



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 86

[2014 1460]

Finlay Geoghegan J.  
Peart J.  
Mahon J.

IN THE MATTER OF K.J., A MINOR BORN ON THE 5TH MARCH, 2008 AND

IN THE MATTER OF THE CHILD CARE ACT 1991 (AS AMENDED) AND

IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 OF THE 27TH NOVEMBER 2003 CONCERNING JURISDICTION  
AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL  
RESPONSIBILITY AND

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN

THE CHILD AND FAMILY AGENCY

PLAINTIFF

AND

C.J. AND C.S.

DEFENDANTS

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 29th day of April 2015**

1. The appellant is the mother of the child named in the title to the proceedings to whom I will refer as "K" in this judgment. The mother appeared in person on the appeal, but previously had legal representation before the High Court. The second named defendant is the father of K, but did not participate in the High Court nor on appeal. The mother appeals against an order of the High Court (O'Hanlon J.) of 11th December 2014, made pursuant to the judgment of the same date (the *Child and Family Agency v C.J. and C.S.* [2014] IEHC 669). The order against which the mother appeals included:-

1. A declaration pursuant to the terms of Article 17 of the Council Regulation (EC) No. 2201/2003 of 27th November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (the "Regulation"), that the courts of Ireland have no jurisdiction under the Regulation in respect of matters concerning parental responsibility for K.
2. A declaration that K is and was at all material times habitually resident in Scotland.
3. An order pursuant to the inherent jurisdiction of this Court and Article 20 of the Regulation permitting the Child and Family Agency ("CFA") to remove K from his current placement in this jurisdiction and place him into the care of Dundee City Council's Children's Services in Scotland.
4. An order permitting the CFA to take all necessary steps for the purpose of implementing the transfer of K from Ireland to Scotland.

2. On the appeal, the CFA were represented by Counsel and solicitor. A *guardian ad litem*, Ms. Ruth More O'Ferrall ("the guardian") had been appointed, in the context of related District Court proceedings and appeared through solicitor and Counsel in the High Court and in this Court. The CFA oppose the appeal in full. The guardian opposes the appeal against the order made, but made submissions against one part of the High Court judgment.

**Background to High Court Proceedings**

3. The background facts are taken from the affidavits, exhibits and reports in the High Court.

4. K was born in Scotland and has lived with his mother in Scotland for the greater part of his life. In particular, since 2011, he has lived with his mother at an address specified in the grounding application in Dundee. His parents separated prior to his birth, whilst his father lives in Dundee he has had little involvement in his upbringing. The guardian reports that she spoke with the father, who does not appear to have parental responsibility for K, but did wish him to return to Scotland.

5. Social Services in Scotland recorded childcare concerns regarding the mother and K since the time of his birth. The mother had a history of involvement with the Mental Health Services in Scotland. It appears, however, that in 2009, the case was closed to Social Services in Dundee. However, in December 2013, it was decided that the case should be allocated to a social worker which was done on 17th January 2014.

6. In the meantime, in April/May 2013, K was diagnosed with an autistic spectrum disorder. He was reviewed at a meeting held by the NHS in April 2013, by a consultant paediatrician and others at which the mother and her adoptive parents were present. A plan was formed for K which involved a review after he had started school.

7. K commenced school in the autumn of 2013. Unfortunately, the mother was involved in an incident, as she perceived it, in protection of K, as a result of which she was charged in October 2013 with assault on a child at the primary school, to which she

pleaded guilty in January 2014. In the meantime, the mother had removed K from his first school; he started at a second school, was again removed, and in February 2014, started at a third primary school. The mother indicated a wish to home school K. There were also other concerns about the mother, in particular, her association with certain men prior to January 2014.

8. In March 2014, as the result of a child protection case conference on 25th March, 2014, K's name was placed upon Dundee City Council's Child Protection Register. Throughout the summer of 2014, there were relevant meetings held in respect of case conferences and what is termed a "core group" in relation to K.

9. K returned to school in the autumn of 2014. The mother, in October 2013, raised issues about K being bullied at school. On 10th October, school ended for the October holiday, during part of which a report exhibited in the High Court indicates K went on a caravan holiday with his maternal grandparents and then returned to Dundee. The Scottish social worker is recorded as visiting the mother and K at their home on 24th October 2014. This appears to be the visit during which an envelope was handed to the mother containing papers for a Children's Hearing on 12th November 2014, referred to below. K did not go back to school on its resumption on 27th October 2014. There appears to have been a GP Certificate furnished to the school. On 29th October 2014, there was a "team around the child" meeting at K's school. The mother did not attend the meeting. On 31st October 2014, the mother and K were reported as missing persons to the police in Scotland. On 2nd November 2014, the mother and K were traced to London (through her car registration) and spoken to by the English police on 2nd November 2014. On 3rd November, the mother made contact with and spoke by phone with Dundee Social Services and is reported as indicating that she was intending to travel to Holland.

10. The mother and K subsequently travelled to Ireland. It appears from the grounding affidavit that it has subsequently been ascertained that they stayed in a Dublin hotel on 8th November 2014, and that she arranged that her car was subsequently delivered to Ireland.

11. In the meantime, in Scotland, a report was made to the Scottish Children's Reporter Administration and a Children's Hearing took place on 12th November 2014. The mother was not present and there is a dispute as to the extent of her knowledge of the hearing. On that day, an interim Compulsory Supervision order was made by the Children's Hearing in the following terms:-

- "1. The child is required to reside at any place of safety away from the place where he/she predominantly resides.
2. The Children's Hearing orders that the place/places where the child is required to reside in accordance with this Order shall not be disclosed, whether directly or indirectly to his mother, [CJ].
3. Contact between [K] and his mother, [CJ] shall be arranged and supervised by the social work department.
4. [K] shall receive all necessary medical treatment and examinations.

The implementation authority is recorded as Dundee City Council and that the order would have effect until 03.12.2014."

12. Pursuant to Interpol communications, the mother and K were located in Dublin on about 14th November 2014, and on 17th November 2014, K was removed from the care of the mother by the gardaí under s. 12(1) of the Child Care Act 1991. On that day, he was placed in the care of the CFA under s. 12(3) of the Child Care Act 1991.

13. On 18th November 2014, the CFA applied for and was granted an Emergency Care order by the District Court. K was placed into the care of the CFA under s. 13 of the Child Care Act until 25th November 2014, and placed in foster care by the CFA. He had access with his mother. On 26th November 2014, the CFA sought and was granted an interim care order in respect of K by the District Court following a hearing at which the mother opposed the order sought.

