Health Service Executive* [2006] IESC 60, [2006] 4 I.R. 374 wherein Murray C.J. referred to the fact that the court had to have regard to the constitutional rights and welfare of the infant to decide on the future but immediate care and custody of the infant with a view to giving effect to the consequence of the court's decision, namely her return to the custody of her parents.
- 40. They argue that the continuing failure of the respondent to return the children to this jurisdiction is in breach of express representations to the CJEU by the UK Government, in breach of the Irish court order of non-recognition, and is a continuing breach of the Regulation and the constitutional rights of the appellants and the children and their rights as protected by the Charter and the European Convention on Human Rights ("ECHR").
- 41. The appellants argue that Article 41 of the Charter, Article 13 of the ECHR and Articles 34.1 and 40.3 of the Constitution each require the courts to ensure that the administration of justice is effective and that the principles of fair procedures are respected. The appellants rely on *Efe v. Minister for Justice* [2011] IEHC 214, [2011] 2 I.R. 798 and *S. v. Minister for Justice* [2011] IEHC 31 in support of their contention that the requirement to effect a remedy mandates the court to examine the situation presenting before it and to make such order as does justice in any given situation.
- 42. It is submitted that the failure of the High Court to direct any meaningful action on the part of the respondent perpetuates and exacerbates the breach of procedural and

substantive rights which have been found to have already occurred; the first requirement to remediate the situation is to ensure that the children are returned to the State.

43. The appellants further rely on the decision of the US Court of Appeals, 7th Circuit, in the case of *Redmond v. Redmond* which, they submit, is authority for the making of such consequential orders as are sought in this case. The appellants rely on *The State (Quinn) v. Ryan* and *The State (Trimbole) v. The Governor of Mountjoy Prison* as authorities for the proposition that where there is a breach, the courts must effect a remedy.
44. The appellants also refer to the analogous principles of law as set forth in the cases of *Irish Bank Resolution Corporation Ltd. v. Quinn* [2012] IEHC 510, [2012] 4 I.R. 381; *Derby & Co. Ltd. v. Weldon* (Nos. 3 & 4) [1989] 2 W.L.R. 412, and *O'Neill v. O'Keefe* [2002] 2 I.R. 1 regarding the granting of international extraterritorial Mareva injunctions to vindicate rights and provide effective remedies.
45. The appellants submit that the trial judge fell into error in deciding that the power to order the return of the children was a discretionary power, contending that the discretion only arises as to what order will do justice; a court cannot refuse to make any order, as such a refusal perpetuates the injustice and continuing breach of rights.
46. The appellants rely on the decision of this court in *R.L. v. Judge Heneghan* [2015] IECA 120 at para. 35 to support the proposition that the court's discretion could only operate/be applied to refuse to vindicate the family's rights in "some extraordinary and wholly exceptional circumstances that operated to tilt the balance of justice away from restoring to the applicant what was removed from [him/her]". It is submitted that no such circumstances exist in the present case.
47. The appellants further rely on *O. v. Minister for Justice* [2012] IEHC 1 wherein Hogan J. observed that the set aside jurisdiction is essentially restitutionary in nature and it is generally designed to restore the *status quo ante*.
48. The appellants contend that the trial judge additionally failed in the exercise of his discretion to properly weigh and factor in the manner in which the children were removed from the State, the respondent's actions amounting to an unconstitutional act, a contempt of the administration of justice of the Irish courts and a deliberate and conscious breach of the rights of the family. It is argued that such actions were planned and designed to prevent the appellants from being able to secure a remedy to prevent the breach and forcible removal until it was complete and the children were in another jurisdiction.
49. The appellants submit that habitual residence did not fall to be considered as, by virtue of the Regulation, the Irish court is given exclusive jurisdiction to deal with non-recognition of the order. It is contended that it is the Irish courts who accordingly enjoy jurisdiction to remedy breaches of rights perpetrated by the respondent in relation to the persons the subject of its failed application and as a consequence of its unlawful actions.

50. They note that as a result of the judgment of Binchy J., the orders made to injunct R. from being adopted were “entirely pointless”. Restoring the rights of the family on foot of unlawful conduct does not require a consideration of habitual residence, it is submitted.
51. The appellants further assert that the trial judge erred in making findings as to habitual residence in the absence of any prior indication that the court intended to consider same. As a consequence, the appellants did not address on affidavit any factual matters relevant to the issue of habitual residence, nor make legal submissions thereon.
52. The appellants contend that it is clear from the affidavit of the first appellant sworn on the 17th January 2018 that the appellants intended their move to this jurisdiction on the 5th September 2017 to be permanent due to the risk which had emerged in relation to the unity of the family group which pre-dated the institution of any proceedings in respect of R. in England. It is submitted that R. was not habitually resident in England at that time but rather his habitual residence had changed to Ireland such that the English court did not have jurisdiction under the Regulation.
53. The appellants submit, relying on the decision of the CJEU in *C. v. M.* (Case C-376/14 PPU) EU:C:2014:2268 and the decisions of the courts of this jurisdiction in *A.S. v. C.S. (Child Abduction)* [2009] IESC 77, [2010] 1 I.R. 370 and *K.W. v. P.W.* [2016] IECA 364, that habitual residence could be acquired on behalf of a child where there was residence for a relatively short time provided there was a settled intention on the part of the parent to acquire an habitual residence. They note that similar conclusions in relation to the unity between the habitual residence of very young children and their parents were endorsed by the UK Supreme Court in *A. v. A. (Children: Habitual Residence)* [2013] UKSC 60, [2014] A.C. 1 and *In re L.C. (Children)* [2014] UKSC 1, [2014] A.C. 1038. They contend that there was such a settled intention on the part of the appellants.
54. In contrast to the trial judge’s view that it was most unusual for a child to have a different habitual residence to that of their sibling, the appellants assert that while it may take longer for older children to integrate into their new arrangements, an infant in the position of that in the case of *Mercredi* obtains social and family integration through their parents. They note that there is no minimum period of time within which habitual residence is established; the Regulation envisaging it changing in a very short period of time.
55. The appellants contend that apart from the binding duty to effect a remedy, the State in so doing has an ongoing duty and obligation to uphold and protect the rights of the family, as also expressly and separately mandated by the Constitution, and that it would only be in exceptional circumstances that the court would resile from giving effect to such rights.

**Submissions of the respondent**

56. The respondent submits that pursuant to the provisions of the Regulation (citing in particular Recital 12 and Article 8 of same), jurisdiction in matters of parental responsibility lies with the member state of the child’s habitual residence. It contends that

rights of custody can be vested in a court if it is seised of an application to deal with the child's residence and parental responsibility. In this regard, the respondent places reliance on the case of *X C.C. v. B. (Abduction)* [2009] EWHC 2635 (Fam), [2010] 1 F.L.R. 1197 wherein Macur J. held that the rights of custody were vested in the courts of England and Wales on the date of the departure of the children. In that case, the local authority had commenced care proceedings in respect of the children, who were living with their parents in England. On receipt of the local authority's application for an interim order or a care order, the court clerk directed that it be transferred to the relevant county court and listed for hearing. On being served with the papers, the parents immediately removed the children to Ireland.

