THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 104

137/2015

Kelly J.
Finlay Geoghegan J.
Hogan J.

In the matter of the Child Abduction and Enforcement of Custody Orders Act 1991, and

In the matter of the Hague Convention on Child Abduction and

In the matter of Council Regulation (EC) 2201/2003 of 27th November, 20013 and

In the matter of N E, a child

BETWEEN/

D. E.

Applicant/Respondent

AND

E.B.

Respondent/Appellant

Judgment delivered on the 20th day of May 2015, by Ms. Justice Finlay Geoghegan

1. The appellant in this Court and respondent in the High Court ("the mother") is the mother of the child to whom I will refer as 'N'. N. was born on 26th October 2013. The respondent in this Court and applicant in the High Court is the father ("the father") of N. The mother appealed against the order of the High Court on the 4th March, declaring that on or about the 20th July, 2014, she had wrongfully retained N in Ireland within the meaning of Article 3 of the Hague Convention on Child Abduction and Article 2 of Council Regulation (EC) No. 2201/2003. The High Court also ordered pursuant to Article 12 of the Hague Convention and Part II of the Child Abduction and Enforcement of Custody Orders Act 1991, that N be returned to the jurisdiction of the courts of France. The order was made for the reasons set out in a written judgment delivered by O'Hanlon J. on the 4th March, 2015. The trial judge placed a stay on the order for a period of three months to expire on the 4th of June 2015.

2. In the High Court the mother had contested the father's application for the return of N upon the basis of an alleged wrongful retention in Ireland on or about 20th July 2014 on two grounds. First, it was contended that N was not habitually resident in France on or about the 20th July, 2014 and, second, as N. would be at "grave risk" if she were returned to France that pursuant to Article 13(b) of the Hague Convention the order for return should be refused. The trial judge rejected each of the defences. In view of the concerns expressed by or on behalf of the mother in relation to a return of N to France, the trial judge sought and obtained undertakings from the father, so as to ensure that an adequate plan would be in place upon the return of N to France. The father's undertakings were reduced to writing and are part of the order made by the High Court.

3. In her notice of appeal to this Court, the mother appealed against the findings of the High Court in relation to the habitual residence of N on the 20th July, 2014 and in relation to the defence of grave risk. At the commencement of the oral hearing, counsel on her behalf indicated that by reason of the undertakings furnished to the High Court she was not pursuing an appeal against the rejection of the defence in reliance upon grave risk. Accordingly, the sole issue before this Court is the correctness or otherwise of the determination by the High Court judge that N was habitually resident in France immediately prior to the 20th July, 2014.

Facts

4. Many of the relevant primary facts are not in dispute. The mother is an Irish national who has lived and worked in France for some time. The father is a French national who lives and works in France. The father and mother are not married to each other, but have been co-habiting in the Paris region since May 2008. N was born in France. The parties both accept that N has dual nationality. She has both a French identity card and an Irish passport which was issued in January 2014.

5. The father, mother and N lived together in France from the date of her birth (26th October, 2013), until the 23rd March, 2014. On the 23rd March, 2014, all three came to Ireland and the joint express purpose of the trip was to introduce N to the mother's family in Ireland. It has subsequently become apparent that the mother may have had additional intentions, but these were, however, at the time unknown to the father. The father left Ireland on the 31st March, 2014, and returned to France for work. The mother and N remained in Ireland. N was baptised in Ireland on the 20th April, 2014 and the father returned to Ireland on the 18th April, 2014, for the baptism and returned to France on the 25th April, 2014.

6. The mother was on parental leave from her employment in France and was due to return to work on 11th July 2014. The father was aware of this date. However on 27th March 2014 the mother sent an email to her work superior stating she was resigning. On 28th March 2014 the mother applied to the Irish Department of Social Protection for lone parent allowance. In April 2014 she registered N with a general practitioner, applied to have her name added to the rent book for the house in which she was living with her father and brothers and applied for a PPS number for N. She did not inform the father of these steps at the time.

7. The mother and N returned to France on the 8th May, 2014 and then came back to Ireland on the 15th May, 2014. The father purchased a ticket for the mother and N to return to France on the 28th May but she, however, changed her return date to the 12th June, 2014, when she and N again went to France. The mother and N came back to Ireland on the 22nd June, 2014. There are disputes as to the reasons allegedly given by the mother to the father for her return to Ireland on the 22nd June. The father has deposed that the mother and her sister told him that it was for a visit of approximately eight to ten days in order to permit the mother to pass her driving test and that intensive lessons had been arranged for that purpose. The mother disputes this but averred

that she mentioned learning to drive.

