[2019] IEHC 641

THE HIGH COURT

[2017 No. 18 FJ]

IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION (EC) 2201/2003

AND

IN THE MATTER OF FOREIGN PROCEEDINGS BEARING REFERENCE NO. P017P00941

AND

IN THE MATTER OF M.D. A MINOR BORN ON THE 26TH DAY OF MAY 2012

AND

IN THE MATTER OF E.W. A MINOR BORN ON 23RD DAY OF AUGUST 2014

AND

IN THE MATTER OF R.E. A MINOR BORN ON THE 3RD DAY OF SEPTEMBER 2017

BETWEEN

HAMPSHIRE COUNTY COUNCIL

APPLICANT/RESPONDENT TO APPEAL

AND

C.E. AND M.E.

RESPONDENTS/APPELLANTS

JUDGMENT of Mr. Justice Binchy delivered on the 30th day of July, 2019

1. On 12th April, 2019 I delivered a decision whereby:-

    1. I allowed the appeal of the appellants against an order made by Creedon J. (*ex parte*) (the "Recognition Order") recognising and enforcing an order of the High Court of England and Wales (the "Return Order") made pursuant to Chapter III of EC Council Regulation 2201/2003 (the "Regulation") and

    2. I set aside the Recognition Order pursuant to an application to set aside the same brought by the appellants.

2. This judgment is concerned with relief sought by the appellants as a consequence of the orders made by me on 12th April, 2019 *Hampshire County Council v. C.E. & anor*. [2019] IEHC 340), which were not appealed. I heard comprehensive submissions from the parties as regards what further orders, if any, should be made arising out of that decision, on 21st May, 2019.

3. In short, apart from seeking costs as they do, the appellants are also seeking further orders from this Court directing the return from England to this jurisdiction of the children referred to in the title to these proceedings in light of the fact that the Return Order is not now recognised in this jurisdiction. It was on the basis of that order that the respondent, assisted by the Child and Family Agency (the "CFA") in this jurisdiction, returned the children to England.

4. For its part, the respondent, while not appealing the judgment delivered by me on 12th April, 2019, submits that, in the particular circumstances of this case, no order as to costs

should be made and nor should the court make any further orders in these proceedings. This Court, it is submitted, is now *functus officio.*

5. Put at its simplest, it is the appellants' contention that they are entitled to be put back in the same position that they were in prior to the Recognition Order. This means that that the children must be returned to Ireland and that it is of no concern to this Court what happens thereafter, which, in the absence of agreement, will have to be addressed through further proceedings.

6. The reliefs now sought by the appellants were not sought in the framework of the application to set aside the Recognition Order, or within the context of the appeal against that order. However, for the purposes of seeking the reliefs now sought, the appellants delivered points of claim on 3rd May, 2019, to which the respondent replied by points of defence delivered on 16th May, 2019.

7. Furthermore, the appellants caused the issue of a summons pursuant to the Guardians of Infants Act 1964, (as amended) (the "Act of 1964") on 9th May, 2019 (concerning all three children referred to in the title to the proceedings) as well as a notice of motion dated 16th May, 2019. That notice of motion came on for hearing before this Court on 21st May, 2019, the same date on which I received submissions from the parties on the question as to what, if any, further orders I should make arising out of the judgment delivered by me on 12th April, 2019.

8. The points of claim and the motion issued by the appellants in substance claim the same reliefs if by different routes. The substance of the reliefs sought is an order directing the return of the three children to this jurisdiction, into the care of the appellants. In the points of claim, the relief is sought on the basis of the decision of this Court of 12th April, 2019, as well as the judgments of the Court of Appeal of 17th May (*Hampshire County Council v. C.E. and N.E. & Ors* [2018] IECA 154), 7th June and 28th November, 2018 (under the citations [2018] IECA 157 and [2018] IECA 365) and the judgment of the Court of Justice of the European Union ("CJEU") of 19th September, 2018 (Joined Cases C-325/18 PPU and C-375/18 PPU) ECLI:EU:C:2018:739). Relief is also sought pursuant to s. 14 of the Act of 1964.