57. The respondent contends that the courts of England and Wales are seised of the issues concerning parental responsibility of the children. In respect of the two older children, it asserts that custody rights were vested in the respondent by virtue of extant interim care orders and also vested in the English court by virtue of the ongoing proceedings.
58. In the case of R., it similarly argues that his custody rights were vested in the English court as the respondent had applied for an interim care order before his departure.
59. Accordingly, the respondent submits that the three children were habitually resident in England and Wales at the time of their departure and that their removal was "wrongful". In respect of M. and E., the respondent submits that Articles 9 and 10 of the Regulation apply and there could be no question of them having gained habitual residence in this jurisdiction.
60. Whilst acknowledging that the situation of R. differs, the respondent argues that it was open to the High Court to find that he was habitually resident in England and Wales at the time that he was brought into this country by the appellants. The respondent submits that, applying the test in *Mercredi*, R. was born in Southampton to English parents and his siblings have at all times been habitually resident in England and Wales, and it would be unlikely to have a different habitual residence to that of his siblings. It notes his insufficient integration in this jurisdiction and submits that it is likely that he was removed unlawfully from the jurisdiction of England and Wales, activating the operation of Article 10 of the Regulation.
61. The respondent cites Articles 17 and 19(3) of the Regulation, which provide that a court should declare of its own motion that it has no jurisdiction where a court of another member state has jurisdiction under the Regulation.
62. The respondent contends that the children's return to England was not unlawful and that in the absence of a definite ruling on the habitual residence of the children or whether the return of the children to England was unlawful or amounted to a wrongful removal, the summons and motion were sterile and was for all the reasons supplied correctly dismissed.

63. The respondent submits that the State has an obligation to comply with its obligations under the Regulation, which supersedes domestic law. It is asserted that none of the authorities relied on by the appellants (including *State (Quinn) v. Ryan*) are referable to the circumstances of the forced movement of children across international borders from their primary residence. It contends that even if the appellants' rights were breached (which is denied), the appellants still have an effective remedy; they can seek recognition of the judgment of Binchy J. through the courts of England and Wales.
64. In reply to the appellants' submission that the respondent's conduct gives rise to the right to an effective remedy, the respondent notes that the whole legal process and the proceedings before the Irish courts were initiated by the criminal abduction of the two girls and the wrongful removal of R. from the jurisdiction of the courts of England and Wales. It submits that the appellants' contention was correctly described by the trial judge as an "exercise in futility", being legally ill-founded and adverse to the children's welfare, as well as ignoring the orders of the English court which have not been the subject of any successful challenge and would require the Irish court to have a base for primary jurisdiction.
65. The respondent argues that the *N.* case relied on by the appellants is distinguishable from the instant case, noting the following aspects:
- (i) the *N.* case had no international element and there was no issue of jurisdiction in respect of habitual residence;
  - (ii) in *N.* the axis for consideration was one of withdrawal of consent to adoption as opposed to care proceedings; and
  - (iii) in *N.* there were no adverse welfare considerations to dislodge the presumption of natural parenting predominance, whereas in the instant case there was, in the case of all three children, a finding of a competent court that a placement with the natural parents placed the children at risk of significant harm.
66. The respondent contends that the right to an effective remedy is not absolute and has a discretionary element and is only exercised to do justice to a situation. It is submitted that this is not a case that calls for justice to be effected by way of extracting children from their now well-established setting and where legally placed in another jurisdiction.
67. The respondent asserts that the appellants' contention that habitual residence did not fall to be considered is plainly wrong as the jurisdiction for matters relating to the exercise of parental responsibility finds its primacy through the establishment of habitual residence.
68. The respondent further argues that it is wrong to say that the appellants were taken by any form of surprise in respect of the issue of the court's determination on habitual residence as the whole invitation on behalf of the respondent was that the court would need to determine the issue of habitual residence before deciding as to whether there was jurisdiction so as to grant the relief sought by the appellants.

69. It is submitted that it was open to the appellants at first instance to seek to either adjourn or seek permission to file affidavit evidence on the issue which they did not do and that it would be wrong to permit an appeal based on a failing by the appellants which they could have, had it then occurred to them, corrected at first instance. It contends that there was a wealth of information within the existing affidavits and papers and a number of undisputed facts before the court that meant the trial judge was well positioned to deal with this issue. The respondent submits that despite the appellants citing various authorities on habitual residence, the trial judge did not in any way offend any of the principles enshrined within these cases in making his determination.

### **Discussion and determination**

#### **Habitual residence**

70. The objections of the appellants to the trial judge making a determination on the issue of habitual residence of the three children are difficult to understand. Irrespective of the context in which litigation arises, it is difficult to imagine any case where orders are sought which are capable of impacting on the welfare of a child and when it is evident that the child is resident in another jurisdiction where the judge would not consider the central issue of that child's habitual residence. The jurisdiction to grant consequential orders was invoked firstly in points of claim dated the 3rd May 2019. Same sought, in the alternative, relief under Article 15 of the Regulation. As is clear from Article 15(3), the issue of the habitual residence or former habitual residence of a child and any holder of parental responsibility is of central importance where the exceptional jurisdiction under Article 15 is being invoked which has the possibility to qualify the operation of Article 8. The points of claim further rely on *Chafin v. Chafin* and *Redmond v. Redmond*, decisions where the issue of habitual residence was found to be of central importance. The two judgments are replete with reference to and consideration of the issue of habitual residence.

71. A special summons issued on the 9th May 2019 pursuant to the Guardianship of Infants Act 1964. The special indorsement of claim expressly pleaded that the habitual residence of the appellants is Ireland since the 5th September 2017. Para. 9 provides (in bold):-

"The three children and/or each of them were and/or are habitually resident in Ireland."

72. Thus the question of the habitual residence of the three children was put in issue by the appellants expressly. Their assertions on this issue were contested by the respondent. The correct exercise by the trial judge of his discretion on any legal basis also stood to be informed to some extent by its determination. The answer would determine to a material extent the proportionality of the orders being sought by the appellants. The trial judge correctly considered the issue of habitual residence relevant and proceeded to determine it.

#### **Principles to be gleaned from the jurisprudence**

73. The substantive consequential relief sought required the children to be brought to this state so that the Irish courts could then assume jurisdiction and thereafter make all

determinations regarding their best interests and welfare. It is to be recalled that the general rule found in Article 8(1) of the Regulation provides that the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised. If it were the case that habitual residence was not determined or a child had no habitual residence, then the courts of the state where the child is present should have jurisdiction. Within this context, habitual residence is a condition precedent to this court having jurisdiction under either Article 10 of the Regulation and generally under the inherent jurisdiction of the High Court in light of the principle of the comity of courts.

