THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 365

Record Number: 2018/68

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 THE 23RD DAY OF AUGUST 2014

AND

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

Peart J.
Whelan J.
Costello J.

BETWEEN/

HAMPSHIRE COUNTY COUNCIL

APPLICANT/

RESPONDENT

- AND -

C.E. AND N.E. (OTHERWISE N.C.)

RESPONDENTS/

APPELLANTS

- AND –

CHILD AND FAMILY AGENCY

(BY ORDER)

SECOND RESPONDENT

-AND-

THE ATTORNEY GENERAL

AMICUS CURIAE

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of November 2018

1. This is the third judgment delivered by this Court in the course of this appeal. Previous judgments were delivered by Hogan J. (as he then was) on 17th May 2018, [2018] IECA 154, and 7th June 2018, [2018] IECA 157. Those judgments set out in some detail the complex personal circumstances of the appellants and events which led to this Court's involvement in the matter. In essence the appeal is from a decision of Ms. Justice Reynolds made in the High Court on 18th January 2018 wherein the learned judge held that there was no jurisdiction to extend time to bring an appeal against ex parte orders made pursuant to Council Regulation No.

2201/2003 ("the Brussels II *bis* Regulation").

2. The *ex parte* orders sought to be appealed against were made by Ms. Justice Creedon on 21st September 2017 pursuant to the Brussels II bis Regulation during a vacation sitting of the High Court. On that date Hampshire County Council ("HCC") obtained orders of recognition and a declaration of enforceability of certain orders of the English High Court, made at Portsmouth on 8th September 2017, as amended ("the Portsmouth orders"), pertaining to the three minors referred to in the title of the proceedings.

Background
3. The first named appellant is the mother of the three minors. The second named appellant is the father of the youngest minor only. To preserve their anonymity, the minors will be referred to pseudonymously throughout. Mella was born on 26th May 2012 and is now aged about six years and a half. Stella was born on 23rd August 2014 and is now aged four years and three months. Ross was born on 3rd September 2017 and is now aged one year and two months.

4. Prior to the events of September 2017, the couple and the minors were habitually resident within the jurisdiction of the courts of England and Wales. The mother was aged twenty four and the father twenty six. The parents come from a socially disadvantaged background. It appears the mother was a victim of domestic violence by a former partner. She subsequently separated from that individual in 2016. In late 2016, she entered into a new relationship with the second named appellant. The couple married in 2017.

5. On 30th June 2017, some months prior to the birth of Ross, HCC obtained an interim care order in relation to Mella and Stella from the Family Court at Portsmouth. That order conferred parental authority on HCC in relation to the two girls and, *inter alia*, prohibited their removal from the jurisdiction of the courts of England and Wales. They were left in the care and custody of the appellants. It is noteworthy that at the June 2017 hearing in Portsmouth the CAFCASS guardian - charged with ensuring that the decisions of HCC were made in the best interests of the two minors concerned - apparently disagreed with the proposals of HCC in respect of a contemplated placement of the two girls for adoption.

6. It would appear that in the summer of 2017 HCC became aware of the mother's pregnancy. Ross was born on 3rd September 2017. Within twenty four to forty eight hours following his birth, social workers informed the mother of an intention to remove all three minors from the couple. The signature of both parents was procured to a document pursuant to which the second named appellant was required to leave the family home immediately and to have no further contact with any of the three minors without first informing HCC pending the outcome of contemplated court proceedings.

The family in Ireland
7. On 5th September 2017, two days following the birth of Ross, the parents and three minors travelled to Ireland by ferry. They obtained accommodation here. They immediately disclosed their presence in this jurisdiction to relevant authorities including a health nurse and effected registration of the minors with a doctor. Mella and Stella were enrolled in a local school. The family was monitored by the Child and Family Agency ("the CFA"). The CFA was established in this State pursuant to the provisions of the Child and Family Agency Act, 2013. The said Act came into operation on 1st January 2014. The functions of the CFA under s. 8 of the Act include an obligation to support and promote the development, welfare and protection of children and to support and encourage the effective functioning of families.

8. An affidavit of Claire Farrell, a social worker with the CFA, was sworn in this appeal on 18th April 2018. It confirms that An Garda Síochána carried out a welfare check in respect of this family on 7th September 2017 and advised the CFA that no concerns were noted in relation to the minors' presentation or their home environment. On 8th September 2017 the CFA was aware that in regard to the older minors, Mella and Stella, interim care orders existed since June 2017 in the jurisdiction of the courts of England and Wales.

9. On 8th September 2017 the CFA advised HCC that to procure the return of the three minors to the jurisdiction of the courts of England and Wales it would be necessary to obtain orders in Ireland pursuant to the Brussels II *bis* Regulation for the recognition and enforcement of any welfare orders HCC had or might obtain in England.

10. On 8th September 2017 HCC instituted wardship proceedings in relation to the three minors before the Family Courts in Portsmouth. A solicitor who previously acted for the parents in England was apparently informed of the proposed wardship application that same day. There is no evidence before this Court that the solicitor was actually served with the relevant documentation which was relied upon to secure wardship orders and return orders in respect of the minors. The parents were not served with the papers before the Portsmouth orders were made notwithstanding that HCC knew of their whereabouts in Ireland at the time.

11. On 8th September 2017 HCC procured the Portsmouth orders discharging pre-existing interim care orders concerning Mella and Stella and securing in their stead orders making all three minors wards of court together with orders directing their return to the jurisdiction of the courts of England and Wales. The September 8th 2017 Portsmouth orders were later amended on 11th September 2017.

12. It will be recalled that one of the potential grounds of non-recognition of judgments relating to parental responsibility specified in Article 23 of the Brussels II *bis* Regulation is:

> "(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings … in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted that judgment unequivocally."

Irish Interim Care Order
13. The said affidavit of Claire Farrell deposes that on 11th September 2017 the CFA made an unannounced home visit to the family in Ireland. There is no suggestion that any concern was identified regarding the welfare of the minors during that visit. On 12th September 2017, a further announced visit took place and it was noted that the family home was being maintained to a good standard. There were no concerns noted in relation to the home environment.

14. At the resumed hearing of this appeal, counsel on behalf of HCC confirmed that the parents were served with the Portsmouth orders. The affidavit of Claire Farrell states that HCC had advised her on 11th September 2017 that it was appropriate to inform the parents of the Portsmouth orders relating to the three minors and she duly did so on that date. This communication appears to have been verbal. An affidavit of service of Mr. David Farrell deposes that on 11th September 2017 at 5.30 pm he served upon both appellants a copy of the Portsmouth wardship orders. No reason is identified why HCC refrained from service of any of the grounding documents on the parents prior to moving the application in court at Portsmouth on 8th September 2017.

15. On or about 13th September 2017, about one week prior to the application by HCC to the High Court for *exequatur* orders for the recognition and enforcement of the Portsmouth orders in accordance with Article 28 of the Brussels II *bis* Regulation, the CFA obtained an interim care order in the District Court in relation to the three minors for a period to 26th September 2017.