9. In the points of claim, it is claimed that the first named appellant is custodian and guardian of all three children, and that both appellants are the sole guardians and custodians of the third named child, R.E. It is claimed that there is no order which is recognised or enforceable in this jurisdiction giving custody, parental responsibility or any other rights to any other third party. In their points of claim, the appellants invoke the previous decisions of the Court of Appeal and the CJEU in these proceedings, referred to above, as well as the decisions of the Supreme Court in *The State (Quinn) v. Ryan* [1965] I.R. 70 and *The State (Trimbole) v. the Governor of Mountjoy Prison* [1985] I.R. 550 in support of the claim of the appellants to an effective remedy having regard to the decisions of this Court to set aside recognition of the Return Order and also to allow the appeal against the Recognition Order.

10. In the points of claim, it is further claimed, in the alternative, that this Court has an inherent and equitable jurisdiction to make orders to uphold the constitutional rights of the appellants, and/or to give effect and meaning to orders of this Court. The appellants rely upon the decision of the Supreme Court in the case of *N. v. Health Service Executive* [2006] IESC 60.

11. The appellants further rely upon the Act of 1964. They also rely on authorities from the United States in which cases, they submit, orders of the kind that they now seek in these proceedings were granted namely, the decision of the Supreme Court of the United States in the case of *Chafin v. Chafin* 568 U.S. 165 (2013) and the decision of the Court of Appeals, 7th Circuit, in the United States, in the case of *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013) (25th July, 2013).

12. In the points of defence filed on behalf of the respondent, it is pleaded that this Court has no jurisdiction to adjudicate on the matters raised. It is pleaded that proceedings concluded with the decision of this Court of 12th April, 2019.

13. It is pleaded that the father of E.W., namely Mr. W, who is not only the father of E.W. but is also the primary carer of both of the older children M.D. and E.W., pursuant to a final care order made in England at the behest of the respondent, should have been put on notice of the reliefs now sought by the appellants, and in particular should have been served with the special summons and notice of motion issued by the appellants, and that there was no such service.

14. It is further pleaded that there is no basis for the reliefs sought as all children are and always have been habitually resident within the jurisdiction of the Courts of England and Wales, both *de facto* and *de jure*. Accordingly, this Court has no jurisdiction over the children having regard to the Regulation and, specifically Article 8 thereof. The Courts of England and Wales were at all times seised for the purposes of the Regulation by reason of the fact that the children were habitually resident in that jurisdiction when the court became seised of the matter. It follows that the children were not unlawfully removed from this jurisdiction.

15. Proceedings were not issued in this jurisdiction by the appellants until 10th May, 2019, and there is no basis upon which it can be argued that the children were habitually resident in Ireland on that date. On the contrary, they were clearly resident in the jurisdiction of the Court of England and Wales, and, accordingly, this Court should declare of its own motion that it has no jurisdiction. The respondent relies on Articles 17 and 19(3) of the Regulation.

16. It is acknowledged that *The State (Quinn) v. Ryan* establishes that breaches of fundamental rights granted by the Constitution should lead to an effective remedy. However, none of the authorities relied upon by the appellants have any relevance to the forced movement of children across international borders from their primary resident Member State. The State has an obligation to comply with its obligations under the Regulation, and the Regulation supersedes domestic law. However, if the appellants are

correct in their assertions as to breaches of their rights (which is denied) their effective remedy is to seek recognition of the judgment of this Court through the Courts of England and Wales.

Submissions of the parties

Submissions of the Appellants

17. The appellants rely upon the finding of the Court of Appeal that the actions of the respondent in removing the children from the State before service of the Recognition Order was "wholly unlawful". It is submitted that, in the light of that finding, and the decision of this Court both to allow their appeal and to set aside the Recognition Order, it follows that the appellants are entitled to such further orders as are just to meet the case, and specifically, an order directing the return of the children to this jurisdiction forthwith.