#### **Habitual Residence - CJEU jurisprudence**

74. The jurisprudence of the CJEU, was refined over a series of cases, including *A* (Case C-523/07) [2009] E.C.R. I-2805, EU:C:2009:225; *Mercredi*; *C. v. M.*, and *O.L. v. P.Q.* (Case C-111/17 PPU) EU:C:2017:436. The CJEU has developed a multi-factorial or hybrid approach to the ascertainment of a child's habitual residence as the following dicta demonstrate. In *O.L. v. P.Q.* it was stated: -

"As regards how the expression 'habitual residence' of a child is to be understood, it must be noted that neither Regulation No 2201/2003 nor the 1980 Hague Convention defines that concept. Nor do the articles of that regulation that refer to it contain any express reference to the law of the Member States for the purpose of defining its meaning and scope." (para. 39)

In *Mercredi* it was stated: -

"According to settled case-law, it follows from the need for a uniform application of European Union law and the principle of equality that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see, *inter alia*, Case 327/82 *Ekro* [1984] E.C.R. 107, paragraph 11; Case C-98/07 *Nordania Finans and BG Factoring* [2008] E.C.R. I-1281, paragraph 17; and Case C-523/07 *A* [2009] E.C.R. I-2805, paragraph 34)." (para. 45)

In *C. v. M.* it was stated: -

"Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in paragraph 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However,



the time which has passed since that judgment should not in any circumstances be taken into consideration.” (para. 56)

In *O.L. v. P.Q.* it was stated: -

“According to that case-law, the ‘habitual residence’ of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case (judgments of 2 April 2009, A, C-523/07, EU:C:2009:225, paragraphs 42 and 44, and of 22 December 2010, *Mercredi*, C 497/10 PPU, EU:C:2010:829, paragraph 47).” (para. 42)

In the *A* case it was stated: -

“However, it is conceivable that at the end of that assessment it is impossible to establish the Member State in which the child has his habitual residence. In such an exceptional case, and if Article 12 of the Regulation, which concerns the jurisdiction of the national courts with respect to questions relating to parental responsibility where those questions are related to an application for divorce, legal separation or marriage annulment, is not applicable, the national courts of the Member State in which the child is present acquire jurisdiction to hear and determine the substance of the case pursuant to Article 13(1) of the Regulation.

Therefore, the answer to the second question is that the concept of ‘habitual residence’ under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.” (paras. 43 and 44)

In *O.L. v. P.Q.* it was stated:-

“To that end, in addition to the physical presence of a child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child’s residence corresponds to the place which reflects such integration in a social and family environment (judgment of 2 April 2009, A, C-523/07, EU:C:2009:225, paragraph 38).” (para. 43)

In *Mercredi* it was stated: -

“The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into

account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.

It follows from all of the foregoing that... the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case." (paras. 53 to 56)

The above was approved again in *O.L. v. P.Q.*, where it was stated: -

"Where the child in question is an infant, the Court has stated that the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of, and that an infant necessarily shares the social and family environment of that person or those persons. Consequently, where, as in the main proceedings, an infant is in fact taken care of by her mother, in a Member State other than that where the father habitually resides, the factors to be taken into consideration include, first, the duration, regularity, conditions and reasons for the mother's stay in the territory of the former Member State and, second, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State (see judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 54 to 56).

As regards the intention of the parents to settle permanently with the child in a Member State, the Court has recognised that that can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State (see, to that effect, judgment of 2 April 2009, *A*, C-523/07, EU:C:2009:225, paragraph 40).” (paras. 45 and 46)

In the *A* case it was stated: -

“As the Advocate General pointed out in point 44 of her Opinion, the parents’ intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.

By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State.

In the light of the criteria laid down in paragraphs 38 to 41 of this judgment and according to an overall assessment, it is for the national court to establish the place of the children’s habitual residence.” (paras. 40 to 42)

In *O.L. v. P.Q.* it was stated: -

“Thus, according to the Court’s case-law, the intention of the parents cannot as a general rule by itself be crucial to the determination of the habitual residence of a child, within the meaning of Regulation No 2201/2003, but constitutes an ‘indicator’ capable of complementing a body of other consistent evidence.

Admittedly, the weight to be given to that factor, for the purposes of determining where a child is habitually resident, depends on the circumstances specific to each individual case (see, to that effect, judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 50 and 51).” (paras. 47 and 48)

The paragraphs of *Mercredi* cited in the above extract provide:-

“In that context, the Court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *A*, paragraph 40).

In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can

be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.” (paras. 50 and 51)

The judgment in *O.L. v. P.Q.* provides:-

“...it must be stated that the concept of ‘habitual residence’, within the meaning of Regulation No 2201/2003, reflects essentially a question of fact. Consequently, to take the position that the initial intention of the parents that a child should reside in one given place should take precedence over the fact that the child has continuously resided since birth in another State would be difficult to reconcile with that concept.

...having regard to the structure of the 1980 Hague Convention and of Article 11(1) of Regulation No 2201/2003, the argument that the parents jointly exercise rights of custody and that the mother could not, therefore, decide alone on the child’s place of residence cannot be determinative for the purposes of establishing where the child is ‘habitually resident’, within the meaning of the regulation.

According to the definition of ‘wrongful removal or retention of a child’, in Article 2(11) of that Regulation and in Article 3 of the 1980 Hague Convention, noted in paragraph 36 of the present judgment, a decision on the legality or illegality of a removal or a retention is to be based on the rights of custody awarded under the law of the Member State where the child was habitually resident before his or her removal or retention. Accordingly, in the framework of assessing an application for return, the determination of the place where the child was habitually resident precedes the identification of the rights of custody that may have been infringed.

Consequently, the consent of the father or the absence of that consent, in the exercise of his rights of custody, to the child settling permanently in a place cannot be a consideration that is decisive for the determination of the ‘habitual residence’ of that child, within the meaning of Regulation No 2201/2003, which is consistent, it may be added, with the idea that that concept reflects essentially a question of fact.

That interpretation is, moreover, confirmed by Article 10 of that regulation, which envisages precisely the situation in which a child acquires a new habitual residence following a wrongful removal or retention.

...in a case such as that in the main proceedings, to consider that the initial intention of the parents is a factor of crucial importance in determining the habitual residence of a child would be detrimental to the effectiveness of the return procedure and to legal certainty.” (paras. 51 to 56)

The CJEU continued and stated: -

“In brief, to interpret, in such a context, the concept of the ‘habitual residence’ of a child, within the meaning of Regulation No 2201/2003, in such a way that the initial intention of the parents as to the place which ‘ought to have been’ the place of that residence would constitute the fundamental factor, would be likely to compel the national courts either to gather a substantial quantity of evidence and testimony in order to determine with certainty that intention, which would be difficult to reconcile with the requirement that a return procedure should be expeditious, or to issue their judgments while not in possession of all the relevant information, which would result in legal uncertainty.” (para. 59)

The CJEU further provided: -

“It is clear from the explanatory report on the 1980 Hague Convention that one of the objectives of that convention and, by extension, of Article 11 of Regulation No 2201/2003, is the restoration of the *status quo ante*, that is, the situation that existed prior to the wrongful removal or retention of the child. The aim of the return procedure is accordingly to put the child back in the environment with which the child is most familiar and, thereby, to restore the continuity of the child’s living conditions and the conditions in which the child can develop.