### **The High Court Proceedings**

14. On 25th November 2014, the CFA issued a plenary summons, a concurrent plenary summons, a notice of plenary summons and a notice of motion seeking relief in substantially the same terms as the plenary summons. On the same day, orders were made by the High Court (O'Hanlon J.) giving liberty to serve a notice of the plenary summons on the father, the second named defendant, and to issue and serve the notice of motion returnable for 27th November 2014 at 10.00 am.

15. The motion in the High Court was grounded upon the affidavit of Ms. Sarah Greene of the CFA sworn on 25th November 2014, and exhibits referred to therein and an affidavit of Ms. Elizabeth White, the allocated Scottish social worker, also sworn on 25th November 2014. There was one replying affidavit of the mother and a report of the guardian dated 8th December 2014, who appears to have been appointed in the course of the District Court proceedings on either 4th or 5th December 2014. The CFA lodged written submissions in the High Court, which are also in the book of appeal before this Court.

16. The reliefs sought by the CFA in its notice of motion were, in substance, identical to the reliefs sought in the plenary summons, and insofar as relevant to the appeal may be summarised as:-

1. A declaration that K is and at material times was habitually resident in Scotland.
2. A declaration pursuant to Article 17 of the Regulation that the courts of Ireland have no jurisdiction under the Regulation in respect of matters concerning parental responsibility for K.
3. An order pursuant to the inherent jurisdiction of the High Court and/or Article 20 of the Regulation permitting the CFA to remove K from his current placement in Ireland and place him into the care of Dundee City Council's Children's Services in Scotland.
4. Ancillary orders providing for all necessary and incidental directions to facilitate the transfer K from Ireland to Scotland.
5. In the alternative, orders and declarations pursuant to Article 15 of the Regulation directing the court to transfer this matter to the courts of Scotland and additional reliefs to facilitate the transfer of K to Scottish Social Services.

17. There was a hearing on the affidavits and exhibits, a report of guardian and written submission of the CFA before the High Court on 9th December 2014. Oral submissions were made on behalf of CFA, mother and guardian. It appears that at the hearing the CFA did not pursue the alternative relief sought under Article 15.

### **High Court Hearing**

18. The order of the High Court of 11th December 2014 indicates that it was only the motion which was heard in the High Court. It is not recorded, however, that there was any determination of the High Court or agreement that the hearing of the motion was to be treated as the trial of the action. On this appeal, where the mother was not represented, no issue was raised by reason of the fact that the orders are recorded as made on the hearing of a motion, as distinct from following the full hearing of the plenary proceedings. This Court did not raise it as an issue during the hearing and I am not doing so now. However, I do not wish to be taken as agreeing that where a motion seeks, in substance, all the reliefs sought in plenary proceedings, there is no necessity to consider and determine if it is appropriate that hearing of the motion be treated as the trial of the action (as is sometimes done by agreement or order of the court), or failing that, to consider the jurisdiction to make the order sought on a motion as distinct from following the hearing of the proceedings.

### **Decision of the High Court**

19. The High Court judge delivered a full written judgment on 11th December 2014. In it, she made findings on facts and legal issues which gave rise to the orders set out at the commencement of this judgment. For the purpose of this judgment, I propose considering the findings and decision of the High Court and the appeals taken in relation to thereto in the following order:-

- (i) The finding that K was habitually resident in Scotland at all material times.
- (ii) The decision that the High Court is the appropriate forum to discharge the functions under Articles 17 and 15 the Regulation and that the District Court does not have power to make declarations (pursuant to Articles 17 and 15 of the Regulations) and does not have power to conduct any inquiries as to which Member State has/does not have jurisdiction in matters of parental responsibility under the Regulation
- (iii) The declaration made by the High Court pursuant to Article 17 of the Regulation.
- (iv) The orders made permitting the CFA to return K to Scotland.

### **Appeal**

20. The mother sought to appeal against the entire order made. Whilst, her appeal was out of time, the CFA agreed that time could be extended and no further issue arises. The guardian sought leave to intervene and be represented on the appeal. Whilst, in the interest of K, the guardian supports the orders made by the High Court effectively permitting the CFA to transfer K to Dundee Social Services, she and her legal representatives submit that the breadth of the decision made by the High Court judge in relation to the absence of jurisdiction in the District Court under Articles 17 and 15 (and possibly other Articles) of the Regulation are incorrect, and are such that they are creating difficulties in relation to other children and proceedings and they wished to make submissions contrary to the view taken by the High Court judge. At a direction hearing, liberty was granted to the guardian to be represented at the appeal in order that there be a *legitimus contradictor* of the CFA before the Court of Appeal on these important jurisdictional questions. The mother, understandably, has no interest in issues which are not central to the orders relating to K and are difficult issues for a person without legal representation.

### **Habitual Residence of K**

21. The High Court judge, in my view, correctly made a finding in accordance with the appropriate principles referred to in her judgment that K was habitually resident in Scotland at all times material to the High Court proceedings. The relevant dates are either the date of commencement of the District Court proceedings or the High Court proceedings in November 2014. There can be no dispute on the facts that when the mother and K left Scotland, which the mother submitted to this Court was on 28th October 2014, first travelling to England and then on to Ireland, K was habitually resident in Scotland. Notwithstanding the submission of the mother that she wanted to exercise her rights pursuant to European Law and come to live in Ireland when she came here, there were no facts upon which it could have been determined that the habitual residence of K had changed to Ireland by either the 18th or 25th November 2014. Accordingly, I would dismiss the appeal against that part of the judgment and order of the High Court.

### **Jurisdictions of the District Court and High Court under the Regulation**

22. The High Court judge, at paras. 3 to 5 of her judgment set out the context in which the respective jurisdictions of the District Court and the High Court under the Regulation, and in particular Article 17, arose in the proceedings and the submissions made on behalf of the CFA in the following terms:-

"3. On the 25th and 27th November, 2014, the Dublin Metropolitan District Court heard ancillary proceedings arising from this case under the Child Care Act 1991. The presiding District Court Judge raised a question in relation to the exercise of the District Court's jurisdiction under Council Regulation (E.C) 2201/2003. The question raised was whether there was an obligation on the District Court to make a declaration under article 17 of the Regulation where the presiding judge came to the conclusion that a court of another Member State had jurisdiction under the Regulation. Clarity is sought in this Court on whether the District Court can or should discharge the functions under the Regulation on determinations of jurisdiction.

4. Article 17 of the Regulation provides as follows:

'Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.'