18. The appellants rely in particular 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, there must be remedy.

19. It is further submitted that there is an inherent and equitable jurisdiction in the Court to give effect to the constitutional rights of the appellants and their children, and the appellants rely upon *N. v. the Health Service*.

20. It is submitted that, outside of this jurisdiction, there is authority for the making of such consequential orders as are sought in this case, and, as mentioned above, the appellants rely upon the decision of the Supreme Court of the United States in the case of *Chafin v. Chafin* and the decision of *Redmond v. Redmond*.

21. In *Chafin*, the petitioner, who is a citizen of the United Kingdom, had been living with the child of the couple in Scotland when the respondent was on military service in Afghanistan. When the respondent, following military service in Afghanistan, travelled to Alabama, he was joined there soon afterwards by the petitioner and their child, E.C. However, the petitioner was subsequently arrested for domestic violence and as a result of her arrest, it came to light that she had overstayed her visa and she was deported. She then brought proceedings before the District Court in Alabama seeking an order directing the return of E.C. to her country of habitual residence i.e. Scotland. The petitioner was successful and she immediately left the United States with the child. She then initiated custody proceedings in Scotland, and the Scottish Court granted her interim custody and a preliminary injunction prohibiting the respondent from removing E.C. from Scotland. In the meantime, the respondent had appealed the decision of the District Court in Alabama to the Court of Appeals for the Eleventh Circuit. That Court dismissed the appeal on the grounds that it was moot (because E.C. was then in Scotland) and the Court considered that it did not have the power to grant the relief sought.

22. The issue before the Supreme Court was whether or not the appeal of the respondent was moot. The Supreme Court concluded that it was not moot, stating at p. 8:-

> "But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U. S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the United States, and may back up any such command with sanctions … No law of physics prevents E. C.'s return from Scotland … and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States ... After all, the consequence of compliance presumably would not be relinquishment of custody rights, but simply custody proceedings in a different forum.
>
> Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured."

23. The appellants rely on this decision as authority for the proposition that this Court may make an order directing the return of the children to this jurisdiction, even though there is a possibility that the respondent may not comply with such order.

24. In *Redmond*, the parents of the child concerned were not married although they shared the same family name. The parties had been residing in Ireland, but when their relationship broke down, soon after the birth of their child, the mother returned to Illinois in the United States with the child. Because the parties were not married, the father was not at that time entitled to bring forward an application under the Hague Convention (the "Convention"). It took him some three and a half years to overcome that obstacle, following which he issued proceedings in this country seeking guardianship and joint custody of the child and also an order directing that the child live in this country. The mother participated fully in the proceedings, but the father succeeded in obtaining the orders he sought. However, the Court allowed the mother to take the child back to Illinois to make preparations for their move to Ireland, but only on condition that the mother promise under oath to return with the child by a specified date. The mother made that promise but did not honour it. She returned to Illinois with the child and remained there with her, following which the father brought an application under the Convention before the District Court of Illinois. That Court held in favour of the father on the grounds that by disobeying the Irish order, the mother had wrongfully removed the child from Ireland. The Court also held that the habitual residence of the child was in Ireland on the grounds that the parties had, when the mother became pregnant, agreed that the baby would be raised in Ireland. As a result, the child was returned to Ireland.

25. However, the mother successfully appealed the decision of the District Court. The appellate court found that the child was habitually resident in the United States at the time that the mother returned to Illinois with him, and that being the case, the District Court was wrong to order the child to be returned to Ireland. Because the child had been returned to Ireland, the Court was required to consider the issue of mootness. The court was referred to the decision in *Chafin v. Chafin* and concluded that it had an equitable authority to issue an order requiring the return of the child to the United States.

26. On the basis of all of the foregoing authorities, it is submitted on behalf of the appellants that, having invoked the jurisdiction of this Court, the respondent is subject to the jurisdiction of the Court, and it is open to this Court to make orders directing the production of all three children before the Court, notwithstanding that they have been resident in the United Kingdom since their return there almost two years ago. Once the children are returned here, it is open to the respondent to seek recognition again in this jurisdiction of the orders made in the Courts of England and Wales.