However, in a situation such as that in the main proceedings, in accordance with that objective, the alleged wrongful conduct of one of the parents cannot in itself justify the granting of an application for return and the removal of the child from the Member State where the child has been born and has lawfully and continuously lived to a Member State with which the child is not familiar.” (paras. 61 and 62)

75. The application of the above principles is illustrated in the case of *C. v. M.*, a preliminary reference from the Irish Supreme Court and it is useful to recall the relevant aspects of the decision of the CJEU delivered on the 14th October 2014: -

“As regards the concept of ‘habitual residence’, the Court has previously stated, in interpreting Article 8 of the Regulation in the judgment in *A* (EU:C:2009:225) and Articles 8 and 10 of the Regulation in the judgment in *Mercredi* (EU:C:2010:829), that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgments in *A*, EU:C:2009:225, paragraphs 31 and 35, and *Mercredi*, EU:C:2010:829, paragraphs 44 and 46).

In those judgments the Court also held that a child’s habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in *A*, EU:C:2009:225, paragraphs 37

and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47 and 56). The Court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in *A*, EU:C:2009:225, paragraphs 38 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47, 49 and 56).

The Court explained that, to that end, account must be taken of, *inter alia*, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State (judgments in *A*, EU:C:2009:225, paragraphs 39 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 48, 49 and 56). The Court also held that the intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in *A*, EU:C:2009:225, paragraphs 40 and 44, and *Mercredi*, EU:C:2010:829, paragraph 50).

Further, in paragraphs 51 to 56 of the judgment in *Mercredi* (EU:C:2010:829), the Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

The concept of the child's 'habitual residence' in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the abovementioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in paragraphs 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could

not be certain, at the time of the removal, that the stay in that Member State would not be temporary.” (paras. 50 to 55)

**Principles to be gleaned from the case law**

76. The CJEU jurisprudence above referred to and quoted makes clear that for habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (the *A* case and *Mercredi*). Whether there is some degree of integration particularly by an older child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (the *A* case).

**“...all the circumstances specific to the individual case...”**

77. With respect to the specific circumstances which may be relevant in a given case, the cases including *A* and *Mercredi* and subsequent decisions of the CJEU, some of which were considered and analysed by the UK Supreme Court in the case of *In re B. (A Child)* [2016] UKSC 4, [2016] A.C. 606, suggest the following non-exhaustive list of considerations, factors and circumstances may be relevant in a given case and are considered to be principles of general application:

- (i) Neither Regulation No. 2201/2003 nor the 1980 Hague Convention defines the concept of habitual residence. The CJEU in its jurisprudence has developed a multi-factorial or hybrid approach to establishing a child’s habitual residence.
- (ii) It is the child's habitual residence which is in question, not the parents’, and it is the child's level of integration, rather than the parents’, in a social and family environment which must be analysed by the court determining the question.
- (iii) In common with the other rules of jurisdiction, the meaning of “habitual residence” is shaped in the light of the best interests of the child and in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.
- (iv) The duration, regularity and conditions for the stay of the child in the country where it is claimed habitual residence has been acquired must be examined.
- (v) The relevant question is whether a child has achieved some degree of integration in a social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.
- (vi) Parental intention is but one relevant factor in the assessment. It is not determinative. Hague Convention decisions which considered parental intention to be of pre-eminent importance are no longer good law. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. The purposes and intentions of the parents

are merely one of the relevant factors. This point was pivotal in the decision of the CJEU in *O.L. v. P.Q.*

- (vii) The court should consider the reasons for the parents' move to and the stay in the jurisdiction in question.
- (viii) The child's nationality is relevant.
- (ix) In evaluating whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up and assess the degree of connection which the child had with the State in which she resided before the move.
- (x) The history of attendance at school, kindergarten and education generally is relevant.
- (xi) The child's linguistic knowledge.
- (xii) The family and social relationships of the child.
- (xiii) Whether possessions were brought, whether there is a right of abode and the nature and extent of durable ties with the new country of residence.
- (xiv) It is the quality of the stability of a child's residence as opposed to its permanence which is relevant in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.
- (xv) In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parent or parents who effected the move.
- (xvi) In *In Re B. (A Child)* Lord Wilson noted as follows at para. 45:-

"...The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts *down* those first roots which represent the requisite degree of integration in the environment of the new state, *up* will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."
- (xvii) The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state.



- (xviii) Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new country, probably the faster his or her achievement of that requisite degree of integration.
- (xix) In circumstances where all of the central members of the child's life in the original state have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, where any of the central family members have remained behind and thus represent for the child a continuing link with the original state, probably the less fast his or her achievement of habitual residence.
- (xx) A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for him. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused and fact based.
- (xxi) In circumstances where the social and family environment of a new-born or infant is shared with those on whom he is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

**Habitual Residence of M. and E.**

78. Habitual residence is primarily a question of fact. On the 5th September 2017, M. was aged 5 years and 4 months. E. was aged 3. They were subject to interim care orders in favour of the respondent and there was in place an order of the court prohibiting their removal out of the jurisdiction of the courts of England and Wales. The first appellant had parental responsibility which was shared jointly with the respondent and also, at least in the case of E., probably with her father, Mr. W., who was also a significant figure in the life of M. The second appellant, albeit their step-father, did not have parental responsibility rights in connection with either. The first appellant lacked legal capacity on the 5th September 2017 to unilaterally change their habitual residence without the knowledge or consent of the respondent.
79. The authorities relied on by the appellants as well as the respondent support the conclusions of the trial judge that both M. and E. were at all material times habitually resident within the jurisdiction of the courts of England and Wales immediately prior to their removal by the appellants to this jurisdiction in September 2017. The opinion of Advocate General Szpunar in *C. v M.* was relied on by the appellants. The decision of the court is considered above.
80. Applying the jurisprudence to the circumstances specific to M. and E., their physical presence in Ireland was fleeting and lasted just over two weeks in all. They were British citizens whose only place of residence had been England prior to the 5th September 2017. Applying the principles set out in the judgments cited above, including *A*, paras. 38 and 44; and *Mercredi*, paras. 47, 49 and 56, the move was disruptive of their established life in England which was governed by care orders which remained in full force and effect. It was too fleeting in duration, relative to their ages and lived experiences, to

demonstrate the requisite degree of integration in a new social and family environment sufficient to establish a new habitual residence in Ireland.

81. It must have been obvious to the appellants that the respondent would seek the return of the two children arising from the clear breaches of the care orders which their removal had given rise to and hence their presence in this State was temporary to that extent. The Regulation contains no definition of "habitual residence" and the CJEU jurisprudence confirms, as the trial judge found, that the meaning and scope of the concept must be determined in the light of, in particular, the objective stated in Recital 12 of the Preamble.
82. The removal was incapable, on the facts, as a unilateral act of the appellants of such short duration, of giving rise to a change in their habitual residence which remained at all times that of England and Wales as the trial judge correctly found.

**Habitual residence of R.**

83. R. was born on the 3rd September 2017. The appellants were the sole holders of parental responsibility in regard to the new-born on that date. One component of parental responsibility is the right to determine the country where the child shall live. The appellants made a joint decision to move permanently to Ireland with him. Their main reason for the family's move to Ireland was to prevent R. being placed in care and to avoid the risk of his adoption. The respondent acknowledges that the considerations regarding his habitual residence differ from those arising in relation to M. and E. I am satisfied that if they were the sole holders of rights of custody regarding R. on the 5th of September 2017, the appellants were entitled to act jointly in pursuance of establishing a new habitual residence for him in this State.