8. The father consented to N travelling to Ireland with the mother on each of the 23rd March, 2014, 15th May, 2014 and 22nd June, 2014. He has deposed that the consent given on each occasion was for the purpose of a limited visit by N to Ireland in a context that he knew the mother had to return to work in France on 11 July 204. He has averred that he never gave his agreement to N staying and living in Ireland. .

9. In July 2014, the mother did not and would not give to the father a proposed date for the return of herself and N to France. On the 18th July, 2014, the father sent an email to the mother formally asking her to bring N back to France on the 20th July, 2014. The mother did not return with N to France and has not returned since that date. The father contends that the mother has wrongfully retained N in Ireland since in or about the 20th July, 2014.

10. The father applied to the Central Authority of France on the 29th July, 2014, for assistance in procuring the return of N to France. The French Central Authority sent to the Irish Central Authority a request received on the 8th September, 2014, and these proceedings were commenced by special summons issued on the 13th October, 2014.

11. It is not in dispute that the father, under French law, holds parental authority in relation to N as does the mother under both Irish and French law.

High Court judgment

12. The High Court judge in a careful and detailed judgment set out the issues to be decided, the applicable law and her conclusions on the relevant issues. The mother does not dispute the applicable law as stated, but it is nonetheless necessary to refer briefly to same. As set out by the High Court judge, since the application is for the return of N to France, both the Hague Convention and Council Regulation (EC) No. 2201/2003 ("the Regulation") apply to these proceedings. Article 2(11) of the Regulation defines the term "wrongful retention" as follows:

> "The term 'wrongful removal or retention' shall mean a child's removal or retention where:
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> (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
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> (b) provided that, at the time of removal or retention, the rights of custody were actually exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

13. For present purposes it is consistent with the definition of wrongful retention in Article 3 of the Hague Convention and it is unnecessary to set that out. The trial judge at para. 12 of her judgment identified the matters to be established by the applicant father on the balance of probabilities in relation to the alleged wrongful retention where she stated:-

> "In order for this Court to grant a declaration that 'N' was retained wrongfully by the respondent on or about the 20th July, 2014, within the meaning of article 3 of the Convention and article 2 of the Regulation, the applicant must establish on the balance of probabilities that:
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> (i). 'N' was habitually resident in France immediately before the 20th July, 2014;
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> (ii) on the aforesaid date, the applicant had rights of custody in respect of 'N' under the laws of France;
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> (iii) the respondent's alleged retention of 'N' in the Republic of Ireland on or about the 20th July, 2014, was in breach of these rights of custody, and
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> (iv) the alleged custody rights of the applicant were exercised or would have been exercised but for removal or the retention."

14. Of those issues, the only issue in dispute before the High Court and again in this Court is the question as to whether N was habitually resident in France immediately before the 20th July, 2014.

15. It was not in dispute that N was habitually resident in France on the 23rd March, 2014, when she came on her first visit to Ireland. It was also not in dispute that the father did not at any time prior to the 20th July, 2014, consent to the habitual residence of N being changed from France to Ireland. In the High Court the submissions made on behalf of the father relied in part upon the judgments of the Supreme Court in *A.S. v. C.S. (Child Abduction) [*2010] I.R. 370, 386 and *P.A.S v. A.F.S.* [2004] IESC 95 and *S.R. v. M.M.R.* (Unreported, Supreme Court, 16th February, 2006), to the effect that where a young child is living with both parents, both of whom have parental authority neither parent can change the habitual residence of the child without the consent of the other parent. On behalf of the mother it was submitted that in a case such as this where the Regulation applies, the consent of a parent to a change of habitual residence is no longer determinative but is simply a factor to be taken into consideration and that the High Court was not bound by the Supreme Court decisions to that effect by reason of three later judgments of the Court of Justice of the European Union: Case C- 497/10 *Mercredi v. Chaffe* (22nd December, 2010), Case C-523/07 *Re A* [2009] E.C.R. I-2805 and Case C-376/14 *C. v. M. PPU* (9th October, 2014).