5. Counsel for the plaintiff submits that the District Court is a court of local and limited jurisdiction under Article 34.3.4 of the Constitution of Ireland 1937, meaning that the jurisdiction of the District Court is limited to the powers envisaged and conferred upon it by statute. Jurisdiction of the High Court is one of full original jurisdiction and it also has an inherent jurisdiction and a supervisory role in terms of its powers of hearing cases involving judicial review and *habeas corpus*. The High Court also has the power to make any necessary and relevant declarations. Often, the High Court and the Supreme Court make relevant orders in the exercise of their inherent jurisdiction. These orders mitigate any possible infirmities in the Regulation and contribute to the smooth operation of same."

Having referred to the practice in England, as she understood it to be and certain other provisions in the Regulation and a decision of mine in *A.O'K. v. M.K.* [2011] 2 I.R. 498, she stated her conclusion:-

"9. Thus, this Court is of the view that the High Court is the appropriate forum to discharge the functions under the

Regulation. Therefore, it is appropriate for the High Court to hear this particular application. This Court accepts the submissions made on behalf of counsel for the plaintiff that the District Court does not hold any power to make declarations under the Regulation. The District Court does not have power to conduct any enquiries as to which Member State has/does not have jurisdiction in matters of parental responsibility under the Regulation, nor does it have power to make requests of courts in other Member States under article 15 of the Regulation."

23. In the final paragraph of her judgment, the High Court judge returned to the issue of the respective jurisdictions of the High Court and the District Court under the Regulation stating as follows:-

"22. This Court holds that the High Court is the appropriate forum to discharge the functions under the Regulation. The District Court does not have any power to make declarations under the Regulation. The District Court does not have power to conduct any enquiries as to which Member State has/does not have jurisdiction in matters of parental responsibility under the Regulation, nor does it have power to make requests of courts in other Member States under article 15 of the Regulation."

24. Most of the above decisions of the High Court are *obiter*. Nevertheless, this Court was informed by Counsel for the guardian that her conclusions in relation to the absence of jurisdictions in the District Court under the Regulation are causing problems and requested that the Court should consider the submissions made on behalf of the guardian and decide whether or not the views expressed by the High Court judge on these issues are correct. It appears necessary to do so. The mother, understandably, did not make any submissions on these issues.

25. There is no dispute between Counsel for the CFA and the guardian that the High Court has jurisdiction to make a declaration pursuant to Article 17 of the Regulation. I agree that this is the position in an appropriate case and will return to what is an appropriate case. The dispute relates to the jurisdiction of the District Court to make such a declaration and make other decisions pursuant to the Regulation. I propose, primarily, to consider the jurisdiction of the District Court under Article 17 which applied on the facts herein. Whilst the High Court judge made an observation in relation to Article 15, it was clearly *obiter* as the CFA did not pursue any such application in either the District or High Court.

26. As appears from the title, the Regulation is a Regulation of the European Union concerning jurisdiction and the recognition and enforcement of judgments, *inter alia*, in matters of parental responsibility. It is common case that public law childcare proceedings, such as those taken by the CFA in relation to K, are proceedings relating to parental responsibility and come within the scope of the Regulation pursuant to Article 1. The Regulation, in Chapter II, section 2 in Articles 8 to 15 respectively, contains provisions relating to the jurisdiction of the courts of Member States in proceedings relating to parental responsibility for a child and certain other proceedings. The general rule in matters of parental responsibility is set out in Article 8 which provides:-

"General jurisdiction

1. 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.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

27. As appears, the basic rule is that it is the courts of the Member State in which the child is habitually resident which has jurisdiction in matters of parental responsibility. Articles 9 and 10 contain special rules where a child moves lawfully from one Member State to another and acquires a new habitual residence there (Article 9) and in case of wrongful removal or retention of a child (Article 10). Article 12 contains special rules where parental responsibility proceedings are connected with an application for divorce, legal separation or marriage annulment. Article 13 provides by way of exception for jurisdiction based on the presence of the child, where the habitual residence cannot be established and jurisdiction is not determined on the basis of Article 12. Finally, Article 14 provides that where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction is to be determined in each Member State by the law of that State.

28. Section 3 of Chapter II of the Regulation, in which Article 17 is found, contains common provisions in relation to the hearing of proceedings to which the Regulation applies in the courts of Member States. This includes all proceedings relating to matters of parental responsibility of a child. It is important to emphasise that it is all proceedings. Whilst, in practice, where all the parties to proceedings are and have at all material times been habitually resident in Ireland, it may not be necessary for a court to consider the terms of the Regulation; nevertheless, the Regulation does apply to the proceedings. The applicability of the Regulation is not dependent upon a party being or having been resident in another Member State. Also, proceedings relating to matters of parental responsibility may be public law in nature, such as the present proceedings, or may be private law disputes between persons having or claiming parental responsibility in relation to a child.

29. Article 17 of the Regulation provides:-

"Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction."

30. Article 16 defines the circumstances in which a Court is deemed to be "seised", and insofar as relevant to the submissions made herein, provides that a Court shall be deemed to be seised "at the time when the document instituting the proceedings or an equivalent document is lodged with the court . . ."

31. When the CFA made the application to the District Court for the emergency care order in relation to K on 18th November 2014, the relevant District Court application must have been issued or lodged and in accordance with Article 16.1(a) of the Regulation, the District Court was "seised" of proceedings in a matter relating to parental responsibility concerning K. This continued to be the position with the application of the CFA for an interim care order. The facts before the District Court in relation to K were such that, in my view, the District judge correctly raised an issue as to whether the District Court in Ireland had jurisdiction to decide a matter relating to parental responsibility concerning K, or whether the courts of Scotland had jurisdiction by virtue of the Regulation. He did so, presumably, for the purpose of giving the parties an opportunity of addressing him on the issue. Having done so, and heard the parties, if he formed the view that K remained habitually resident in Scotland when the proceedings commenced, the question for consideration is whether, in accordance with Article 17, the District judge was permitted, or indeed bound, to declare that the District Court has no jurisdiction to hear and determine the care proceedings as the courts of Scotland had jurisdiction under the Regulation.

32. However, a determination by the District judge pursuant to Article 17 that the District Court does not have jurisdiction pursuant to the Regulation to determine the care proceedings does not leave it bereft of jurisdiction to make interim orders in certain circumstances. It may do so pursuant to Article 20 of the Regulation which provides:-

"1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate."