16. The interim care order recites Council Regulation No. 2201/2003 Article 20 in its title. However, the order itself makes no reference to its purpose being provisional protective measures as contemplated by Article 20 pending determination of an intended application for recognition and enforcement of a foreign order pursuant to Chapter III, Articles 21 and 28. On the contrary, the order itself expressly recites that it was made by the District Court Judge:

> "having heard the evidence tendered herein and being satisfied that an Application for a Care Order in respect of the minor has been or is about to be made…"

17. The order made expressly provides that it is necessary for the protection of the relevant minor's health and welfare that s/he be maintained in the care of CFA pending the determination of the application for the Care Order.

18. The interim care order was characterised by HCC in the High Court at the *ex parte* application hearing on 21st September 2017 as a protective measure made in this State pursuant to Article 20 of the Brussels II *bis* Regulation to secure the minors. It is unclear whether the appellants were candidly so informed prior to the making of the interim care order on 13th 2017.

19. The facts and circumstances surrounding the making of the interim care order in relation to the three minors in the District Court in September 2017 are of limited relevance to this appeal. However, there is no suggestion in the affidavit of the said Claire Farrell that once the CFA obtained the interim order in the District Court taking the three minors into care there could be any legitimate basis for a contention that the parents constituted a "flight risk". The parents were unrepresented at the District Court hearing in September 2017 when the interim care order was granted. It appears that Alex Mercer, a social worker with HCC travelled to Ireland for the purpose of giving evidence to the District Court on that date. The consent of the parents was procured for the interim care order. The parents indicated that they wished to avail of legal representation. It does not appear that any was provided in respect of that hearing.

20. On 20th September 2017, the eve of the *ex parte exequatur* application by HCC pursuant to the Brussels II *bis* Regulation before the Irish High Court, an application for an extension of the interim care order was filed by the CFA. It had been served on the parents on 19th September 2017. According to the aforesaid affidavit of Claire Farrell, she was aware on 20th September 2017 that "the said application to ratify the United Kingdom Orders was to be made *ex parte* before the High Court the following day, 21st September 2017, and that it was intended that Rich Sullivan (Social Worker of the Respondent) would be travelling with a colleague via ferry to Rosslare Harbour on same date to effect the return of the minors in anticipation of the High Court granting the application. I say that the Respondent, Alex Mercer, requested your deponent to not inform the Appellants of the making of the application as they were considered a flight risk and the order was being sought *ex parte*."

21st September 2017 - High Court *Exequatur* Application

21. The *ex parte* application of HCC seeking recognition and enforcement of the Portsmouth orders came on for hearing in the High Court before Ms. Justice Creedon on 21st September 2017. It sought, *inter alia*, the following reliefs of relevance to this appeal:

> 1. ...
>
> 2. An order pursuant to Article 31(1) of Council Regulation (EC) 2201/2003 that the High Court shall give its decision without delay…
>
> 3. An order pursuant to Chapter III… and in particular Article 21 thereof that the order of the High Court of Justice of England and Wales dated 8th September 2017 made by his Honour Judge Levey and amended with permission of the court on 11 September 2017, be recognised in this jurisdiction.
>
> 4. Pursuant to Chapter III of Council Regulation (EC) 2201/2003 and in particular Article 28 thereof that the said return orders be enforced in this jurisdiction.

22. The application proceeded on the basis that the parents had a right of appeal. Counsel for HCC stated:

> "… the second hearing before… a separate High Court judge is to be treated as an appeal and if that's not the case then I know that the respondent parents are running an argument as well that they're entitled to bring an application to set aside as they would any *ex parte* docket. So, I don't think that the right of appeal is interfered with in that way nor I think would a court entertain with any gratitude an argument from my part that the parents were so circumscribed in appealing." (lines 13-16, page 2 of transcript 21st September 2017)

The court was informed that the CFA "…are holding the child (sic) pending the making of any order by this court."(lines 26-27, page 2 of transcript 21st September 2017)

The new-born Ross

23. The affidavit of Mr. McGrath on behalf of HCC grounding the application included the averments that an interim care order was made in Portsmouth regarding Ross on 6th September 2017. At para. 9 thereof it was deposed that at a date unknown, in breach of the Portsmouth orders, the couple travelled to Ireland with the three minors. This averment appears to be fundamentally incorrect. It was not controverted by HCC at any time during the resumed hearing of this appeal that this family had travelled to Ireland on 5th September 2017, a date prior to orders of any kind being procured from the courts of England and Wales relating to the new-born.

24. It was asserted on behalf of HCC at the *exequatur* application that "the child (*sic)* are habitually resident in Wales." (line 21, page 4 of transcript 21st September 2017). As far as the new-born Ross is concerned his habitual residence was potentially relevant, live and likely to be a contested issue. The facts as found by this Court in the first judgment of Hogan J., 17th May 2018, [2018] IECA 154, at para. 2, and reiterated in the second judgment of this Court, [2018] IECA 157 given by Hogan J. on 7th June 2018 at para. 2, indicate that the new-born travelled with his parents and siblings to Ireland on 5th September 2017 when he was about two days old.

25. On the latter date there were no orders in existence restraining his removal from the jurisdiction of the courts of England and Wales. The appellants appear to have been the only holders of rights of custody regarding Ross on 5th September 2017. They, arguably, had legal capacity to change his habitual residence.

26. It does not appear to have been correct to represent to Creedon J., as the transcript from 21st September 2017 appears to suggest, that the new-born was removed from the jurisdiction of the English courts in breach of the Portsmouth orders. Orders obtained *after* his lawful removal from the jurisdiction of England and Wales were "chasing orders". The court ought to have been appraised of that fact.

27. The parents appear to have resided in this jurisdiction at all times from 5th September 2017. HCC appears to have accepted that the appellants were at all material times habitually resident in Ireland from their arrival on 5th September 2017. Hence, on 21st September 2017 it informed the High Court that the appellants had two months within which to appeal the orders. Such a two month time limit is only available under Article 33(5) of the Regulation where the parties against whom enforcement is sought are habitually resident in the requested state. In all other cases the time limit for appeal is one month.

28. At any *inter partes* hearing HCC might reasonably have anticipated an argument being made on behalf of the appellants that the Portsmouth orders pertaining to Ross were in substance "measures preparatory to adoption" within the meaning of Article 1 (3)(b) of the Brussels II *bis* Regulation falling wholly outside the scope of the said Regulation and unenforceable. Article 1 (3)(b) states:

> "Article 1.
>
> ……
>
> 3. This Regulation shall not apply to:
> …
> (b) decisions on adoption, measures preparatory to adoption,…"

29. Counsel for HCC, Mr. Day, fairly admitted in the course of the resumed hearing before this Court in October 2018 that HCC had carried out an assessment in June 2017, months prior to his birth. He stated that it was fair to say that an adoption had been contemplated by HCC for Ross "from a very early stage".

30. Whether the Portsmouth orders regarding Ross ought to have been excluded from being the subject-matter of a Brussels II *bis* Regulation *exequatur* application in the first place by virtue of Article 1 (3)(b), or for any other reason, is not a matter which falls to be determined on this appeal.

The *ex parte* Orders

31. By its order made *ex parte* on 21st September 2017, the High Court ordered, *inter alia*, that "Pursuant to Chapter III of Council Regulation EC 2201/2003 and in particular Article 21 thereof that the Return Order be recognised in this jurisdiction" and further that "Pursuant to Chapter III of Council Regulation EC 2201/2003 and in particular Article 28 thereof that the Return Order be enforced in this jurisdiction."