**Were rights of custody in respect of R. also vested in the English High Court?**

84. As a fall-back position, counsel on behalf of the respondent submitted that at the date of removal of R. from England the English High Court was the holder of custody rights within the Regulation. There are authorities in this jurisdiction for the proposition that in certain instances a court can be the holder of rights of custody, including *H.I. v. M.G. (Child abduction: Wrongful removal)* [2000] 1 I.R. 110 and *G.T. v. K.A.O. (Child abduction)* [2007] IESC 55, [2007] 3 I.R. 567.
85. In *In Re H. (Abduction: Rights of Custody)* [2000] 2 A.C. 291, the House of Lords considered whether a court could ever have rights of custody attributed to it in the context of the Hague Convention. Having reviewed the authorities, including decisions made in the US and New Zealand, they held that "any person, institution or other body" pursuant to article 8 of the Convention could include a court as "other body". Thus where an Irish father had initiated proceedings under the Irish Guardianship of Infants Act 1964, seeking guardianship and access, but the mother had fled to England prior to any determination by the Irish court, the court acquired rights of custody if its jurisdiction had been invoked in respect of matters of custody within the meaning of the Convention. Lord Mackay of Clashfern attached importance to the issue of service upon an affected party of the proceedings, observing at p. 380: -

"First of all the application to the court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the application. Secondly, a question arises as to the time at which the court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration in relation to the Convention.

...In relation to the present Convention while in the wardship jurisdiction the issue of an application to make the child who was the subject of the application a ward of court I consider that generally speaking there is much force in using the service of the application as the time at which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked..."

The House of Lords considered the date of service to be the time at which a court generally becomes definitively seised.

86. The respondent relies on the decision in *In Re C (Unmarried Father: Custody Rights)* [2000] EWHC 2219 (Fam), [2003] 1 W.L.R. 493 in support of its contention, belatedly made, that the English High Court was a holder of rights of custody in respect of R. such as would render his removal wrongful within the Regulation. However I note the following extract from the judgment of Munby J.: -

"58. So the court will be invested with rights of custody if, even before the respondent has been served, the matter comes before a judge who exercises a judicial discretion as to the future conduct of the proceedings, even if he makes no substantive order and only gives directions.

59. But, wardship apart, the mere issue of proceedings that have not yet been served will not normally be enough. That was the view expressed by Hale J. in *In re W* [1999] Fam 1, 19C and again in *In re J* [1999] 2 F.L.R. 653, 656B, having regard in each case to what had earlier been said in *In re B (Abduction) (Rights of Custody)* [1997] 2 F.L.R. 594."

87. It is true that in particular circumstances, it may arise that a removal could be wrongful as having been in breach of rights of custody vested in a court as distinct from a parent although it is noteworthy that the CJEU in *Mercredi* declined to rule on whether a court can hold rights of custody for the purpose of Article 2(1) of the Regulation. However, the interim care order sought to be relied upon in Council Regulation (EC) 2201/2003 proceedings was made on the 6th September 2017 - a day after the appellants and R. had left the jurisdiction and moved to Ireland. Therefore it cannot be relied upon as retrospectively conferring rights on the English court, nor is it capable of have any

bearing on a determination of the issue of R.'s habitual residence. No order, *ex parte* or otherwise, concerning R. existed at the date of his removal from the jurisdiction of the courts of England and Wales by the appellants. This distinguishes the case from the authorities sought to be relied upon.

88. Furthermore, given that an order of the High Court was made on the 12th April 2019 setting aside the original recognition by an Irish court on the 21st September 2017 of the Return Order of the English High Court made in the absence of the appellants on 8th September 2017 and the said decision has not been appealed against by the respondent, neither the application for, nor the making of, the Return Order can be relied upon by the respondent for this purpose.
89. There is no evidence that any proceedings concerning R. were in being before he was removed by the appellants. There is no evidence that the proceedings came before any judge or were the subject of the exercise of any judicial discretion before the 6th September 2017. The claim that the courts of England and Wales had rights of custody in relation to R. at the date of his removal to Ireland is not established – assuming such rights could exist.

#### **Application of the principles to the case of R.**

90. Habitual residence is primarily a matter of fact construed in the light of the jurisprudence as applied to the circumstances of the child in question. The determination of habitual residence, as the jurisprudence makes clear, is multi-factorial and, *inter alia*, takes account of all the circumstances specific to the individual child. Hence, a determination in regard to one child or other children – such as M. and E. – is not predicative of the determination in relation to a younger sibling where the relevant facts are shown to be materially different.
91. R. was 48 hours old when the family moved to Ireland and hence it could not strictly be said that “all three children have always resided together”, as the trial judge observed at para. 67. He found in line with the test laid down by the CJEU in *Mercredi* that it was necessary to consider the reasons of the appellants in moving to this country.

#### **"Adequate degree of permanence"**

92. The reference to “permanence” in *Mercredi* was considered by the UK Supreme Court in *A. v. A. (Children: Habitual Residence)* and subsequently in *In re R. (Children)* [2015] UKSC 35, [2015] 2 W.L.R. 1583 where Lord Reed observed at para. 16 that it is “the stability of the residence that is important, not whether it is of a permanent character.” It is generally accepted that the reference to “permanence” by the CJEU in *Mercredi* at para. 44 of its judgment was not being used in the sense of forever or even necessarily indefinite, but rather by way of contrast with the idea of “temporary” and in the context of stability.
93. The UK Supreme Court also considered the issue of whether the holder of rights of custody could effect a change in habitual residence in nine or ten days in the case of *In re B. (A Child)*. In that case the biological mother, who had sole parental responsibility for her child, lawfully removed her daughter to Pakistan with the intention of moving there

permanently. Within nine days of their departure the appellant (the mother's former same-sex partner and *de facto*, though not *de jure*, co-parent) brought proceedings seeking a parental responsibility order. A preliminary issue for determination by the High Court was whether it had jurisdiction to hear the application. The High Court held that it did not as the child was no longer habitually resident within the jurisdiction of England and Wales. This decision was upheld by the Court of Appeal but by a 3-2 majority, the Supreme Court held that at the date of the institution of the domestic proceedings, jurisdiction had not been lost as the child still remained habitually resident in England and Wales as of that date. The judgment of Lady Hale and Lord Toulson is noteworthy: -

"57. We agree fully with Lord Wilson JSC's reasoning and conclusion on the issue of habitual residence. He has described the identification of a child's habitual residence as overarchingly a question of fact: para. 46. At the risk of appearing pedantic, we would prefer to describe it as a mixed question of fact and law, because the concept is a matter of law but its application is a matter of fact. We do not, however, understand Lord Wilson JSC to be laying down a rule of law that a child must always have an habitual residence: rather that, as a matter of fact, the loss of an established habitual residence in a single day before having gained a new one would be unusual. In this particular case, although the respondent said that her intentions were permanent, looked at from the child's point of view, on the relevant date they had been in Pakistan for only nine days, they had no home there, and she had not yet been entered into a school. Had the respondent then changed her mind and decided that the move was a bad idea, it is unlikely that a court would have held that the habitual residence of either of them had changed during those few days."