27. Furthermore, the right to an effective remedy is guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"). Insofar as it is argued that there is an obligation on this Court to give effect to the Regulation in priority to the terms of the Constitution, it is clear that the Regulation itself must be interpreted in light of Article 47 of the Charter.

28. The Court of Justice of the European Union ("CJEU") has already held that the enforcement of the Recognition Order prior to the service of the declaration of enforceability of the same is contrary to Article 33(1) of the Regulation, read in the light of Article 47 of the Charter (para. 75 of the decision of the CJEU in these proceedings).

29. Insofar as it may be argued on behalf of the respondent that the reliefs now sought were not sought within the framework of the motion to set aside or the appeal against the Recognition Order, it is submitted that the issue of relief only arises when the substantive issue has been determined, and that this is clear from *The State (Quinn) v. Ryan* and also *N. v. Health Service Executive and An Bord Uachtála.*

30. It is submitted that the matter now comes before the Court in a manner very similar to an application for production of a person by way of an application for habeas corpus. The appellants are looking for orders for production of the children, and it is only upon their production before the Court that issues such as guardianship and custody will arise. It is then, and only then, that the Court will be required to determine the habitual residence of the children. However, it is in any case denied that the children were, at the time that they travelled to Ireland, habitually resident in the jurisdiction of England and Wales. This is especially so in relation to R.E., who was not subject to any court order at all at the time that he was brought here by the appellants.

31. It is not correct to say that Mr. W. should have been served with this application. He was never a party to these proceedings in the first place and that was a decision taken by the respondent, not the appellant.

32. By way of alternative argument, the appellants argue that it is open to this Court to request the Courts of England and Wales, pursuant to Article 15 of the Regulation, to transfer the proceedings in that jurisdiction to this jurisdiction. Article 15 of the Regulation provides at sub-articles :15.1-15.3:-

> "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:

   (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
   (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:

   (a) upon application from a party; or
   (b) of the court's own motion; 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 of the court's own motion or 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:

   (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
   (b) is the former habitual residence of the child; or
   (c) is the place of the child's nationality; or
   (d) is the habitual residence of a holder of parental responsibility; or
   (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property."

Submissions of the respondent

33. Firstly, it is submitted that it is not correct to say that Mr. W. should not have been served with notice of the application for the relief now sought by the appellants. He is the father of E.W. and the foster carer of both E.W. and M.D. He too has fundamental rights in respect of which he is entitled to be heard.

34. It is submitted that the Regulation governs the issues raised by these proceedings, both in this jurisdiction and in England and Wales. Furthermore, in cases involving the welfare of children, it is the best interest of the children that governs the decision to be made by the court.

35. Counsel for the respondent forcibly submits that this Court should now determine the habitual residence of the children. This Court became seised of this application on 10th May, 2019, the date of the issue of the special summons, and on this date all three

children were clearly resident in England and Wales. Accordingly, this Court should, of its own motion, decline jurisdiction in the matter pursuant to Article 17 of the Regulation.

36. At the time that E.W. and M.D. were taken by the appellants from the jurisdiction of England and Wales to this country, they were the subject of care orders which expressly prohibited their removal from the jurisdiction of England and Wales. Therefore, Articles 9 and 10 of the Regulation apply, and if the Court is satisfied that there was an abduction then an Irish court could never have jurisdiction in relation to E.W. and M.D.

37. As regards R.E., it is accepted that his situation is different. Nonetheless, he is now habitually resident in England and Wales. As regards whether he was so at the time that he was brought into this country by the appellants, it is submitted that the court should apply the test identified by the CJEU in *Mercredi v. Chaffe*, [Case C-497/10PPU, 22nd December, 2010]. In that case, the CJEU held that:-

> "The concept of 'habitual residence' for the purposes of Articles 8 and 10 of Council Regulation (EC) No. 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, 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 being 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 of the circumstances of fact specific to each individual case.
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> If the application of the above mentioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence under Article 13 of the Regulation."