32. The order contains the following recitals:

> "… THE COURT NOTING that:
>
> 1. The Respondents do have two months from the date of service of this Order to appeal against the making of this Order
>
> 2. Execution of the said Return Order may issue before the expiration of the period within which an appeal may be made against this Order
>
> 3. Execution of the said Return Order may be stayed on application to this Court in the event of an ordinary appeal in the jurisdiction of England and Wales…
>
> 4. …"

The order recites further:

> "AND THE COURT BEING SATISFIED
>
> 5. that the Applicant being a party in the English proceedings is an interested party pursuant to Article 21(3) of Council Regulation (EC) 2201/2003
>
> 6. That none of the matters referred to in Article 23 of the said Regulation apply to the application herein
>
> 7. …
>
> 8. …
>
> 9. …"

Execution

33. On Thursday 21st September 2017 a copy of the High Court *ex parte* order was sent to the CFA's solicitors Ensor O'Connor and same was in turn forwarded to the principal social worker. Claire Farrell in her said affidavit deposes at para. 10 that she:

> "liaised with the above-mentioned Rich Sullivan by phone and arrangements were made for the children to be handed over at Rosslare Harbour to the said Rich Sullivan and his colleague from Hampshire Children's Services. I say that I did not attempt to contact the Appellants, nor was I instructed to by Alex Mercer in advance of the aforementioned handover."

34. At paras. 11-12 she deposes:

> "11. I say that the said handover was completed at Rosslare Harbour at approximately 4.15pm. I say the said minors were returned by Ferry to the United Kingdom accompanied by Social Workers from the Respondent. I say that I attempted to contact the Appellants at approximately 4.50pm but there is no answer. I did not leave a voicemail.

12. I say that, on 22nd September 2017, your Deponent contacted the Appellants and advised them that the Respondent was successful in having the United Kingdom return order ratified in Ireland and that the children were returned to the United Kingdom in the manner described in the preceding paragraph on 21st September 2017."

Subsequent events in England pertaining to the minors

35. Subsequent to the return of the minors on foot of the *ex parte* orders to the jurisdiction of the courts of England and Wales, the older minors Mella and Stella were placed in the care of Stella's father on a long term basis. A final care order to that effect was made in the High Court of England and Wales on 23rd December 2017. With regard to Ross, their brother, his fate has been quite different. On 23rd December 2017 a placement and care order in furtherance of adoption was made in respect of him by the English Family Court. The appellants have lost care and custody of all three minors. They continue to reside in Ireland.

36. The parents sought leave to appeal against the Portsmouth orders made on 8th September 2017 to the English Court of Appeal. Their application for permission to appeal was heard by Peter Jackson L.J. in the Court of Appeal of England and Wales on 9th October 2017 and leave to appeal was refused. It would appear from the reasons given by Peter Jackson L.J. when he refused permission to appeal that an important consideration for his refusal was that the three minors "are now once again subject to the court's jurisdiction" (i.e. the courts of England and Wales).

Appeal of Irish High Court *ex parte* order

37. On 24th November 2017 the parents issued a motion by way of appeal returnable before the High Court for 18th December 2017. This is the appeals procedure which operates in this State whenever it is sought to exercise the right of appeal provided for under Article 33 of the Regulation. It sought, *inter alia*, an order setting aside the *ex parte* orders of Creedon J. of September 21st 2017.

38. The appeal came on for hearing before Ms. Justice Reynolds in the High Court on 18th January 2018. At the commencement of the hearing a belated procedural point as to time was raised on behalf of HCC.

39. Article 33(5) of the Brussels II *bis* Regulation states:

> "5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at this residence. No extension of time may be granted on account of distance."

40. It was contended on behalf of HCC that the service on the parents of the copy order and enforcement order *simpliciter* on Friday 22nd September 2017 caused time to commence running for the purposes of an appeal against the decision of Creedon J. on 21st September 2017. It was argued that the parents' appeal notice of motion dated 24th November 2017 was issued out of time. HCC contended that the High Court judge lacked jurisdiction to extend time pursuant to Article 33(5) of the Brussels II *bis* Regulation for the purposes of enabling the parents pursue an appeal.

41. That hearing appears to have proceeded on the premise - acquiesced in by the parties and the court itself - that the parents' appeal had been brought out of time in light of Article 33(5) of the Regulation and Order 42A of the RSC. In the course of the hearing of this appeal in October 2018 counsel for the appellants resiled from that position and asserted for the first time that the appeal dated 24th November 2017 had in fact been brought within time. The implications of this assertion will be considered hereafter.

42. Having considered legal argument advanced on the basis that the appeal was brought by the parents out of time Ms. Justice Reynolds agreed with HCC that she had no jurisdiction to extend the time to bring an appeal. Her order to that effect is dated 18th January 2018 and is the subject of this appeal.

The peregrinations of the appeal before this Court

43. The appeal from the decision of Ms. Justice Reynolds made on 18th January 2018 has given rise to two separate requests for preliminary rulings pursuant to Article 267 of the Treaty on the Functioning of the European Union and two extensive judgments of Mr. Justice Hogan delivered on 17th May 2018 and 6th June 2018. Additionally, there has been an Opinion of Advocate General Kokott delivered on 7th August 2018 and a judgment of the CJEU delivered 19th September 2018.

44. On 17th May 2018, having heard legal argument the following questions were referred by this Court to the CJEU pursuant to Article 267 TFEU, namely:

> (i) "Where it is alleged that children have been wrongfully taken from the country of their habitual residence by their parents and/or other family members in breach of a court order obtained by a public authority of that State, may that public authority apply to have any court order directing the return of the minors to that jurisdiction enforced in the courts of another Member State pursuant to the provisions of Chapter III Council of Regulation (EC) No. 2201/2003 or would this amount to a wrongful circumvention of Article 11 of that Regulation and the 1980 Hague Convention or otherwise amount to an abuse of rights or law on the part of the authority concerned?"
>
> (ii) "in a case concerning the enforcement provisions of Council Regulation (EC) 2201/2003 is there a jurisdiction to extend time for the purposes of Article 33(5) where the delays are essentially *de minimis* and an extension of time would otherwise have been granted by reference to national procedural law?"
>
> (iii) "without prejudice to question (ii) where a foreign public authority removes the minors, the subject matter of the dispute, from the jurisdiction of a Member State pursuant to an enforcement order made *ex parte* in accordance with Art. 31 of Council Regulation (EC) 2201/2003 but before the *service* of such order on the parents thereby depriving them of their rights to apply for a stay of such an order pending an appeal, does such conduct compromise the essence of 'parents' entitlement under Article 6 ECHR or Article 47 of the Charter such that an extension of time (for the purposes of Article 33(5) of that Regulation) should otherwise be granted?" On 7th June 2018 this Court having heard further legal argument including from the Attorney General who appeared through counsel as both *legitimus contradictor* and *amicus curiae* referred an additional question to the CJEU pursuant to Article 267 TFEU as follows:"

45. A fourth question was referred by this Court on 6th June 2018, namely:

> (iv) "Whether it is compatible with EU law and, specifically, the provisions of Council Regulation (EC) 2201/2003, for the

courts of one Member State to grant an interlocutory injunction (protective measures) directed in *personam* at the public body of another Member State preventing that body arranging for the adoption of minors in the courts of that other Member State where the in *personam* injunction arises from the necessity to protect the rights of the parties in enforcement proceedings arising under Chapter III of the 2003 Regulation?"