94. The common intention of the appellants to change R.'s habitual residence from England to Ireland cannot by itself be determinative of the issue. Earlier judicial thinking which tended to accord parental intention a dispositive or at least pre-eminent weight in determining a child's habitual residence, particularly where the parent was the sole holder of rights of custody at the date of removal of the child, is inconsistent with the child-centred approach as enunciated and refined by the CJEU in decisions such as *Mercredi* which govern the determination of the issue in this jurisdiction.
95. R.'s habitual residence at birth on the 3rd September 2017 was in England. The CJEU held in *U.D. v. X.B. (Case C-393/18 PPU)*, EU:C:2018:835 that the fact of residence in the new state is a prerequisite to establishing a new habitual residence. Therefore R.'s habitual residence could not have been changed prior to his departure from the jurisdiction of England and Wales and prior to his arrival in Ireland.
96. Residence, as a general rule, must have a certain duration to reflect an adequate degree of permanence before it gives rise to the establishment of a new habitual residence. Nevertheless the Regulation does not lay down any minimum period of residence to do so. R.'s parents intended to change it and to move permanently to Ireland where they

moved here on the 5th September 2017. They rented accommodation and enrolled the older children in a school.

97. Six days later on the 11th September 2017 any process of establishing stability in an environment with the appellants was significantly undermined when the CFA made an unannounced visit and told them of the making of the Return Order in England on the 8th September. This inevitably injected some uncertainty into R.'s future expectations, viewed from the child's perspective. On the 12th September, the CFA visited again to advise the appellants of their intention to apply to the District Court for an interim care order arising from contact they had with the respondent. This turn of events significantly further undermined the permanence of his situation from the child's perspective. The appellants had some awareness of the likelihood that the respondent might apply to have the Return Order recognised and enforced – so at the very least a court battle lay ahead.
98. On the 14th September 2017, the CFA obtained an interim care order in respect of R. On that day, R. was eleven days old and had been in Ireland for nine days. Any process of stability in the society and care of his parents and integration into his family of birth ended. R. was placed in foster care and never resided with the appellants again. He was removed from Ireland on the 21st September, just over two weeks after his arrival.
99. I am satisfied that R.'s presence in Ireland for the days between the 5th and 21st September 2017, when analysed in detail, based on the facts, including the dramatic changes to his social and family environment brought about by being taken into care which prevented the requisite acclimatization, was so precarious as to prevent it from acquiring the necessary quality of stability to enable a change in habitual residence, which his parents clearly intended, to take effect. His English habitual residence of origin was never lost.

**References by trial judge to Recital 12 of Council Regulation (EC) 2201/2003 and "best interests"**

100. The appellants object that the trial judge had regard to Recital 12 of the Regulation and also the "best interests" in considering the habitual residence of the children, particularly R. However, the judgment accords entirely with the CJEU jurisprudence in this regard, exemplified in decisions such as *O.L. v. P.Q.* which, referring to the expression "habitual residence" held at para. 40: -

"Accordingly, the Court has repeatedly held that the concept is an autonomous one of EU law, which has to be interpreted in the light of the context of the provisions referring to that concept and the objectives of Regulation No 2201/2003, in particular that which is apparent from recital 12 thereof, according to which the grounds of jurisdiction which it establishes are shaped in the light of the best interests of the child, in particular on the criterion of proximity..."

**Effective remedy being sought**

101. The substantive consequential relief sought requires that the children be brought to this State so that the Irish courts could then assume jurisdiction and thereafter make all determinations regarding their best interests and welfare. It is to be recalled that the

general rule found in Article 8(1) of the Regulation provides that in trans-national cases involving children, the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised. If it were the case that habitual residence was not determined, or a child had no habitual residence then Article 13(1) of the Regulation provides that the courts of the state where the child is present shall have jurisdiction.

102. Arising from the setting aside in April 2019 of the Recognition Order made by the High Court on the 21st September 2017, which had been executed that same day by the respondent, the appellants sought consequential orders which were "just to meet the case".

103. The points of claim of May 2019 specifically sought the following consequential orders:

- (a) an order directing the CFA to travel to England forthwith and:
  - (i) arrange the transfer of custody of the three children and/or any of them the subject matter of these proceedings into their care; and,
  - (ii) arrange for the children's re-return to this jurisdiction;
- (b) an order for the return of the children to the jurisdiction of this court forthwith; and,
- (c) an injunction to restrain the respondent from taking any steps to adopt R. or his siblings pending their return to this jurisdiction.

The special summons brought pursuant to the Guardianship of Infants Act 1964 sought broadly similar consequential relief, invoked the inherent jurisdiction of the court and also sought, in the alternative;

- (a) an order pursuant to Article 15 of Council Regulation (EC) 2201/2003 declaring that the children have a particular connection with this jurisdiction and requesting the courts of England and Wales to transfer the hearing of all proceedings as to the children or any or all of them to this jurisdiction.

#### **Consequential orders and Council Regulation (EC) 2201/2003**

104. As the trial judge correctly noted there is no explicit guidance to be found within the Regulation itself as to the nature or extent of consequential orders, if any, that could or should be made in the event that a recognition order is set aside subsequent to its execution. The structure of Article 33 implicitly pre-supposes service of an order prior to its enforcement and a sequencing whereby an appeal proceeds to determine the rights of the party or parties against whom enforcement is sought.

105. The effectiveness of a remedy manifests itself in the sense of preventing the alleged violation of law or its continuation, or in providing adequate redress for any violation that has already occurred. Since the Regulation is silent on the issue, the trial judge correctly concluded that the issue of an effective remedy fell to be determined under domestic law.

106. Article 47 of the Charter confirms that approach: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article." The standard of the right to an effective remedy is fulfilled in each Member State differently. Article 47 must be construed, in every case where an effective remedy sought concerns a child, with due regard to Article 24, which concerns the rights of the child:

- "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

The provisions of Article 24 were informed by the U.N. Convention on the Rights of the Child, including Article 12. Article 42A of Bunreacht na hÉireann is reflective of both.

107. The appellants asserted their right to the reliefs set out above as constituting the effective remedy to which they are entitled as litigants whose rights have been breached by the respondent and invoke jurisprudence including *Efe v. Minister for Justice*. It will be recalled that in his judgment in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 Murray C.J. commented at p. 721 that it was "the task of the courts to ensure that where rights are wrongfully breached that remedies are effective".

108. The appellants rely on the decisions in *The State (Quinn) v. Ryan* and *The State (Trimbole) v. The Governor of Mountjoy Prison* for the proposition that the court has a greater onus to act where the conduct was designed to prevent the exercise of the rights in question.