38. Applying this test, it is submitted that R.E. was born in Southampton to English parents who have no connections to this jurisdiction. His siblings are, and have at all times been, habitually resident in England and Wales, and it would be most unusual against that background to have a different habitual residence to that of his siblings. It is submitted that if the court is satisfied that R.E. was removed unlawfully from the jurisdiction of England and Wales, then Article 10 of the Regulation applies.

39. While it is accepted that at the time the appellants brought R.E. to this jurisdiction rights of custody and parental responsibility were not vested in the respondent, they were

vested in the Court of England Wales. Reliance is placed in this regard in the case of *X County Council X v. B* (Abduction: Rights of Custody in the Court) [2010] 1 FLR 1197 in which case Macur J. held that on the date of the departure of the children in that case from England to this country, the Courts of England and Wales were seised of the matter and rights of custody were, accordingly, vested in the courts.

40. It is submitted that the appellants still have an effective remedy; they can apply to the Courts of England and Wales for an order to revoke the existing orders made in relation to the children. Counsel submitted that before the CJEU, the respondent indicated that it would respect any Irish judgments and would hear arguments thereafter in relation to an application to have the children returned to this country.

41. Insofar as the appellants are now relying upon the Act of 1964, any decision that this Court now takes must be governed in the best interest of the children. Section 3 of the Act of 1964 makes it clear that the welfare of the children is paramount. The Court must therefore have regard to the fact that E.W. is living with his father and E.W. and M.D. are in the foster care of Mr. W. Moreover, they are attending local schools. A decision is awaited regarding the placement of R.E. (which decision has been deferred pending the outcome of these proceedings). It is submitted that the return of the children to this country could not be in their best interests.

42. It was open to the appellants to participate in the ongoing proceedings in England and Wales, and they choose not to do so. Full care orders in respect of E.W. and M.D. have been made in the intervening period. As a result, they have been placed in the care of Mr. W. In seeking the reliefs that they do, the appellants seek to reverse all of that, without regard to the best interests of the children.

43. A full care order has also been made in relation to R.E., who has been the subject of a placement order of the court since December, 2017. However, counsel for the respondent informed the Court that those proceedings are not concluded, pending the outcome of these proceedings.

44. It is submitted that the reliance placed by the appellants on Article 15 of the Regulation is misconceived. Article 15 operates by way of an exception to Article 8 of the Regulation, so that a court that is seised of proceedings may, in the particular circumstances of the case, transfer those proceedings to another jurisdiction where, inter alia, the habitual residence of those children is in the latter jurisdiction. That is not the case here. In any case, there are no proceedings in England and Wales to transfer here, as final care orders as regards all children have been made in England and Wales more than a year ago, and nor are there substantive proceedings in this jurisdiction to transfer to England and Wales.

45. It is submitted on behalf of the respondent that neither *Quinn v. Ryan* nor *Trimbole* are authority for the kind of orders now sought by the appellants in this case. Those cases concerned the execution of warrants; there were no children involved.

46. As regards *Redmond v. Redmond*, the decision of the appeal court in the United States was not surprising, because in that case the Court decided that the child concerned had, at the relevant time, been habitually resident in the United States. That is not so in this case i.e. the children are not, it is submitted, habitually resident in this country, whereas the child in Redmond was found by the Court to be habitually resident in the United States, hence the Court in that case ordered her return to that jurisdiction.

47. The respondent submits that the reliefs now sought should have been sought as far back as September, 2017, and insofar as the appellants are asking the Court to exercise a discretionary remedy, it should do so against the appellants on grounds of delay. If the Court were to grant the orders sought, the delay created by the appellants themselves would operate contrary to the best interests of the children, having regard to the fact that the childrens' lives have moved on in the intervening period.

Discussion and Conclusion

48. The case made on behalf of the appellants in support of this application is, at one level, relatively straightforward. They argue that since the children were returned to the United Kingdom pursuant to an order of this Court that has since been set aside, the appellants are entitled to be put back in the same position as they were prior to the Recognition Order. This, they argue is the only effective remedy and they further argue that they are entitled to an effective remedy both under domestic law and the Charter. They also submit that the Court has the jurisdiction to make such an order notwithstanding the obvious fact that the children are now in the United Kingdom and out of the reach of the jurisdiction of this Court.