46. On behalf of the appellants it was contended before this Court in May 2018 that HCC was intent on proceeding with their adoptions and that protective measures were required by the parents directing HCC to refrain from proceeding with the adoption of the minors pending the conclusion of this appeal. Paras. 15 and 71 of the first judgment of this Court 17th May 2018, [2018] IECA 154 reflects the understanding of the position at that time.

47. At the June 2018 hearing the appellants sought interlocutory relief to restrain HCC from proceeding to have the three minors adopted.

48. HCC filed a statement of position on the morning of the hearing of an application by the parents for an interlocutory injunction by way of protective measures on 29th May 2018 though they did not appear before this Court in the initial hearing days. HCC indicated that it intended to proceed only with adoption of the infant Ross and that the two older minors were in the custody of Stella's father and that there were no plans to remove them from his care with a view to placing them for adoption. The position as understood by this Court is outlined in its second judgment of 6th June 2018, [2018] IECA 157, namely that HCC proposed to proceed only with the adoption of the new born Ross.

The Opinion of the Advocate General - Re Time Running

49. The opinion of Advocate General Kokott was delivered on 7th August 2018. At the resumed hearing of this appeal on 22nd October 2018 counsel for the appellants placed reliance on excerpts from the said opinion to support her contention that the appeal of the parents was never out of time in the first place and the appellants are entitled to pursue it now.

50. The relevant excerpt from the opinion is as follows:

"(a) Preliminary observations

95. In the words of Article 33(5) of Regulation No 2201/2003, the time for appealing against the declaration of enforceability is to be one month or two months where the party against whom enforcement is sought is habitually resident in a Member State other than that in which that declaration was given.

96. In the present case, it is common ground that the time for appealing was two months from service of the enforcement order of the Irish High Court of 21 September 2017, that that order was served on the parents on 22 September 2017 and that the parents lodged their appeal against the order on 24 November 2017. The referring court therefore proceeds on the premiss that the parents' appeal was lodged 48 hours late.

97. It is certainly not for the Court to question that premiss and the underlying findings of fact made by the referring court. In addition, none of the parties seems to question the fact that the date on which time began to run was indeed the date on which the enforcement order of the Irish High Court of 21 September 2017 was served on the parents, that is to say, 22 September 2017.

98. Nonetheless, as the referring court also observes, the national file contains a 'Memorandum of appearance' of the parents' representative dated 27 September 2017, drawn up in accordance with Order 12, Rule 9 of the Rules of the Superior Courts, and the Form No 1 in Part II of Appendix A referred to therein. In that document, the parents' representative states that he has received the 'Originating Summons' and asks to be sent a 'Statement of claim', which seems to refer to the application for a declaration of enforceability lodged by HCC with the Irish High Court with a view to securing enforcement of the English High Court order of 8 September 2017.

99. It is for the referring court to examine that factor and to determine whether, on the assumption that it is correct, the fact that the parents had not received HCC's application for a declaration of enforceability or any other relevant document at the time of service of the enforcement order of the Irish High Court of 21 September 2017 has an *impact on the starting point* of the period for lodging an appeal.

100. In that context, it should be borne in mind that, according to the Court's case-law, the effective protection of the fundamental rights conferred on individuals by EU law requires that they be given a complete statement of reasons in order to be able to defend themselves in the best possible conditions . In addition, in connection with actions against acts of the EU institutions, the Court has noted that time for the purpose of lodging an appeal can begin to run only from the point at which the person concerned had precise knowledge of the content and the grounds of the act at issue in such a way as to be able to take full advantage of his right to institute proceedings . Last, it is useful to bear in mind the case-law of the European Court of Human Rights, according to which time for the purpose of lodging an appeal can begin to run only from the point at which the appellants were actually in a position to know the judicial decision *in full*.

101. Only if the referring court concludes, on the basis of that examination, that the parents' appeal was indeed lodged out of time does the question arise whether the period prescribed in Article 33(5) of Regulation No 2201/2003 might be extended in a case in which a judgment authorising enforcement was enforced before it had been served on the defendant to enforcement."

Judgment of the CJEU

51. In a judgment delivered on 19th September 2018 the CJEU (First Chamber) ruled as follows at para. 95:

"...

1. The general provisions of Chapter III of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that, where it is alleged that minors have been wrongfully removed, the decision of a court of the Member State in which those minors were habitually resident, directing that those minors be returned and which is entailed by a decision dealing with parental responsibility, may be declared enforceable in the host Member State in accordance with those general provisions.

2. Article 33(1) of Regulation No 2201/2003, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in a situation such as that at issue in the main proceedings, enforcement of a decision of a court of a Member State which directs that minors be made wards of court and that they be returned and which is declared enforceable in the requested Member State, prior to service of the declaration of enforceability of that decision on the parents concerned. Article 33(5) of Regulation No 2201/2003 must be interpreted as meaning that the period for lodging an appeal laid down in that provision may not be extended by the court seised.

3. Regulation No 2201/2003 must be interpreted as not precluding, in a situation such as that at issue in the main proceedings, a court of one Member State from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of minors who are residing there."

52. On the issue of service and in light of the arguments on behalf of the appellants now being advanced that effective service did not take place until Monday 25th September 2017, the following extract from the CJEU judgment is relevant:

"64. As is apparent from the request for a preliminary ruling, Order 42A, rule 10(2)(ii) of the Rules of the Superior Courts provides that 'execution of the judgment or decision may issue before the expiration' of the period within which an appeal may be made.

65. The Court has ruled that, in order to ensure that the requirement under Article 31 of Regulation No 2201/2003 that there be no delay cannot be undermined by the suspensive effect of an appeal brought against a decision on a declaration of enforceability, a placement order is to become enforceable at the point in time when the court of the requested Member State declares, in accordance with Article 31, that that order is enforceable (judgment of 26 April 2012, *Health Service Executive*, C-92/12 PPU, EU:C:2012:255, paragraph 125). The Court thus ruled that, in order not to deprive Regulation No 2201/2003 of its effectiveness, the decision of the court of the requested Member State on an application for a declaration of enforceability must be taken with particular expedition, and appeals brought against such a decision of the court of the requested Member State must not have a suspensive effect (judgment of 26 April 2012, *Health Service Executive*, C-92/12 PPU, EU:C:2012:255, paragraph 129).

66. That statement has no bearing, however, on the - separate - question as to whether a decision that has been declared enforceable at the stage of *ex parte* proceedings may be enforced before it has been served.

67. In that regard, it must be observed that the wording of Article 33 of Regulation No 2201/2003 does not, in itself, enable an answer to be given to the questions raised.

68. Although that article provides that the period for bringing an appeal against an enforcement decision starts to run from the date of service of that decision, it does not clarify whether enforcement may take place prior to service.