33. Counsel for the CFA made clear in submission that the HSE, following the coming into force of the Regulation, had made a policy decision that in childcare cases with a European dimension, in the sense of it being perceived that the Irish Courts did not have jurisdiction pursuant to the Regulation, or where it did so but the circumstances were such that it might be appropriate to make a request pursuant to Article 15 to the courts of another Member State, that proceedings would be brought in the High Court. Such proceedings were sometimes in addition to proceedings in the District Court under the Child Care Act, where emergency or interim care orders were made to protect the child pending determination of the High Court proceedings. The stated reason for moving in the High Court was the perceived limitations on the jurisdiction of the District Court to make all the necessary orders and the inherent jurisdiction of the High Court, which enabled ancillary orders, particularly in relation to the transfer of children to another jurisdiction to be made. Reference was made in submission, also, to the experience in European matters of High Court judges; the relatively small number of cases arising each year; the fact that proceedings pursuant to the 1980 Hague Convention, as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991, and applications for return pursuant to Article 11 of the Regulation must be brought in the High Court. I sympathise with the position of the CFA in relation to these cases, which are not straightforward and which take time and the desirability of being able to bring the cases before judges who may have experience in the relevant area. However, that cannot of itself determine the jurisdictional issues in relation to the District Court. Further, it was correctly acknowledged during submissions that in the Dublin Metropolitan District, there are District judges with considerable experience and expertise in dealing with complex childcare cases, including with a European dimension. The position may not be the same throughout the country due to the limited numbers of such cases.

34. The CFA made two interconnected submissions against the District Court having jurisdiction to make a declaration pursuant to Article 17. The first submission is that the Regulation is concerned with the attribution of jurisdiction between Member States and not within a Member State. Reference was made to the Practice Guide. It follows, it was submitted that Article 17 does not specify within a Member State which Court must or may make the declaration. The second submission is based upon the District Court being a court of local and limited jurisdiction and that it does not have jurisdiction under the relevant Irish legislation jurisdiction to make an Article 17 declaration. Both of those submissions are, in my view, misconceived.

35. Firstly, it is correct that in general, the Regulation is concerned with the attribution of jurisdiction between Member States and not within. Further, that it is a matter for the Member States to determine which courts will have jurisdiction to hear the different types of proceedings to which the Regulation applies and in which courts certain applications expressly provided for under the Regulation may be brought. In the latter case, Article 68 requires Member States to furnish a list of the relevant courts. Ireland has specified the High court for applications for the return of wrongfully removed or retained children (Article 11) applications for recognition of judgments (Article 21) and applications for enforcement (Article 28).

36. However, Ireland has decided in the Child Care Act 1991, that childcare proceedings are to be brought in the District Court. Those are proceedings relating to parental responsibility to which the Regulation applies. The Regulation does not interfere with that decision or attribution of jurisdiction between the courts in Ireland. Article 17 does not establish any new form of application. Rather, it imposes an obligation on all courts in all Member States to be satisfied that it and not a court in another Member State has jurisdiction pursuant to the Regulation in a case to which the Regulation applies brought before it. Both the wording and the scheme of the Regulation is such that the only permissible construction of Article 17 is that it requires the particular court of a Member State "seised", or to use our terminology, before which proceedings are commenced or out of which they are issued to consider whether it or the courts of another Member State have jurisdiction to hear the case pursuant to the Regulation. This obligation is imposed on the District Court, as on all other courts, with jurisdiction to hear child and family matters. If any such court, including the District Court, determines that it, as a court of Ireland, does not have jurisdiction under the Regulation, and that the courts of another Member State do have jurisdiction, then it is obliged to make a declaration that it has no jurisdiction. Further, this provision is mandatory and applies whether or not there were extant proceedings in the courts of the other Member States: see *Re. B (a child) (Care Proceedings: Jurisdiction)* [2014] 2 WLR 1384, paras. 76 and 80.

37. Sir James Munby P. in *Re. E (a child) (Care Proceedings: European Dimension)* [2014] 1 WLR 2670 at 2677, to which the parties referred the Court (a judgment relating to unusual facts and primarily concerning Article 15), set out at paras. 34 to 36, future practice for the English courts in relation to obligations and good practice under Articles 15 and 17 which appears consistent with the above:-

"34. What of the future?

35. It is highly desirable, and from now on good practice will require, that in any care or other public law case with a European dimension the court should set out quite explicitly, both in its judgment and in its order: (i) the basis upon which, in accordance with the relevant provisions of BIIR[the Regulation], it is, as the case may be, either accepting or rejecting jurisdiction; (ii) the basis upon which, in accordance with Article 15, it either has or, as the case may be, has not decided to exercise its powers under Article 15.

36. This will both demonstrate that the court has actually addressed issues which, one fears, in the past may sometimes have gone unnoticed, and also identify, so there is no room for argument, the precise basis upon which the court has proceeded. Both points, as it seems to me, are vital. Judges must be astute to raise these points even if they have been overlooked by the parties. And where Article 17 applies it is the responsibility of the judge to ensure that the appropriate declaration is made."

38. As appears, Munby P. takes the view that it is the responsibility of the judge before whom the proceedings come to ensure an appropriate declaration where Article 17 applies. In the context of the point made that the obligation arises, even where there are no extant proceedings before another Court, it is, perhaps, relevant also to simply draw attention to Article 19 pursuant to which, in certain circumstances where there are proceedings relating to parental responsibility of the same child and same cause of action in

two Member States, there may be an obligation to stay the proceedings rather than make an immediate declaration under Article 17. Article 19 was not considered to be applicable on the facts herein by any party. I share that view.

39. The second submission made by the CFA was that, as the District Court is a court of local and limited jurisdiction, it is confined to doing what is permitted by statute and does not have any express jurisdiction under the relevant Irish Acts to make a declaration pursuant to Article 17. That submission is also not correct as it fails to take account of the nature of the Regulation in accordance with European Union law. A Regulation has general application, is binding in its entirety and directly applicable in all Member States (Article 288 of the Treaty on the Functioning of the European Union). Since the early decisions of Case-64 *Costa v. Enel* (Case 6/64) [1964] E.C.R. 585 and *Simmmenthal* (Case 106/77) [1978] E.C.R. 629, it has been held that European law takes precedence over any rule of domestic law. In the latter case, the Court of Justice stated at para. 24:-

"24. . . . a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community Law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."

40. The CFA, in its submissions, referred to Article 34.3.4 of the Constitution and the reference therein to courts of "local and limited jurisdiction" and submitted that the constitutional reference limited the District Court's ability to make a declaration when required by Article 17 of the Regulation. This submission fails to take account of Article 29.4.6 of the Constitution and relevant European Law principles.