49. Dealing with this latter point first, the Regulation is entirely silent on this issue. While the Regulation provides for an appeal against a recognition/enforcement order (which, it will be re-called, must in the first instance be made following upon an *ex parte* application) and while the decision of the CJEU in these proceedings makes clear, for the first time, that a Recognition Order/declaration of enforceability must be served upon the parties affected by it, prior to execution of the same, neither the Regulation nor the decision of the CJEU give any guidance as to the consequences of a successful appeal in circumstances where the order has already been executed. That being the case, it seems to me that the availability of any remedy in these circumstances falls to be determined in accordance with domestic law.

50. In principle, I am satisfied that there is no impediment upon the Court such as to prevent the granting of the orders sought, and that the authorities relied upon by the appellants, both in this jurisdiction *(The State (Quinn) v. Ryan* and *Trimbole*) and in the United States (*Chafin v. Chafin,* and *Redmond v. Redmond*) support the proposition that this Court has jurisdiction to make orders of the kind now sought by the appellants. All of that said, however, the appellants were unable to point to any authorities in this jurisdiction in which such orders have been made in the past. Notwithstanding the very strong views of the court in *The State (Quinn) v. Ryan*, it does not appear as though such an order was contemplated by the Court, although the court was prepared to hold English police officers in contempt of Court, but for the apology proffered on their behalf. In *Trimbole*,

the complainant was in custody in this jurisdiction and it was possible to provide an effective remedy by ordering his release from custody.

51. Assuming however that the Court does have the jurisdiction to grant the orders now sought by the appellants, I think it must be the case that this is 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 alone of the wrongful behaviour of the party against whom the order is sought. By this I mean that if there are 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. In this case, it is both reasonable and necessary to consider the scheme of the Regulation as a whole in order to decide the issue, even though the Regulation does not expressly address these circumstances.

52. In the course of his decision of 17th May, 2008, in these proceedings, Hogan J. in the Court of Appeal referred to a decision of the Supreme Court in *Child and Family Agency v. C.J.* [2016] IESC 51. In that case the High Court had made an order directing the return of a child to the United Kingdom but on that occasion to Scotland. The background leading up to the making of that order was quite different to the background leading up to the making of the Recognition Order. But the effect was the same; a child was separated from its mother and returned to the United Kingdom. All three courts adjudicating upon the matter (the High Court, Court of Appeal and Supreme Court) were in agreement that the habitual residence of the child was, at all times, Scotland. In his judgment, O'Donnell J. noted that it followed, therefore, that the courts of Scotland had jurisdiction in matters of parental responsibility by reason of Article 8 of the Regulation. One of the issues that the Court had to consider was what, if anything, should be done by way of redress for the execution of an order of the High Court which was subsequently set aside, in circumstances where the child concerned had been returned to Scotland and remained in that jurisdiction. O'Donnell J. concluded that since the courts of Scotland had jurisdiction in matters of parental responsibility concerning the child by reason of the fact that the habitual residence of the child was, at all material times, in Scotland and since those courts were then exercising that jurisdiction, it would "therefore be an exercise in futility, and worse, to require the CFA to seek the return of the child when the courts of Scotland would still have the function, and the obligation of determining how, where and by whom such care should be provided".

53. That case is 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, was 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 direct the return of the child, notwithstanding that the effect of the order had been to separate mother and child.

54. In this case, the principal argument of the respondent, in relation to the jurisdiction of this Court, also revolved around the habitual residence of the children. It is the respondent's submission that all three children have, at all times, been habitually resident in the United Kingdom and that, accordingly, this Court has no jurisdiction in matters of parental responsibility for the children, by reason of Article 8 of the Regulation. It is submitted that this Court should, therefore, in accordance with Article 17 of the Regulation, declare of its own motion that it has no jurisdiction.