69. It must be noted in that regard that the requirement that the decision authorising enforcement be served has a dual function: on the one hand, it serves to protect the rights of the party against whom enforcement is sought and, on the other, it allows, in terms of evidence, the strict and mandatory time limit for appealing provided for in Article 33 of Regulation No 2201/2003 to be calculated precisely (see, by analogy, judgment of 16 February 2006, *Verdoliva*, C 3/05, EU:C:2006:113, paragraph 34)."

Right to seek a stay as an essential safeguard of the fundamental right to an effective remedy

53. Creedon J. proceeded on 21st September 2017 to make orders based on the submissions of HCC that the appellant parents had no right to seek a stay in this jurisdiction in relation to the recognition and enforcement orders.

54. The transcript of proceedings before the court on 21st September 2017 includes the following statement of counsel:

"Execution may be stayed, and this is important because the jurisdiction -- and this is a matter which has arisen in the case before Mr Justice Humphries (sic) the jurisdiction to grant a stay lies not with the court which makes the order , it lies with the court , this is according to the scheme of the Regulation, it lies with the appeal court and the appeal court in Ireland can only grant a stay if an appeal has been lodged in the UK…" (lines 5-10, page 10 of transcript 21st September 2017)

55. In their letter dated 22nd September 2017 to the parents, Messrs. MacCarthy & Associates, the solicitors for HCC, stated *inter alia*:

"(f) Execution on foot of the aforesaid Judgment shall not be stayed pending expiration of the time for appeal as aforesaid;"

The precise basis either in fact or law for this statement is not clear. It embodied a clear representation that no stay of the orders could be obtained in this jurisdiction – at least for two months. The High Court did not make any order in these terms. Thus the said letter to the parents fundamentally misrepresented the effect of the orders made by the High Court the previous day in a material respect.

56. It is appropriate to have regard to the conclusion of the CJEU that the conduct of HCC gave rise to an infringement of the parents' rights of defence and deprived them of their right to seek a stay of the return order. In that regard the court stated:

"71. It is apparent in that respect from the request for a preliminary ruling that, in accordance with Order 42A, rule 10(2)(iii) of the Rules of the Superior Courts, the order providing for enforcement must contain a notification that 'execution of the judgment or decision may be stayed on application to the Court in the event of an ordinary appeal in the Member State of origin'.

72. The possibility of applying, in accordance with national law, for such a decision to be stayed constitutes an essential safeguard of the fundamental right to an effective remedy and, more generally, of the rights of the defence, which may be granted, in particular, if enforcement of a decision carries a risk of manifestly excessive consequences.

73. In those circumstances, while, as the Advocate General noted in point 119 of her Opinion, the person against whom enforcement is sought must have the opportunity to lodge an appeal in order to be able to raise, in particular, one of the grounds of non-recognition set out in Article 23 of the regulation, it must be noted that enforcement of the return order, before the order had even been served on the parents concerned, prevented them from challenging in good time the 'declaration of enforceability' within the meaning of Article 33(5) of Regulation No 2201/2003, and, in any event, from applying for a stay of the order.

74. It must also be noted that, at the hearing before this Court, HCC argued that the prompt enforcement of the decision was rendered necessary by a 'general flight risk'. It should be pointed out, however, that the minors had been placed in foster accommodation in Ireland since 14 September 2017. Consequently, enforcement of the decision ordering their return to the United Kingdom does not appear to have been characterised by a particular urgency.

75. In those circumstances, it must be held that enforcement of a decision of a court of a Member State, which directs that minors be made wards of court and that they be returned and which is declared enforceable in the requested Member State, prior to service of the declaration of enforceability of that decision on the parents concerned is contrary to Article 33(1) of Regulation No 2201/2003, read in the light of Article 47 of the Charter.

76. The referring court also asks whether, in those circumstances, Article 33(5) of Regulation No 2201/2003 must be interpreted as meaning that the period for bringing an appeal laid down in that provision must be invoked against the parents concerned.

77. In that regard, it should be borne in mind that, according to settled case-law, in general, limitation periods fulfil the function of ensuring legal certainty (judgment of 7 July 2016, *Lebek*, C-70/15, EU:C:2016:524, paragraph 55 and the case-law cited). In addition, it is also consistent with a minor's best interests for decisions concerning that minor to be open to challenge only for a limited period.

78. In the case in the main proceedings, it is not disputed that the decision authorising enforcement was indeed served on the parents concerned.

79. Admittedly, since that decision was served after its enforcement, the parents were deprived of their right to seek a stay of the return order. However, that infringement of their rights of defence has no effect on the period for bringing an appeal which commenced when that decision was served.

80. In those circumstances, the period for bringing an appeal laid down in Article 33(5) of Regulation No 2201/2003 cannot therefore be extended by the court seised.

81. In view of the considerations in paragraph 75 of the present judgment, it is for the referring court to examine whether national law is such that it may withdraw the decision relating to the application for a declaration of enforceability previously made."

Reformulated argument of appellants - resumed hearing of Appeal 22nd October 2018
57. The appellants pursued a variant of their appeal before this Court on 22nd October 2018. Ms. Jackson SC on behalf of the appellants acknowledged that in light of the ruling of the CJEU the time for lodging an appeal specified in Article 33(5) of the Brussels II *bis* Regulation may not be extended.

58. She, however, contended that the appeal dated 24th November 2017 brought on behalf of the appellants was within time and that no extension of time to appeal was ever required by her clients. She contended in substance that Ms. Justice Reynolds was in error insofar as her order of 18th January 2018 was predicated on an assumption that the appeal had been brought on behalf of the parents out of time having regard to Article 33(5) of the Brussels II *bis* Regulation.

59. On behalf of HCC it was contended that valid service had been effected on the parents on Friday 22nd September 2017 on which date the enforcement order had been served upon them. It was not denied that the supporting documentation including the grounding affidavit, the exhibits, the *ex parte* docket and all other relevant material had not been served on the parents until Monday 25th September 2017.

60. The question now sought to be determined by the appellants is whether valid service is deemed to have occurred only on 25th September 2017. If so the parents' appeal was brought within the time limit specified for doing so and can proceed.

Arguments on behalf of appellants
61. On behalf of the parents it was asserted that the jurisprudence of the European Court of Justice mandated that the effective protection of the fundamental rights conferred on them by EU law required that they be provided with a complete statement of reasons in order to ensure the capacity to defend themselves in the best possible conditions. Ms. Jackson SC asserted that there was jurisprudence from the CJEU which supported the proposition that, for the purpose of lodging an appeal, time can begin to run only from the point at which the person concerned has precise knowledge of the content and the reasons or grounds for the act or order at issue in such a way as to enable him or her to take full advantage of their rights including any entitlement to appeal. It would appear in this regard that the appellants have substantially adopted the points raised in the Opinion of the Advocate General referred to above at paragraph 50.

Arguments on behalf of HCC
62. HCC relied on Case C-145/86 *Hoffman v. Krieg* [1988] E.C.R. 645 where the Court of Justice ruled that proceedings to challenge execution of a foreign judgment which had been registered could not be entertained where registration of the judgment had not been appealed within the time provided for doing so.

63. Counsel for HCC relied in particular on paras. 29 to 31 of that judgment which stated:

"However, the application, for the purposes of the execution of a judgment, of the procedural rules of the state in which enforcement is sought may not impair the effectiveness of the scheme of the convention as regards enforcement orders.