41. It follows from the above that my conclusion is that a judge of the District Court hearing an application in childcare proceedings with a European dimension is obliged to consider whether or not the particular District Court as an Irish court has jurisdiction under the Regulation or whether the courts of another Member State has jurisdiction. Most often jurisdiction will be based on habitual residence of the child pursuant to Article 8. If the facts are such that there is a question as to whether the child is not or was not, at the date of commencement of the proceedings, habitually resident in Ireland, and may have been habitually resident in another EU Member State (except Denmark) having given the parties an opportunity to make submissions, the judge must decide whether the Irish courts or the courts of another Member State has jurisdiction under the Regulation. If the decision is that the Irish courts do not have jurisdiction, then the District judge must make a declaration to that effect pursuant to Article 17. Having made that declaration, the District judge retains a limited jurisdiction under Article 20. In relation to K it is pursuant to Article 20 that the District Court had jurisdiction under the Regulation to make the emergency and interim care orders. The full extent of that jurisdiction in the District Court may require further consideration in the light of what is stated below in relation to the High Court. It does not appear appropriate or necessary for this appeal to determine the extent of that jurisdiction in this appeal.

42. I would add that the misunderstanding by the CFA of the jurisdiction of the District Court and its obligations pursuant to Article 17 of the Regulation may arise from the wording of the Regulation itself, which requires the Court to make "a declaration". Whilst the term "declaration" is used in the Regulation, what, in substance, Article 17 obliges the District Court to do is to make a decision as to whether or not it has jurisdiction in the proceedings commenced before it concerning parental responsibility of the relevant child. That obligation is in no sense exercising a jurisdiction pursuant to an application for declaratory relief which would vest in the High Court. The obligation imposed on the District Court judge before whom the proceedings come is of his or her "own motion" to declare, where the relevant facts are such, that the District Court had no jurisdiction to hear the case. That obligation requires a District Court judge hearing proceedings to which the Regulation applies, *inter alia*, relating to parental responsibility of a child who appears to be habitually resident in a Member State of the European Union (other than Denmark) to determine at an early point in the proceedings, either that the District Court does have jurisdiction or that it does not have jurisdiction and when it reaches the latter conclusion, then it is obliged to expressly so declare, or using again terminology more familiar to us, to make an order that the District Court does not have jurisdiction pursuant to the Regulation (other than pursuant to Article 20).

43. If, as I have determined, Article 17 of the Regulation requires a District judge before whom proceedings are commenced to determine whether or not the District Court has jurisdiction pursuant to the Regulation, then it must follow that the District judge has jurisdiction, in accordance with fair procedures, to request or require the parties to put before him relevant evidence upon which he can determine the issue and to bring to their attention any other matter which he considers relevant.

44. It is difficult to understand why, in principle, the issue which must be addressed by a District judge pursuant to Article 17 of the Regulation is so different to an issue which would have to be addressed in the event, for example, that care proceedings were commenced in the Dublin Metropolitan District in relation to a child living with its parents in County Kerry.

### **High Court Article 17 Declaration**

45. I now return to the jurisdiction of the High Court in the plenary proceedings herein to make a declaration pursuant to Article 17 of the Regulation. As already stated it has jurisdiction in an appropriate case to make such a declaration. It follows from the above analysis of Article 17 that the High Court only has jurisdiction to make a declaration pursuant to Article 17 if it is "seised" of a case over which it has no jurisdiction under the Regulation. The question therefore is did the plenary summons issued by the CFA include a claim for substantive relief in relation to K over which the High Court had no jurisdiction under the Regulation. It appears to me from the decision of the Supreme Court in *CFA v. R.D.* [2014] IESC 47 referred to below that the order sought permitting the CFA to remove K from his current foster care placement in Ireland and place him into the care of Dundee City Councils Children's Services in Scotland was a claim in relation to the exercise of parental responsibility in relation to K over which the Irish courts, including the High Court do not have jurisdiction. This conclusion is further explained below.

46. It will be recalled that pursuant to Article 1(b) of the Regulation it applies *inter alia* to the "exercise" of parental responsibility. Further in accordance with Article 1.2(d) such matters are expressly stated to include "the placement of the child in a foster family or in institutional care". Accordingly it appears to me on the facts herein that the High Court did not have the jurisdiction under the Regulation and the courts of the Scotland did have the jurisdiction in relation to such relief. Hence insofar as the High Court made a declaration pursuant to article 17 which included that the High Court did not have jurisdiction in relation to the claims relating to parental responsibility of K in the plenary proceedings herein it was correct to do so.

47. I appreciate that the declaration actually made by the High Court, in the form sought by the CFA, was broader than I have now determined. Article 17 of itself does not appear to envisage an application to one court within a Member State seeking a general a declaration that all the courts of the Member State do not have a jurisdiction concerning parental responsibility for the child in question. Article 17 is directed to the court seised of the relevant case and the declaration envisaged expressly by Article 17 is one that such court does not have jurisdiction in relation to the case before it. In expressing this view I am not excluding the possibility that in an appropriate case a broader a declaration might be granted by the High Court pursuant to its general jurisdiction to grant declaratory relief. However such a declaration would not be made pursuant to Article 17. For the purposes of the outcome of this

Appeal nothing turns on the broader declaration made.

48. I have already indicated that the observations of the High Court judge in relation to the absence of jurisdiction in the District Court to request a Court of another Member State to assume jurisdiction pursuant to Article 15 of the Regulation and other functions under the Regulation must be considered *obiter*. I do not propose dealing in any detail with those issues in this judgment. However, it is appropriate, it appears to me, to express the view that the *obiter* views expressed by the High Court judge do not appear consistent with the direct effect of the Regulation in Irish law and certain of the reasoning in this judgment. I consider the jurisdiction of the District Court under Article 15 of the Regulation needs further consideration and would wish to leave over any decision until it arises on an appeal.

#### **Order of the High Court Permitting K to be Transferred to Scotland**

49. The High Court judge, having decided that K was at all material times habitually resident in Scotland, and also, that the courts of Ireland do not have jurisdiction under the Regulation in relation to parental responsibility proceedings concerning K and that the courts of Scotland do have jurisdiction, was then faced with the question as to how to solve the practical situation of K being present in Ireland, in foster care pursuant to interim orders of the District court whilst the courts of Scotland must hear and make decisions in any care proceedings relating to K. The evidence before her indicated a necessity for a relevant assessment in relation to the future care of K.

50. The High Court judge, at para. 18 of her judgment, refers to the conclusions of the *guardian ad litem* at para. 85 of her report:-

"It is apparent that regardless of which jurisdiction (Ireland or Scotland), CJ and K reside in, a comprehensive assessment of CJ's capacity to care for K is urgently required. This assessment must include:

- a. Careful consideration of CJ's many strengths (she is a committed and loving parent who maintained a well furnished, clean home).
- b. Careful consideration of CJ's vulnerabilities, (her decision making, anger/aggression, possible psychological difficulties).
- c. A careful analysis of K's needs, (to include review of his ASD diagnosis, his need for speech and language therapy and his therapeutic needs and educational needs."