109. The decisions relied upon are distinguishable in a number of material respects:

- (a) each concerned an unlawful arrest to facilitate extradition;
- (b) each case alleged abuse of power by the State or an organ or agent of this State;
- (c) Finlay C.J. in *Quinn* envisaged the restoration of rights infringed "as far as possible", thus clearly envisaging an analysis of the material facts and all relevant and competing rights and interests in each case;
- (d) at the hearings in the cases relied upon all of the stakeholders participated and were represented. By contrast, Mr.W., who has parental responsibility for M. and E., is not on notice of these proceedings;



- (e) none of the cases relied on concerned the welfare of a child whose primary carer was not before the court or on notice of the process and where there is a trans-national dimension to the case;
  - (f) the *Quinn* case did not result in an order for the return of Mr. Quinn to this jurisdiction being made; and,
  - (g) there is no absolute entitlement to the relief sought.
110. The question arises as to whether the trial judge, on the facts before him, correctly exercised his discretion to refuse the specific consequential relief sought. Certain critical facts obtained which were germane to his decision; firstly, in relation to M. and E., they were about 7 and a half and 5 years old, respectively. They had not seen the first appellant, their mother, since mid-September 2017. Their mother, the appellant, had some contact by Skype with them but did not visit them or apply for contact. From and after September 2017, they had resided in England and ultimately were the subject of various court orders including, laterally, an order providing that they both reside with E.'s father, Mr. W., who is the holder of parental responsibility rights and sole day-to-day carer in respect of both. Mr. W. had no notice or awareness of the tenor of the applications being sought to satisfy the appellants' claim for an effective remedy. He was not a notice party to the application. No explanation was given for that omission. The court did not have a single shred of evidence before it as to the views of Mr. W. in relation to the proposed orders.
111. The practical consequences of making the orders sought would be to take the two children away from his care and uproot them from their home, school, environment, way of life and established social relationships to this jurisdiction where they had been present briefly for about two weeks in September 2017 - the second week of which they had spent in care - so that litigation could be launched and pursued, with all its attendant potential delays and uncertainties, regarding their possible future placement in the custody of the appellants so that they could reside in Ireland permanently.
112. In the case of R., by now two years old, he has resided in England for all but two weeks of his entire life. Since the 23rd April 2018 he has lived in a fostering for adoption arrangement. The adoption has not completed by reason of an order of the court and an undertaking given by the respondent not to conclude same pending conclusion of the litigation. He has had at least one encounter with his sisters in England. He has some health issues.
113. While the conduct of the respondent was egregious and is in no way condoned by this court, the inherent jurisdiction ought not to be exercised in relation to these children for the purposes of directly or indirectly punishing past transgressions of the respondent.

**Article 15 of Council Regulation (EC) 2201/2003**

114. Article 15 of the Regulation provides:-

“Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

...

2. Paragraph 1 shall apply:
  - (a) upon application from a party; or
  - ...
  - (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made... by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:

...

(d) is the habitual residence of a holder of parental responsibility..."

115. The appellants seek the transfer of all litigation concerning the children to this jurisdiction. There would appear to be no litigation in being concerning M. and E. now. An aspect of the adoption proceedings appears to be extant concerning R. The courts of England and Wales exercised "jurisdiction as to the substance of the matter" of the adoption of R., within the meaning of Article 15(1), from September 2017 onwards. There are no proceedings concerning M. or E. identified as being extant and capable of being the subject of an Article 15 transfer order. The views of Mr. W., the father of E. and holder of parental responsibility rights in respect of M. and E., have not been sought. There is no evidence of his consent to the application even assuming it was maintainable in the first place.

116. Article 15 is an exceptional jurisdiction and is exercisable to transfer litigation concerning a child to a court better placed to hear it. As a special rule of jurisdiction it must be interpreted strictly. Before making such an order the court must be satisfied that the child has a "particular connection" with this jurisdiction – a concept defined in Article 15(3). Transfer under Article 15 is an exception to the general principle under Article 8.

**(i) Particular connection**

117. Do the children M., E. and R. have, within the meaning of Article 15(3), a "particular connection" with Ireland? This is a question of fact, and Article 15(3)(a)-(e) contains a list of circumstances where the "particular connection" will be established. The fathers of M. and E. reside in England and both children are habitually resident there. The first appellant, their mother, is habitually resident here. In the case of R. both appellants as

holders of parental responsibility reside in Ireland. Thus “a particular connection” within Article 15(3)(d) is met.

**(ii) Better placed**

118. Are the courts in Ireland “better placed to hear the case or a specific part thereof” within the meaning of Article 15(1)? To determine this issue, the trial judge was required to carry out an evaluation in the light of all the circumstances of the particular case. The starting point is the principle of comity and cooperation between Member States – courts and child protection services in England are to be taken as no less competent than those in this jurisdiction. Such an application could, in theory at least, have been brought by the appellants before the courts of England and Wales seeking the transfer to this jurisdiction of any extant or live proceedings concerning any one or more of the children, though there would have been very significant difficulties in them doing so including costs. No adverse inference can be drawn from their failure to do so. The judicial and child welfare arrangements in England and Wales are to be treated by the courts in this jurisdiction as being fully competent to make orders in the best interests of children – particularly so where the children are habitually resident within that jurisdiction.

119. Questions of fact that might inform the evaluation whether a court is better placed to hear the case might include the availability of witnesses of fact, whether assessments have been conducted and by whom, and whether the English court’s knowledge of the case gives an advantage as a result, for example, of judicial continuity between fact-finding and evaluation. Apart from the appellants, there are no witnesses familiar with the day-to-day welfare of the children. All professionals involved are based in England. The adoption process has been in train for over two years. The approach to adoption in this jurisdiction differs from that which operates in England. Nevertheless the European Court of Human Rights has held that the English adoption process did not breach the provisions of the ECHR.

**(iii) Best interests**

120. Would it be in the child’s best interests to transfer the proceedings, within the meaning of Article 15(1)? The best interests inquiry is limited to the issue of forum and is not a substantive welfare assessment. The Irish High Court was deciding whether to request a transfer of the case. That was a different question from what eventual outcome to the case would be in the child’s best interests. The relevant question is whether it is in the child’s best interests that the case be determined (or the specific part of the case to be determined) in another jurisdiction. This is a question which is “quite different from the substantive question in the proceedings”: *In re I. (A Child) (Contact Application: Jurisdiction)* [2009] UKSC 10, [2010] 1 A.C. 319, para. 36.

121. It is necessary to consider the immediate impact of the proposed transfer upon the child’s welfare, in the short or the longer term. What will be its immediate consequences for each child concerned? What impact will it have on the choices available to the court deciding upon the eventual outcome?

122. The discretion is exercisable only if the court has satisfied itself both that the other court is "better placed" to deal with the case and that it is in the "best interests" of the child to transfer the case. It is relevant that "measures preparatory to adoption" are expressly excluded from the operation of the Regulation by Article 1(3). It would not be in the best interests of R. to seek to transfer a dispute about his future to a court which would be unable to consider one of the possible outcomes, namely adoption, the outcome which those professionals with the closest knowledge of him and his welfare considered would be best for him. Apart from that, the impact upon R.'s welfare, in the short or the longer term, of any transfer would be very significant, necessitating his removal from the prospective adoptive family he has resided with for the past two years.
123. The "better placed" and "best interests" questions are separate considerations under Article 15(1), and the "best interests" question provides an additional safeguard for the child. The question is not concerned with what eventual outcome to the case would be in the best interests of R., but whether the transfer itself to facilitate the Irish courts making such a determination would be in his best interests. The discretion to transfer only arises if both are answered in the affirmative and a "particular connection" is established to exist.
124. A court seeking transfer must be able to rebut the strong presumption in favour of jurisdiction remaining in the state of the child's habitual residence. In this case all the evidence was one way and beyond the deep wishes of the appellants that the three children would reside in Ireland with them and the new-born child of the marriage, S., no sound basis was demonstrated for the proposition that the courts in this jurisdiction were best placed to make determinations regarding the welfare of the three children or any of them. The submissions never went beyond a bare assertion of entitlement to a specific order required to address the previous wrongdoing of the respondent which could never have been the basis for the consequential orders sought or any of them. The determination of best interests required that the court be satisfied that the transfer sought would not be liable to be detrimental to the situation of the three children. On the evidence before him the trial judge could never be so satisfied whether in the short or long term. The potential risks of negative effects that the transfers sought could potentially have on the familial, social and emotional attachments of the three children was self-evident.
125. The negative effects that refusal to transfer might have on the familial, social and emotional attachments of a child are also relevant as was noted in *In re N. (Children)* [2016] UKSC 15, [2017] A.C. 167 by Baroness Hale. It is clear that the appellants are entitled to bring proceedings in England and Wales seeking contact with the older children M. and E. and presumably that can progress to residence orders if same are in the best interests of the welfare of the said children. The proposals made by the trial judge were eminently sensible and warranted being acted upon to minimise risk to the children in circumstances where demonstrably the English courts were better placed than the courts in this jurisdiction to make determinations regarding any disputes on welfare of the children, there was no evidence of any extant proceedings concerning M. or E., measures