55. The appellants, on the other hand, contend that this Court is not now being asked to make any substantive order in the proceedings. The Court is merely being asked to direct the return of the children as a consequence of the decision of this Court setting aside the Recognition Order, and also allowing the appeal against the making of that order. It is submitted that it is not appropriate or necessary for this Court to make any decision regarding the habitual residence of any of the children at this juncture. That is a matter to be addressed in the context of the substantive proceedings, following upon the return of the children to this jurisdiction.

56. With respect, however, I cannot accept the submissions of the appellants in this regard. The question of habitual residence is central to determination of jurisdiction in matters of parental responsibility for children. Although, as I have said above, the Regulation provides no guidance on the orders that should be made where a Recognition Order has been set aside after its execution, that fact has no bearing upon those provisions that the Regulation relating to jurisdiction.

57. Since the circumstances of M.D. and E.W. on the one hand, and R.E. on the other hand, are different, it is necessary to give separate consideration to each. Accordingly, I will deal first with M.D. and E.W.

58. M.D. and E.W. 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 child-care authorities (the respondent) and the Courts of England and Wales. Applying the test in *Mercredi v. Chaffe*, there cannot be the slightest doubt that at the time they were brought here, M.D. and E.W. were habitually resident in England.

59. Following upon their return to the United Kingdom, the Courts of England and Wales continued to exercise jurisdiction in the parental responsibility of M.D. and E.W. and this Court has been informed that final care orders have been made, placing them in the care of the respondent. As a consequence of these orders, those children have been placed in the care of the father of E.W. who is also a father figure to M.D. Mr. W. has not been notified of the making of this application, and it is submitted on behalf of the appellants that this was unnecessary because this application flows as a consequence of the

proceedings issued by the respondent itself, and it was the respondent chose not to join Mr. W. to the proceedings.

60. Insofar as the appellants seek the orders that they do as a consequence of my decision of 12th April, 2019 (as distinct from pursuant to the proceedings they have issued under the Act of 1964), I think that the orders that they seek should be refused because, in the words of O'Donnell J. in *Child and Family Agency v. C.J.*, such orders would be an exercise in futility. The Courts of England and Wales have at all times had jurisdiction over matters of parental responsibility concerning M.D. and E.W. and have exercised that jurisdiction. Any changes to the arrangements concerning the guardianship, custody or access to M.D. and E.W. are and have always been a matter for the Courts of England and Wales. That would remain the case even if they were to return here, and no useful purpose could be served by ordering their return here. For this same reason, their return here could not amount to an effective remedy for the purpose of the Charter. If the orders sought were granted, and the children were returned here, at great disruption to them, it is 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.

61. Insofar as the appellants seek the reliefs concerned pursuant to the Act of 1964, I think that the respondent is correct in arguing that this Court should decline jurisdiction in relation to those proceedings, pursuant to Article 17 of the Regulation. This follows from my conclusion that the courts of England and Wales have jurisdiction as regards matters of parental responsibility for M.D. and E.W.

62. I turn now to consider the situation of R.E. On the date on which R.E. was brought into this jurisdiction by the appellants, he was not the subject of any court orders and nor were there any proceedings in being regarding parental responsibility for R.E. However, the respondent had informed the appellants of its intention to issue proceedings concerning R.E. and had also secured from the second named appellants, a commitment on his part to leave the family home immediately and not to have any further contact with any of the three children without first informing the respondent, pending the outcome of the court proceedings to be issued by the respondent.

63. As noted by Whelan J. at para. 25 of the judgment of the Court of Appeal of 28th November, 2018, on the date that they travelled to Ireland, the appellants appear to have been the only holders of rights of custody regarding R.E., and they arguably had the legal capacity to change his habitual residence. As a matter of fact, the appellants were attempting to avoid the jurisdiction of both the respondent and the Courts of England and Wales by moving to this jurisdiction. It was, therefore, surely their intention to establish for R.E. a habitual residence in this country and as the only persons having parental responsibility for R.E. at that point in time, they had the entitlement to do so. But it does not follow from that conclusion that they succeeded in doing so.