51. The guardian, in her report, had previously stated as part of her opinion and recommendations at para. 79:-

"It is apparent that [the mother] and [K] have a loving close relationship. They both report wanting and needing to be together. They both report a desire to remain in Ireland. [The mother] presents as having a genuine sincere concern for her son's well being. When I observed them together it is apparent that they enjoyed each other's company and were affectionate with each other. Neither wanted to leave at the end of the access session."

52. The High Court also had the averment of Ms. Greene of CFA that the view of the CFA was "it is in K's best interest that he is returned to Scotland with the minimum of delay". The basis of that averment appears, from paras. 53 to 56 of her affidavit, to have been the fact that the courts of Scotland were best placed to deal with future applications in relation to the care of K. Ms White, social worker with Dundee City Council who also swore an affidavit filed by the CFA did not express any view on the return of K to Scotland.

53. Regrettably, in her judgment, the High Court judge does not set out clearly either the reasons for which she decided that she should make an order giving the CFA liberty to place K into the care of the Dundee City Council's Children's Services, or the basis of the High Court jurisdiction to make such an order. Potentially relevant to those matters, the High Court judge firstly referred, at para. 14 of her judgment, to the orders made in Scotland and the mother's knowledge of the applications in the following terms:-

"Counsel for the first named defendant made the submission that the Courts of Scotland were not seised of this case for the purposes of article 8, but it is clear that on 3rd December, 2014, a further interim compulsory supervision order under ss. 93, 96 or 120 of the Children's Hearings (Scotland) Act 2011, was made and is deemed, on the face of the order, to have effect until the 24th December, 2014. That order was made at Dundee and signed by the Chair of the Children's Hearing and the implementation authority is Dundee City Council. That order continued the order made on the 12th November, 2014 in similar terms. It is clear that notifications instituting the proceedings were posted to the first named defendant on the 31st October, 2014 and to the Tribunal in accordance with the relevant rules in Scotland on the 4th November, 2014. . . ."

She then referred to Article 3 of the 1980 Hague Convention on Child Abduction, but did not make any conclusion on the facts of the case in relation thereto. There was no application for a return pursuant to that Convention or Article 11 of the Regulation. The High Court judge then accepted that the father was aware of the proceedings and wished K to be returned to Scotland and stated at para. 16:-

"Pursuant to article 20 of Regulation 2201/2003, the High Court can take protective measures if necessary under the Regulation, in relation to the infant, the subject matter of the proceedings."

54. Having then quoted Article 20 and referred to the extract from the guardian's report already cited, she continued at paras. 19 to 21:-

"19. In light of the submissions of counsel and the report of the *guardian ad litem*, this Court grants a declaration under article 17 of Council Regulation (E.C) that the courts of Ireland have no jurisdiction under the Regulation in respect of matters concerning parental responsibility for the child who is the subject of these proceedings.

20. The Court also notes para. 67 of the guardian's report, detailing how the infant might be returned. The guardian outlines that "K" would be accompanied back to Scotland by the social care team. The team should liaise with the Scottish social care team. "K's" current Scottish social worker would not be present on his return to Scotland due to "K's" negative view of the said worker.

21. While the guardian makes suggestions by way of protective measures regarding the method of return of the child, it is a matter for the Scottish Courts to consider and decide all welfare issues arising in this case."

55. Insofar as it is implicit from the judgment delivered and order made, that the High Court judge formed the view that, having regard to the fact that the courts of Scotland had jurisdiction and the courts of Ireland did not have jurisdiction, and the need for the comprehensive assessment of the mother's capacity to care for K, as set out by the guardian, that it was in the best interests of K that he be in the same jurisdiction as the courts before whom the proceedings would take place i.e. Scotland I would respectfully agree. However the more difficult question is, whether on the facts before the High Court in this case, it had jurisdiction to make such an order pursuant to Article 20 of the Regulation or the inherent jurisdiction of the High Court. Having regard to the mother's opposition to the transfer of K to Scotland it was necessary to consider this issue in the High Court.

56. Regrettably, that jurisdiction issue does not appear to have been expressly addressed by the High Court judge. It is probably implicit from the reference to Article 20 in her judgment that she considered the High Court had jurisdiction pursuant to Article 20 to make such an order. The CFA submitted that to be the position. In fairness to the High Court judge, it is unclear as to whether submissions were made on behalf of the mother (who was then legally represented) that the High Court did not have jurisdiction to make such an order as part of the opposition to the making of the order. The High Court judge refers, at the commencement of para. 14 of her judgment, to submissions made on behalf of the mother that the courts of Scotland were not seised of this case for the purposes of Article 8. It is not clear to what issue that submission related.

57. I propose, therefore, firstly considering the submissions that the High Court judge did have jurisdiction, pursuant to Article 20, on the facts of this case to make an order giving liberty to the CFA to place the child in the care of Dundee City Council's Children's Services and effectively transfer K to Scotland.

58. In this Court, Counsel for the CFA and the *guardian* both submitted that the High Court had jurisdiction to make the order pursuant to Article 20 of the Regulation. The mother, without legal representation, did not make a submission as to the absence of a jurisdiction, as such, but rather, that the order should not have been made. This presents a difficulty for this Court, but nevertheless, it must consider whether the High Court did have jurisdiction to make the order by reason of the fact that the mother appeals against the order made.

59. The primary submission that the High Court had jurisdiction on the facts herein, pursuant to Article 20 of the Regulation, to make the orders permitting the CFA to place K in the care of the Scottish Social Services, was in reliance upon the judgment of O'Donnell J. (with whom the other members of the Court agreed) in the Supreme Court in *CFA v. R.D.* [2014] IESC 47, upholding a judgment of the High Court, (Birmingham J.) delivered *ex tempore* on 27th June 2014.

60. The facts in that case were in some respects analogous, and in others quite different to the present. The mother had come to Ireland with the child, but it would appear, after commencement of care proceedings in England. However, whilst the English courts decided the removal was wrongful, that was not the basis of the High Court proceedings in Ireland. Similar proceedings to these were brought by the CFA. As, in this case, the High Court decided the child was habitually resident in England and made a declaration pursuant to Article 17 that the courts of Ireland had no jurisdiction. Also the mother was legally represented before the High court but not the Supreme Court. Importantly, unlike this case, the English High Court had made an order expressly requiring the return of the child to England and seeking assistance of Irish authorities, including the courts. The High Court (Birmingham J.) made orders permitting transfer of the child who was in the care of the CFA.