It follows that the legal remedies available under national law must be precluded when an appeal against the execution of

> a foreign judgment for which an enforcement order has been issued is lodged by the same person who could have appealed against the enforcement order and is based on an argument which could have been raised in such an appeal. In those circumstances, to challenge the execution would be tantamount to again calling in question the enforcement order after the expiry of the strict time-limit laid down by the second paragraph of Article 36 of the Convention, and would thereby render that provision ineffective.
>
> In view of the mandatory nature of the time-limit laid down by Article 36 of the Convention, the national court must ensure that it is observed. It should therefore of its own motion dismiss as inadmissible an appeal lodged pursuant to national law when that appeal has the effect of circumventing that time-limit."

64. Reliance was also placed by HCC on the decision in Case C-3/05 *Verdoliva v. J. M. Van der Hoeven BV and Others* [2006] E.C.R. 1-1595 where the court held that the mere fact that a party against whom an enforcement is sought had notice of the decision registered was not sufficient to cause time to run for the purposes of an appeal pursuant to Article 36 of the Brussels Convention. The CJEU held that the time limit for appeal from the registration of an order is strict and mandatory in nature. The court stated that there had to be certainty as to the date from which time is to run for the bringing of an appeal. It was insufficient that the putative appellant was aware of the registration. The affected party also had to be served on an ascertainable date with the order registering the judgment. Defects in service had to be construed strictly.

65. It was asserted on behalf of HCC that the preliminary ruling of the CJEU in these proceedings regarding Article 33(5) of the Regulation supports the contention that there is no jurisdiction to extend the two month time limit in Article 33(5) irrespective of the national law of the member state and as such the rule should be strictly adhered to. HCC submitted that the order of Reynolds J. was correct in accordance with prevailing CJEU and English law.

66. The decisions in *Hoffman and Verdoliva* were not directly on point and they were offered as authorities for the mandatory nature of time limit provisions in the European instruments dealing with registration of foreign judgments.

67. In the first decision of this Court of 17th May 2018 Mr. Justice Hogan considered *Verdoliva* at para. 62 where he stated:

> "The second case is case C-3/05 *Verdoliva* [2006] E.C.R. 1-1595. That was a case where a judgment of a Dutch court was made the subject of an enforcement order. It appears however that the order was at best served on Mr. Verdoliva in a manner regarded by Italian law as defective. Following a review of the objects of the enforcement provisions of the Brussels Convention, the Court of Justice concluded (at para. 38) that:-
>
> "…..Therefore the reply to the questions put to the Court must be that Article 36 of the Brussels Convention is to be interpreted as requiring due service of the decision authorising enforcement, in accordance with the procedural rules of the Contracting State in which enforcement is sought, and therefore, in cases of failure of, or defective service of the decision authorising enforcement, the mere fact that the party against whom enforcement is sought has notice of that decision is not sufficient to cause time to run for the purposes of the time-limit fixed in that Article."

68. It will be recalled that in his first judgment in this appeal Mr. Justice Hogan considered that decision solely from the perspective of the existence or otherwise of a jurisdiction to provide for an extension of time pursuant to Article 33(5) of the Brussels II *bis* Regulation.

69. HCC pointed out that the Opinion of the Advocate General was advisory only and did not bind the CJEU. No argument as to the validity or effectiveness of service on 22nd September 2017 had ever previously been made on behalf of the parents. Counsel for HCC argued that if an argument is now to be advanced concerning the effectiveness of service it should be made by way of a separate set of proceedings and not as a "bolt-on" to the existing appeal.

Ought a new or reformulated ground of appeal be permitted?

70. The new ground is that service of the appeal notice dated 24th November 2017 was within time. In effect it is contended that time ran only from 25th September 2017 for the purposes of bringing an appeal. There are many reasons why such an application might now be refused - not least the fact that counsel for the parents on 18th January 2018 does not appear to have expressly asserted that service, for the purposes of the running of time for an appeal, had not taken place until 25th September 2017. Neither does it appear to have been fully argued that the appeal notice dated 24th November 2017 was brought within the time.

71. The Supreme Court has endorsed a somewhat flexible approach to the issue of allowing new points to be argued on appeal in recent times. *In Lough Swilly Shellfish Growers v. Bradley*, [2013] IESC 16, [2013] I.R. 227 O'Donnell J. stated at para. 25:

> "However, with respect to the judgment of Henchy J. in *Movie News [Ltd. v. Galway County Council]* the proposition that the objection to any argument of a new point in an appeal is grounded in the constitutional right of appeal, is not beyond argument. Indeed, if it were so, it is hard to see how it could admit of the exceptions, unless the exceptions were themselves mandated by the Constitution."

72. The learned judge continued at para. 27:

> *"What the Constitution requires is an appeal which permits the Supreme Court to consider whether the result in the High Court is correct*. The precise format and procedure of any such appeal is not dictated by the Constitution. While that object is often and best achieved by a careful analysis of the argument in the High Court and the High Court's adjudication of said argument, it does not follow that the constitutional appeal must always be limited to that process." (emphasis added)

73. It is significant that the new argument is one as to law, although not argued before the High Court on 18th January 2018 or indeed initially in this Court. It appears to be an entirely new argument not previously made which is informed, at least in part, by the observations of the Advocate General and the views expressed by the CJEU itself. The question must however be where do the interests of justice lie in this matter? The interests of the minors affected and of justice itself ought not be debased either by exiguous endeavours of one party or injudicious assumptions or omissions of the other - should it transpire that either has occurred.

74. After due consideration I am satisfied, in light of recent jurisprudence of the Supreme Court and particularly the decision of O'Donnell J. in *Lough Swilly Shellfish Growers v. Bradley*, that it is necessary in the public interest and in the interest of minors in general - and in particular the three minors named in the title of these proceedings - that the issue which ought to have been argued and considered on 18th January 2018 be now considered and addressed - namely whether the parents had in fact brought their

appeal within time. It accords with the objectives of the Brussels II *bis* Regulation itself that their fate be determined in accordance with principles which respect their best interests.

Appeals procedure
75. The procedure adopted in this State to give effect to the right of appeal enshrined in Article 33 of the Brussels II bis Regulation was set forth in the list provided for by Article 33(2) as notified on behalf of this State to the Commission pursuant to Article 68 of the said Regulation.

When was the order validly served under national procedural rules?

76. The principle of subsidiarity requires that our national procedural autonomy be respected, subject to the overriding requirement of Union law that all relevant national procedures comply with the principles of equivalence and effectiveness.

Order 42A

77. Order 42A of the Rules of the Superior Courts was inserted by S.I. No. 9 of 2016 Rules of the Superior Courts (Jurisdiction, Recognition and Enforcement of Judgments) 2016. Order 42A, r. 10(2) is required to be construed in a manner harmonious with our EU obligations and with due respect to the rights of litigants pursuant to the Charter on Fundamental Rights including Article 47 thereof.