64. In Mercredi v Chaffe, the CJEU laid down the test to be applied in determining "habitual residence" for the purposes of Article 8 and 10 of the Regulation. That test specifically

considers the situation of an infant who has been staying only a few days in the member state to which he/she has been removed. As noted above, the factors to be taken into consideration include: the duration, regularity, conditions and reasons for the stay in the territory of the Member State and for the [mother's] move to that State, and, secondly, 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.

65. In this case, of course, it is not just the mother's background that must be considered but the background of both appellants. However, it has not been suggested that either of the appellants had any connection of any kind with this country in the past. For the purposes of applying this test, their background appears to be identical.

66. It is common case that the appellants came here with the children for one purpose and one purpose only – to avoid the respondent and the jurisdiction of the Courts of England and Wales. They had no previous connection with this country of any kind. All of their family connections are in the United Kingdom. E.W's father resides in the United Kingdom, and he is also a father figure to M.D. The habitual residence of R.E's siblings at all times remained in England. R.E. was in Ireland for just sixteen days when he was returned to the United Kingdom.

67. Counsel for the respondent argued that it would be most unusual for siblings to have a different habitual residence. While this was not accepted by counsel for the appellants, I think it must be correct in the case of siblings who have, at all times, resided in the full time care of one or other of their natural parents, in this case, their mother. It 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.

68. It is also necessary to consider the reasons of the appellants in moving to this country. Since the CJEU has determined that these reasons are relevant, and must be taken into account, it follows that some reasons will lend themselves more readily to a change in habitual residence and some reasons are less likely to do so. So, for example, where children are moved as part of a family for purely economic reasons, that is likely to point to a change in habitual residence. But can the same be said where the sole reason for the move is a desire to escape the statutory childcare regime in a member state?

69. Recital 12 of the Regulation states that the grounds of jurisdiction in matters of parental responsibility are "shaped in light of the best interest of the child …". Furthermore, Article 24 of the Charter provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's bests interests must be a primary consideration.

70. In general terms, 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, 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.

71. I consider that R.E's habitual residence upon his birth must have been that of his parents and half siblings i.e. England. Since he was in this country only fifteen days, and since the only reason for his being here was one which should not, for the reasons given above, be taken into account in determining his habitual residence, I consider that R.E's habitual residence did not change when he was brought here by his parents. In my judgment, R.E. has at all times been habitually resident in the United Kingdom and subject to the jurisdiction of the Courts of England and Wales. That being the case, this Court should not make an order for the return of R.E. to this jurisdiction, notwithstanding the highly unsatisfactory circumstances by which he was returned to England. Also, for the same reasons given in the cases of M.D. and E. W., this court should decline jurisdiction in the proceedings issued pursuant to the Act of 1964.

72. Finally, I have given consideration to the alternative argument made on behalf of the appellants that, if this Court is unwilling to grant orders directing the return of the children here, it should request the Courts of England and Wales to transfer proceedings in that jurisdiction to this jurisdiction, pursuant to Article 15 of the Regulation. There are two difficulties with that proposition. The first is that none of the children have a particular connection with this jurisdiction, as required by Article 15.3 of the Regulation. The second is that there are no proceedings to transfer in the cases of M.D. and E.W. In the case of R.E., it is unclear if there are any proceedings that could be transferred, because the information given to the Court was somewhat unclear. While this Court was informed that a full care order has been made in relation to R.E., the Court was also informed that those proceedings are not concluded, pending the conclusion of these proceedings. I assume that this refers to the injunction previously granted by this Court restraining the respondent from continuing with any proceedings leading to the adoption of R.E. But, in any case, whether or not there are proceedings that could be transferred, R.E. does not have the particular connection with this jurisdiction required by Article 15.3 of the Regulation.

73. However, 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. In my view, that is the appropriate course for them to take. They may well feel that this will be a pointless exercise, based on their experience to date, but in the intervening period, they have had together another child, and the Court has been told that the CFA has not expressed any concerns about the capacity of the appellants to care for that child. That being the case, the CFA may well be able to render some assistance to the appellants in making such an application, most particularly in relation to R.E., 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 is 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.