61. On appeal to the Supreme Court, O'Donnell J. at para. 6 referred to the applicable English orders in the following terms:-

"6. ... On the 3rd of April 2014 the High Court of England and Wales (Keehan J) made an order declaring that the minor child was habitually resident and continued to be resident in England, that he was removed from the jurisdiction without the consent of Birmingham City Council, and that as a consequence he was unlawfully removed and is wrongfully retained in Ireland. The court therefore ordered that the child should be returned to the care of Birmingham City Council forthwith by no later than the 10th of April 2014 and that the applicant local authority should seek a further hearing of the matter on successful enforcement of the order. The order went on to provide that the court was respectfully requesting that the judicial authorities, the HSE (the predecessor to the applicant herein) and the police in Ireland provide all necessary help and assistance to secure the return of the child to the jurisdiction of England and Wales. That order was again, and necessarily, made, *ex parte* and on the information then available to the English High Court. **It is pursuant to that order and its request for assistance that this application is made.** [emphasis added]"

62. Having upheld the decisions of the High Court on habitual residence of the child in England and Article 17 declaration, O'Donnell J continued:-

"13. ...The jurisdiction which the court then has is pursuant to Article 20 which is a jurisdiction to make orders which are provisional and protective relief in aid of the court of the Member State which had jurisdiction as to the substance of the matter.

14. In the first place this Court will dismiss the appeal against the declaration made by the High Court judge under Article 17 and confirms that it will accordingly proceed on the basis that the courts of England and Wales have jurisdiction as to the substance of the matter. This is an important step since it carries with it the consequence that the primary issues of fact must be resolved in those courts as must the decision as to care and custody.

15. The fundamental issue for this Court as for the High Court was whether it was appropriate to make an order under Article 20 directing the return of the child in question. In most cases, this will follow from a finding that the courts of another Member State have jurisdiction on the grounds of habitual residence. However such order is not required by the Regulation. Instead the Regulation permits the court of another Member State to exercise its jurisdiction to grant provisional and protective measures in aid of foreign proceedings. It remains an issue in each case as to whether it is appropriate to do so. As already observed, in many cases this will not pose any difficulty."

63. On the facts of that case, O'Donnell J. reached the following conclusion:-

"16. In this case however, these Courts are asked to make an order for the return of the minor child on the basis that such an order was made in the United Kingdom on the 3rd of April 2014. However, that order was made *ex parte*, and upon limited information. The situation has changed significantly most notably because of the possibility that the appellant has severed her relationship with David S/L/LF, and most importantly, the views expressed on behalf of Birmingham City Council in the email of 6th July. This raises a possibility that the English Court might consider that it is not now necessary or appropriate that P should return to the United Kingdom. **Whether the care of P and his best interests mean that he should be returned to care [in] the United Kingdom in either the short or longer term, is a matter within the**



**jurisdiction of the courts of England and Wales.** [Emphasis added] The declaration made pursuant to Article 17 by the High Court, is, as a result of this Court's dismissal of the appeal in that regard, now final. However no determination on the question of the future care of P has been made on the information which is now available and which may require to be considered tested and perhaps supplemented. In the exercise of this Court's discretion it is important to know whether Birmingham City Council in the first place, and ultimately the courts of England and Wales, consider that it is now necessary that the child be returned to England and Wales pending any order made by those courts as to the welfare of the child. Accordingly, this Court proposes to adjourn its decision in respect of the appeal against the order returning P to England and Wales pursuant to Article 20 of the Regulation for a period of one week from today with a view to permitting the Birmingham City Council (and the Child and Family Agency if thought appropriate) to bring applications before the English High Court with a view to obtaining its views on question of whether it requires that P be returned to England immediately for the purposes of any decision on his care and welfare. Once this matter has been addressed the Court will make its decision on the Article 20 application, and should make it clear, that should the English court determine that it is appropriate that the child be returned then this Court would be disposed to make such an order.

17. The Court has also emphasised to Ms D the importance of attending before the English court, obtaining legal representation there (and indeed here) and being frank and cooperative with the courts and the authorities in both jurisdictions.

18. Accordingly the order of the Court on this appeal will be to dismiss the appeal against the declaration made by the High Court pursuant to Article 17 and to adjourn for one week the appeal against the order made pursuant to Article 20 of the Regulation. The Court will also make the same orders made in the High Court, prohibiting the publication of any details likely to identify the minor child, lifting the in camera rule to permit the CFA to liaise with the Central Authority for England and Wales regarding the circumstances of the minor and to convey any necessary information or reports to respect of the minor to the central authority in England and Wales and/or to Birmingham City Council and the courts of England and Wales."

64. The above analysis of the position of an Irish Court when it finds, pursuant to Article 17, that it has no jurisdiction over the substance of the proceedings and that a court in another Member State *i.e.* Scotland, has jurisdiction and yet the child remains in this jurisdiction was made in circumstances as stated at para 6 of the judgment where the Irish High Court application was made pursuant to the English High Court order seeking the return of the child and the assistance of the Irish courts. . The above judgment of O'Donnell J. decides in such circumstances relevant to these proceedings:-

1. The jurisdiction retained by the Irish High Court is a jurisdiction pursuant to Article 20.
2. Article 20 permits the Irish High Court, in such circumstances, to grant provisional and protective measures in aid of foreign proceedings, but it remains an issue in each case as to whether it is appropriate to do so.
3. As appears from para. 16 in a case where a child is in the care of the CFA in this jurisdiction, and there are pending care proceedings in the other jurisdiction, the question as to whether the care of the child and his best interests means he should be returned to care in the other jurisdiction, either in the short or longer term, is a matter within the jurisdiction of the other court.
4. If it is unclear whether the other court does require the child to be returned in the short term, it may be appropriate to adjourn and seek clarification from that court before deciding whether or not to make an order for the transfer of the child.
5. If the other court determines that it is appropriate that the child be returned to care in its jurisdiction, then the High Court has jurisdiction to make an order which would achieve or facilitate the transfer or return.

65. In this case there was no order of the courts of Scotland seeking the return of K or the assistance of the Irish courts. The High Court herein cannot be considered to have had any greater jurisdiction pursuant to Article 20 than that determined by O'Donnell J. As noted in his judgment the mother was not represented before the Supreme Court in *CFA v. R.D.* The Supreme Court's attention does not appear to have been drawn to the judgments of the Court of Justice in relation to the limits of the jurisdiction under Article 20: Case C-523/07 A [2009] ECR I-0000, Case C-403/09 P.P.U. (23rd December, 2009) *Deticek v. Sgueglia* and Case C-256/09 *Purrucker v Valles Perez* (15th July 2010). It is not necessary to consider these further for the purposes of this appeal having regard to the conclusion I have reached in accordance with the principles on jurisdiction set out by the Supreme Court in *CFA v. R.D.* [2014] IESC 47. They may, however, be relevant to any future consideration of the extent of the jurisdiction pursuant to Article 20.