78. Order 42A, r. 10(2) provides as follows:

> "A relevant order made under Regulation No. 2201/2003 shall:
>
> (i) state the period in accordance with Article 33(5) of Regulation No. 2201/2003 within which an appeal may be made against the relevant order for enforcement, and
>
> (ii) contain a notification that an execution of the judgment or decision may issue before the expiration of that period, and
>
> (iii) contain a notification that execution of the judgment or decision may be stayed on application to the Court in the event of an ordinary appeal in the Member State of origin…"

79. It appears that a copy of the order of Ms. Justice Creedon and a notice of enforcement was served on the parents on Friday 22nd September 2017. For reasons which are unexplained, HCC omitted to serve upon the parents at the same time the relevant documentation relied upon in court to obtain the ex parte *exequatur* orders the previous day. These included the *ex parte* docket, the affidavit of Niall McGrath filed on 20th September 2017 together with the voluminous documents and exhibits ("the relevant material") therein referred to. The relevant material withheld comprised in excess of ninety pages.

80. Order 42A, r. 12 provides:

> "The notice of enforcement shall state:
> (a) *full particulars of the judgment or decision declared to be enforceable and the relevant order*, (emphasis added)

81. In ascertaining what constitutes effective service of a declaration of enforceability to trigger the running of time for the purposes of an appeal pursuant to Article 33, Order 42A, r. 10(2) of the RSC must be construed with due regard to the fundamental principle that rights enshrined within or derived from the EU Treaties and the Charter as construed and interpreted by the relevant jurisprudence of the CJEU must be amenable to effective exercise. Affected parties are entitled to an effective remedy for the purposes of vindicating all such rights.

82. There have been significant developments in recent times in the law relating to the reasons required to be given by any decision maker who has the legal power to make determinations which affect legal rights and obligations. It will be necessary to consider recent domestic developments in that evolving jurisprudence presently. The issues which arise on this appeal concern the application of those principles to decisions made by the High Court when exercising its jurisdiction pursuant to Chapter III of the Brussels II bis Regulation.

83. Brussels II *bis* has direct effect and prevails over national law. There is no implementing legislation. As its recitals make clear its aims include ensuring equality for all children. The initial process under Chapter III involves an *ex parte* application by a body or individual who holds a judgment which is sought to be recognized and enforced. Thus the scheme of the Regulation envisages the holders of rights of parental responsibility not being heard at the initial step of the enforcement process. That fact has a bearing on the minimum requirements for valid service to be effected to encompass the requirement to discharge the obligation to give reasons.

Reasons as a fundamental prerequisite to valid service being effected
84. The decision and order made on 21st September 2017 did not represent the enforcement of orders which follow on from a prior adversarial process. In fact there is no evidence that the parents were ever served with documents instituting the proceedings ahead of the Portsmouth orders being made on 8th September 2017. HCC was aware that the parents were in Ireland but took no step to effect service upon them. They were not present or represented in court and had no input into the making of the Portsmouth orders. That fact required to be addressed by HCC at the *ex parte* hearing in light of Article 23(c) and Article 23(d) of the said Regulation.

85. The legal requirements which must be met for a decision to recognize and enforce a foreign parental responsibility judgment pursuant to Chapter III of the Regulation require that the judge in this State at the *ex parte* stage determine whether certain prerequisites are established. Those include assessing whether the application fell within the scope of the Regulation at all in the first place. HCC had to establish at the *ex parte* application that specific criteria were met, and that specific potential impediments identified in the Regulation were absent. The appellants, as affected parties, were entitled - and had a compelling need - to know the reasons which had been relied upon as the basis for securing the *ex parte* order. Without service of the underlying documentation on 22nd September 2017 the appellants were blind-sided as to the actual basis for the decision and the precise factors which were considered in its procurement.

86. The appellants, as the respondents named in the *ex parte* orders, were entitled to the essential information as to the manner in which HCC had purported to demonstrate to the High Court that the application could be granted in its favour. The conduct of the application, documents relied upon in the application, the issues which arose and the representations of counsel all clearly informed the reasoning underpinning the *ex parte* decision and order. Same were a prerequisite to ensure in this case that "full particulars of

the judgment or decision declared to be enforceable" were provided to the affected parties as mandated by Order 42A, r. 12 of the Rules of the Superior Courts.

87. Recent jurisprudence on the importance of giving reasons includes the decision of Clarke C.J. in *Connelly v An Bord Pleanála and Ors*.[2018] IESC 31 in which he stated at paras. 5.3-5.4:

> "… However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached.
>
> … it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be *sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."* (emphasis added)

88. Clarke C.J. in *Connelly*, a case involving statutory and regulatory decisions regarding planning and environmental law, carried out an extensive review of the jurisprudence regarding the necessity for and the purpose behind the requirement to communicate reasons stating at para. 6.15:

> "6.15 … it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."

89. The Chief Justice emphasised the importance of providing access to the documentation which formed the basis for the decision stating:

> "6.18 This latter point feeds in to the question of the identification of the documents or materials which can properly be considered for the purposes of identifying the reasons of the decision maker as part of the process of determining whether adequate reasons have been given. I now turn to that issue."

90. He continued:

> "7.3 With regard to identifying the location of reasons for a decision, I made the following comments at para. 9.2 of my judgment in *Christian*:-
>
> > "The second leg of the requirement to give reasons is that the reasons be capable of being determined with some degree of precision. It seems to me in that context that any document recording the reasons must be such that it is possible to say that the document concerned actually represents the reasons for the decision in question in a way which ought not be capable of real debate. …."

Relevance of European law to reasons

91. The Chief Justice in *Connelly* also stated that consideration should be given to any relevant European Union law requirements in relation to giving reasons in any given case stating:

> "9.2 The test is, in my view, that identified in *Christian*. Any materials can be relied on as being a source for relevant reasons subject to the important *caveat* that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned."

92. Clarke C.J. further stated:

> "10.1 …While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other.
>
> 10.2 … What may, however, lead to a successful challenge is if a court concludes that it is not possible either for interested parties or, indeed, the court itself, to know why the decision fell the way it did."
>
> 10.3 There is a middle ground between the sort of broad discursive consideration which might be found in the judgment of a court, on the one hand, and an entirely perfunctory statement that, having regard to a series of factors taken into account, the decision goes one way or the other. There is at least an obligation on the part of decision makers to move into that middle ground, although precisely how far will depend on the nature of the questions which the decision maker had to answer before coming to a conclusion."

Application of domestic principles to present case

93. If one considers the material provided to the appellants on 22nd September 2017, its deficiencies are very clear. The bare recitals in the court order served on the appellants were indeed an "entirely perfunctory statement" and fell far short of meeting the requirement to state "…full particulars of the judgment…" (O. 42A, rule 12(a)). The said rule required that an adequate and complete statement of reasons be provided to the affected parties. In the case of the mother three minor children were being removed from her care permanently. As events transpired the appellants' relationship with their new-born child then aged 18 days old was being severed in perpetuity. The potential implications of the orders for the future lives of the appellants and the lives of their children could hardly have been more profound.

94. As Baker J. correctly observed in *Haier Europe Trading SRL v. Mares Associates Limited* [2017] IEHC 159:

"49. In *Verdoliva v. J.M. Van der Hoeven BV & Ors*. Case C-3/05, the CJEU, on a preliminary ruling concerning the interpretation of Article 36 of the Brussels Convention as amended, answered the question of whether in cases of failure of, or defects in, service of a decision authorising enforcement, the mere fact that the party against whom enforcement is sought had notice of the decision by whatever means was sufficient to cause time to run for the purposes of the Convention.