and proceedings preparatory to adoption fall outside the Regulation, and it was not in the best interests of any of the children that such a transfer, even if jurisdiction to seek it existed, ought to be made.

### **Conclusions**

126. The trial judge did not err in the exercise of his discretion as to whether to make consequential orders in finding that it was not appropriate to so order.
127. The trial judge did not err in the exercise of his discretion and in particular did not have insufficient regard to the wrongful behaviour of the respondent. The egregious conduct of the respondent was considered by the trial judge but he correctly gave pre-eminent weight to the rights and interests of the children in question in the exercise of his discretion.
128. The trial judge correctly assessed the Regulation in determining firstly that its provisions did not expressly provide for any guidance as to the consequences of a successful appeal pursuant to Article 33 in circumstances where the order has already been executed and in considering the exceptional jurisdiction under Article 15 and correctly exercised his discretion in not making the orders sought thereunder.
129. The trial judge did not err in the exercise of his discretion in adverting to and taking into account the habitual residence of the three children. He correctly took into account their habitual residence in considering whether to exercise his jurisdiction in the manner sought.
130. The pleadings delivered and key authorities relied on by the appellants make reference to the concept of habitual residence which the CJEU has held to be primarily a question of fact. Decisions such as *Redmond v. Redmond* and *Chafin v. Chafin* invoked by the appellants demonstrate the crucial importance of determining the issue of habitual residence in all international disputes concerning children. The children were present in England at the date of the hearing and had the trial judge for any reason been unable to determine their habitual residence as an issue of fact, then, in light of Article 13(1) of the Regulation, the principle of the comity of courts and *forum conveniens* would have predicated that the courts of England and Wales where the children were then present should have jurisdiction. The better approach was to determine the issue of habitual residence on the facts which the trial judge was in a position to do and did.
131. The question of R.'s habitual residence fell to be determined on the material facts relevant to his circumstances. As such it was a question of fact not subject to any presumptions based on the habitual residence of his older sisters. R. was capable of having a habitual residence different from that of his siblings. The determination of habitual residence was a relevant issue of fact for the trial judge. Given the specific nature of the effective remedy sought by the appellants, the habitual residence of each of the three children was a relevant fact requiring determination by the trial judge.

132. Siblings can and sometimes do have different habitual residence. The Regulation contains no definition of the concept. In referring to Recital 12 of the Regulation and the fact that jurisdiction in matters of parental responsibility is “shaped in the light of the best interests of the child” the trial judge correctly applied the jurisprudence of the CJEU including *C. v. M.*. The meaning and scope of the concept of “habitual residence”, as the CJEU has previously stated in the judgments in *A* and in *Mercredi*, must be determined in the light of the objective stated in Recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity, which means the practical connection between the child and the country concerned.
133. The trial judge was correct to consider as relevant and determine the habitual residence of M. and E. immediately prior to their removal from the jurisdiction of England and Wales on the 5th September 2017. The habitual residence of the children could not be changed before they left the jurisdiction of England and Wales as the CJEU held in *U.D. v. X.B.*
134. The trial judge did not conflate the requirements of an effective remedy with the concept of jurisdiction under the Regulation. Jurisdiction was a factor to be taken into account where the effective remedy sought was likely to impact significantly on the lives of the children.
135. In the absence of clear evidence before the court as to the wishes of M. and E. it was reasonable for the trial judge to take into account the likely practical consequences for the children of making the consequential orders sought. His assessment was furthermore a matter of common sense.
136. Article 15 of the Regulation requires three distinct matters to be established before the judicial discretion arising thereunder can be exercised. The appellants are correct that the three children have a “particular connection” to Ireland within the meaning of Article 15(3)(d). The appellants are habitually resident in Ireland. The first-named appellant is the mother of all three and the holder of parental responsibility in relation to each. The second-named appellant is the father of R. and the holder of parental responsibility in relation to him. However the appellants failed to establish that the courts of this jurisdiction were “better placed” to hear a case or cases in respect of any of the children. Whilst an application could possibly be made by the appellants to have existing orders in respect of M. and E. discharged there was no evidence that such an application had ever been made by the appellants. There was no evidence that a case or matter concerning M. or E. was in being before the English courts as would engage the provisions of Article 15. Proceedings concerning R. insofar as they concerned measures preparatory to adoption were excluded from the scope of Article 15 by virtue of Article 1(3)(b) of the Regulation. Either way, the appellants failed to establish that the courts of this jurisdiction were “better placed” to hear any such case or matter concerning the welfare of the said children or any of them within the meaning of Article 15(1). An Article 15(1) best interests inquiry limited to the issue of forum was in terms carried out by the trial judge who correctly concluded that the making of such orders would be an exercise in futility.

The appellants failed to meet the two of the three requirements on which an Article 15 transfer is predicated. The consequential orders sought could not amount to an effective remedy within Article 47 of the Charter which falls to be construed in the light of Article 24 of the said Charter.

137. Costs were a matter in the discretion of the trial judge. No valid grounds have been established to interfere with the order made on the 20th August 2019 and perfected on the 27th September 2019.
138. Orders for non-recognition can be enforced. However, in each case, as was made clear by the Supreme Court in *The State (Quinn) v. Ryan*, the court exercises its discretion in light of the relevant facts. Orders affecting children resident or habitually resident in another jurisdiction whose courts have previously made determinations concerning their future welfare ought only be made in the exercise of judicial discretion in the most exceptional circumstances and where this forum is demonstrably in the best position and ergo in the best interests of determining the relevant issue of welfare arising. The trial judge was also correct not to accede to the application insofar as it was premised on the appellants' contention that there is no reason involving the welfare of the children why they should not be returned even on a temporary basis to this jurisdiction; a proposition which would entail uprooting the children from caregivers with whom they have been residing for the past two years. It is important that no impediment is put in the way of the appellants litigating and actively participating in any proceedings concerning the three children or any of them as may be brought or come before the courts of England and Wales.
139. I would dismiss the appeal.
140. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

**Costello J.** I have read and agree with the judgment herein delivered.

**Noonan J.** I have read and agree with the judgment herein delivered.