66. The next issue is whether, in the circumstances of these proceedings, the High Court, in accordance with the Supreme Court decision in *CFA v. R.D.*, had jurisdiction to make the orders made permitting and facilitating the transfer of K to the care of Dundee City Council Children's Services and if so whether it was appropriate to make such an order.

67. The trial judge referred, in her judgment, to the order of 3rd December 2014, of the Children's Hearing which continues the order of 12th November. The order appears to have been in identical terms, save to extend the date of its application to 24th December 2014. The terms of the compulsory supervision order are set out at paragraph 11 of this judgment.

68. Even assuming that the High Court judge implicitly recognised the compulsory supervision orders made by the Children's Hearing on 3rd December 2014, the difficulty is that such order, in its terms, does not require that K, who was then in the care of the CFA, placed in foster care in Ireland, be returned to Scotland and transferred to the care of Dundee City Council Children's Services. The position was factually fundamentally different to that pertaining before the Supreme Court in *CFA v. R.D.* In accordance with that judgment, it follows from the jurisdictional decisions that it was a matter for the courts of Scotland to determine whether or not K should be returned to Scotland in the short or longer term. In the absence of an order of the Children's Hearing or any other relevant Scottish court, requiring the return of K to Scotland which may be recognised by an Irish court under the Regulation, it does not appear to me that the High Court had jurisdiction pursuant to Article 20 (and possibly Article 21) of the Regulation to make the orders permitting the transfer of K by the CFA to Scotland and into the care of Dundee City Council Children's Services. It must be recalled on the facts of this case that K, prior to leaving Scotland, had not been in the care of the Dundee City Council Children's Services. Further, the mother was contending that she lawfully moved to Ireland and she wished to remain in Ireland with K. In such circumstances, as K remained habitually resident in Scotland in accordance with the division of jurisdiction between Ireland and Scotland under the Regulation in relation to parental responsibility for K, it was the courts of Scotland which had to determine whether or not it was in the best interests or welfare of K that he should be removed from his foster care in Ireland transferred to the care of Dundee City Council Children's Services and back to live in Scotland. The High Court did not have jurisdiction to make that

decision and order made...

69. One of the options available to the High Court following the approach of the Supreme Court in *CFA v. R.D.* would have been to adjourn the proceedings before it and request the CFA arrange for Dundee City Council's Children Services to make an appropriate application to the Children's Hearing or other court in Scotland to decide whether it required K to be returned to Scotland. Thereafter any order made could have been sought to be recognised by the High Court pursuant to Article 21 of the Regulation.

70. As appears from recital 21 to the Regulation "the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust . . .". The principle of mutual trust between courts forms an important part of the proper working of the Regulation. "Judgment" is given a very wide definition in Article 2.4 and includes "a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision". Article 21.1 of the Regulation provides: "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required". Whilst Article 21.3 envisages a procedure for an interested party to make an application for a decision that a judgment be or be not recognised in accordance with specified procedures, importantly Article 21.4 of the Regulation enables a court to decide on recognition of a judgment without any formal application where such issue is raised in the course of a proceeding. Article 21.4 provides:-

"Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue."

71. The procedure in Ireland envisaged by Article 21.3 of the Regulation is by application to the High Court. However the jurisdiction under Article 21.4 is independent of such a procedure and applies to all courts. Hence in care proceedings where a court has declared pursuant to Article 17 that it does not have jurisdiction and the courts of another Member State does so and the child is still in this jurisdiction, if the court is made aware of a judgment or order of a court of the Member State of habitual residence, which requires the child to be returned to that Member State, then it may be able to determine pursuant Article 21.3 whether the order should be recognised and if so make orders to facilitate the return of the child pursuant to the recognised order of the Court of the other Member State. The jurisdiction of the court to make orders in aid of foreign proceedings may be considered to exist pursuant to the recognition and enforcement provisions of the Regulation rather than pursuant to Article 20 on a consideration of the judgments of the Court of Justice referred to above. Article 11 may also be relevant in certain circumstances.

72. As the High Court order also referred to the inherent jurisdiction of the Court in making the order permitting the transfer of K to Scotland I have considered whether it could found a jurisdiction to make the order if Article 20 does not. My conclusion is it could not do so. Recourse may only be had to the inherent jurisdiction of the High Court if the courts of Ireland have jurisdiction in relation to the relevant matter under the Regulation. This view appears consistent with that of the UK Supreme Court in *A v. A (Children: Habitual Residence)* [2013] UKSC 60 [2014] AC1.

73. The final issue which requires to be considered is what order this Court should now make on this aspect of the appeal in circumstances where I have concluded that the order in the High Court purportedly made pursuant to Article 20 of the Regulation was made in excess of jurisdiction. It follows that the orders made permitting the CFA to remove K from his current placement in Ireland and place him in the care of Dundee City Council Children's Services and to take all necessary steps to implement the transfer of K to Scotland must be vacated.

74. However the factual position at the time of the hearing of this appeal is that K is back in Scotland in the care of Dundee City Council Children's Services. This judgment also concludes that the High Court was correct in deciding that the habitual residence of K is in Scotland and that the courts of Scotland, and not of Ireland, have jurisdiction to hear all actions in relation to parental responsibility relating to K. Any order which this Court might now make which would seek to reverse the transfer of K which took place pursuant to the now vacated part of the High Order would involve a decision in relation to parental responsibility of K. This Court as a court of Ireland has no jurisdiction under the Regulation to make such a decision in relation to K. Only the courts of Scotland may take such decisions.

75. It remains open to the mother to apply to the Children's Hearing or other relevant court in Scotland to be permitted to bring K to live in Ireland. Also, Article 56 of the Regulation contains a procedure in relation to the placement of a child in institutional care or with a foster family in another Member State. Accordingly, I have concluded the Court should direct that the CFA make a copy of this judgment available to the Dundee City Council Children's Services and the Court should direct the CFA to request the Dundee City Council Children's Services to bring the judgment to the attention of a future hearing of the Children's Hearing (or other relevant Court in Scotland) in relation to K. The Court will also give liberty to the mother to use the judgment in any future applications relating to K, either in Scotland or in this jurisdiction.

#### **Relief**

I will allow the appeal in part and vary the order of the High Court of 11 December 2014 so as to vacate the two paragraphs permitting the CFA to remove K from his current placement in Ireland and place him in the care of Dundee City Council Children's Services and to take all necessary steps to implement the transfer of K to Scotland. In addition I would make orders to give effect to the directions in paragraph 75 of this judgment.

Note: Peart J. and Mahon J. concurred with this judgment.