50. The Court answered the question in the negative and noted that service performed a dual function: it fixes the time for appeal, and in that regard noted the strict and mandatory time limits for appeal provided in Article 36 of the Regulation, and serves to protect the rights of the party against whom enforcement is sought. In that context the Court considered that the procedural requirements for service "are more stringent than those applicable to transmission of that same decision to the applicant". Therefore failure of, or defect in, service had to be construed strictly and no subjective knowledge of the person against whom enforcement was sought could come to be considered as a factor in considering whether service was complete.

51. *In Barnaby (London) Ltd v. Mullen* [1997] 2 I.L.R.M. 341 the Supreme Court adopted the analysis of another judgment of the European Court in *Isabelle Lancray S.A. v. Peters und Sickert KG* Case C-305/88, [1990] ECR 1-2725, which was followed by the CJEU in *Verdoliva v. J. M. Van der Hoeven BV*, regarding the dual purpose of service, and that service fixed the *"terminus a quo"* for the purposes of any appeal by the party affected. The Court refused to deem service good.

52. The relevant factors which must be seen as the guiding principles in the scheme of the Brussels Regulation are as follows:

(a) Time limits for appeal are strict and mandatory.

(b) The purpose of service is to start time running for an appeal, and to ensure fairness of process to the person against whom a judgment is enforced. Therefore the requirement of service is to be construed strictly.

(c) The test of whether the material elements of a judgment were contained in the documents served is objective. Imputed or actual knowledge of the person against whom enforcement is sought is not a relevant factor.

(d) Any rule or practice in a domestic court which impairs the effectiveness of the scheme is to be precluded."

95. The order served on 22nd September 2017 was not sufficiently clear and lacked "full particulars" to enable the parents as affected parties to consider whether they may have grounds to challenge the decision on any basis.

96. I am satisfied that the threshold with regard to adequacy of service as required was not met by domestic law by HCC on 22nd September 2017. At the earliest the material served on the appellants first met the national minimum requirements for provision of information to enable the appellants as affected persons identify and obtain full knowledge of the reasons for the decision in question on Monday 25th September 2017 and not before that date.

EU *jurisprudence* on reasons being intrinsic to notice of a decision

97. Of relevance is the decision of the European Court in Case 236/86 *Dillinger Hüttenwerke AG v. Commission of the European Communities* [1988] E.C.R. 3761. In that case it was contended on behalf of the applicant that it had only acquired full knowledge of the precise wording of and reasons for the decision by way of the Commission's defence. It was asserted that in the absence of publication or notification the period of limitation could begin to run only from the moment when the person concerned obtains precise knowledge of the act in question:

"14. It is clear from the Court's case-law relating to the third paragraph of Article 173 of the EEC treaty (judgments of 5 March 1980 in Case 76/79 *Koenecke* ((1980)) ECR 665, and of 5 March 1986 in Case 59/84 *Tezi Textiel* ((1986)) ECR 887) that, failing publication or notification, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period but, subject thereto, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action."

98. As was stated by the CJEU in its judgment of 6th December 1990 in Case C-180/88 *Wirtschaftsvereinigung Eisen-und Stahlindustrie v. Commission of the European Communities* [1990] E.C.R. I-04413 at para. 22:

"It is clear from the Court's case-law that, failing publication or notification, it is for the party which has knowledge of a decision concerning it to request the whole text thereof within a reasonable period and that the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action (judgment in Case 236/86 *Dillinger Huettenwerke* [1988] ECR 3761, paragraph 14)."

99. That decision was followed in Case C-309/95 *Commission of the European Communities v Council of the European Union* [1998] E.C.R. I-00655 where at paras. 18-19 it is stated:

"18. According to the case-law of the Court, in the absence of publication or notification, it is for the party which has knowledge of a decision concerning it to request the whole text thereof within a reasonable period and the period for bringing an action can begin to run only from the moment at which the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action (Case C-180/88 *Wirtschaftsvereiningung Eisen- und Stahlindustrie v Commission*, cited above, paragraph 22).

19. It must therefore be ascertained what was the date on which the Commission had precise knowledge of the content of the decision and the reasons on which it was based."

100. These principles accord entirely with our domestic regime. I am satisfied that Order 42A, r. 10(2) of the Rules of the Superior Courts must be construed in light of and in concordance with CJEU jurisprudence. There is complete harmony between the national and Union approach and both subscribe to the principle that time for the purpose of lodging an appeal can begin to run only from the point at which the person concerned had precise knowledge of the content and the grounds of the act at issue in such a way as to be able to take full advantage of his right to institute proceedings.

101. In circumstances where an order is made pertaining to minors, unless the order as served affords adequate information to enable a holder of parental rights to acquire precise knowledge and information of the contents of the decision together with all material reasons on foot of which it was made with sufficient particularity to enable them to make an informed decision as to the exercise of their rights including a right to appeal, service is not validly effected and time does not begin to run for the purposes of an appeal.

Conclusions

102. There is complete harmony between the national and Union law on valid service. Procedural fairness requires that time for the purpose of lodging an appeal can begin to run only from the point at which the person concerned had precise knowledge of the content and the grounds of the act at issue in such a way as to be able to take full advantage of their right to appeal. The requirement of service is to be strictly construed.

103. The order obtained by HCC before the High Court on Thursday 21st September 2017 as a condition precedent to enforcement was required to be validly served on the appellants.

104. Having regard to Article 33(5) of the Brussels II *bis* Regulation the time for appealing against the declaration of enforceability made in the High Court on 21st September 2017 was two months from the date of valid service of the said *ex parte* order.

105. It is a matter for the national courts to reach a determination as to whether and when orders, including an enforcement order, have been validly served.

106. The rules governing service are primarily found in Order 42A of the Rules of the Superior Courts.

107. In enforcement proceedings brought pursuant to the Brussels II *bis* Regulation which involved recognition and enforcement of parental responsibility the party against whom the enforcement order has been obtained is entitled to appeal the decision pursuant to Article 33(1).

108. The order of 21st September 2017 incorporates by reference, on its face, significant material and data. Any meaningful understanding of the order, the reasons underlying it and its import presupposes service of and effective access to the said materials on the part of the recipient of the order.

109. No explanation has been forthcoming as to why HCC withheld service of relevant material from the appellants on 22nd September 2017 at a point when the minors had already been removed from the jurisdiction.

110. The withholding of the documentation incorporated by reference into - and intrinsic to an understanding of - the *ex parte* order of 21st September 2017 which articulated the reasons underpinning its granting drained the purported service of any validity for the purposes of Order 42A, r. 10(2). It precluded the appellants from any possibility of being aware of the content of the decision and more particularly of the reasons for the decision. The order was not validly served on 22nd September 2017 for the purposes of the commencement of time running pursuant to Order 42A or Article 33(5).

111. No valid service has been shown to have been effected upon the appellants prior to, at the earliest, Monday the 25th September 2017.

112. It follows that the notice of appeal of 24th November 2017 was served within time.

113. I would allow the appeal.

114. I would remit the matter to the High Court for urgent determination of the substantive appeal with priority.

115. The question of any interlocutory relief is a matter for the High Court.