16. Whilst the trial judge did not expressly determine this issue, nevertheless in her conclusions on the question of the habitual residence of N in July 2014, she expressly applied the considerations identified by the CJEU in the above judgments and, in particular, four points she considered raised by the judgment of the CJEU in *Mercredi*.

17. The conclusion reached by the trial judge on the issue of habitual residence and her reasoning in accordance with the judgment of the CJEU in *Mercredi* is set out at paras. 54 to 58 inclusive of her judgment as follows:

> "54. Firstly, the Regulation does not state any minimum duration period in which the child must be present in a member state before the habitual residence of that child is transferred to that state (as per para. 51 of *Mercredi*). However, the European Court of Justice does say that it is imperative that the removing parent has it in mind to establish there [the state] the permanent or habitual centre of his/her interests, with the intention that it should be

of a lasting character, but duration of the aforesaid stay can serve only as an indicator in the assessment of the permanence of the residence, and that habitual residence must be assessed in terms of circumstances fact specific to the individual case.

55. Secondly, the European Court of Justice in *Mercredi*, held that in determining habitual residence, it was important that in addition to the physical presence of the child in a member state, other factors must also make it clear that the presence of the removing parent and the child is not in any way temporary or intermittent (at para. 49 of *Mercredi*). In this particular case, while the respondent has deposed details of acquiring rented accommodation, receipts of child benefit and social welfare from the Irish Department of Social Protection and the acquiring of Irish P.P.S and Passport records for 'N', her stay in Ireland from the 23rd March to the 20th July (i.e the date of the alleged wrongful retention) was intermittent with return trips to France. As a result, the Court accepts the affidavit evidence of the applicant that he was unaware that the respondent's travels to Ireland were informed with the intention to reside with 'N' in Ireland permanently, and that he would have never permitted 'N' to leave France if he was aware of these intentions. Moreover, this Court also accepts the submission of the applicant that he believed the respondent was going to return to France before the 11th July, 2014 and that the applicant's beliefs were supported by the respondent and "N's" intermittent return trips to France.

56. Thirdly, the Court notes that *Mercredi* was a reference case to the European Court of Justice on the issue of habitual residence for the purposes of article 8 and 10 of the Regulation. The European Court of Justice notes that in determining the issue of habitual residence of an infant, the court must consider the mother's integration in her social and family environment where that infant is dependent on her mother. However, the mother in *Mercredi* held sole parental rights over the infant in question. The father in *Mercredi* did not have any parental responsibility over the infant for the purposes of the Regulation. This Court notes that in this case, the applicant father holds parental rights over 'N' and has provided for her during her residence in France up until the 23rd March, 2014 and during 'N's intermittent trips to France on the dates mentioned above.

57. Fourthly, the European Court of Justice in *Mercredi*, recognised that it was for the national courts of member states to determine the issue of habitual residence, taking into account all the circumstances of facts specific to each individual case (at para. 56 of *Mercredi*). This proposition is of the utmost importance in that it grants the national courts a level of flexibility in ensuring that the ethos of the Convention is not subverted, and that the objectives of same are vindicated. Moreover, the aforesaid proposition has underpinned the jurisprudence of this Court in determining the issue of habitual residence in child abduction cases.

58. It was admitted by the respondent on affidavit that on the 23rd March, 2014, 'N' was habitually resident in France. On considering the affidavits, legal submissions and case-law submitted, this Court concludes that "N's" state of habitual residence was not altered to the Republic of Ireland between the 23rd March, 2014 and the 20th July, 2014. In turn, this Court is of the view that considering all the circumstances of facts specific to this case including the duration, reasons and conditions of 'N's' stay in Ireland, along with both the respondent's and 'N' family origins and social connection with both Ireland and France, the Court is of the view that N's' habitual residence remains in France."

Appeal

18. The mother, on appeal, submitted that the High Court judge was correct in approaching the determination of N's habitual residence immediately prior to the 20th July, 2014, in accordance with the three judgments of the CJEU already referred to. However, she argued that the trial judge failed to apply the criterion outlined by the CJEU correctly to the facts of this case. The submissions made were subtle, nuanced and, in certain respects, would, if accepted, have far reaching consequences for applications for the return, in particular of a very young child, upon the basis of an alleged wrongful retention. In summary, the submissions were to the effect that, first, the High Court judge failed to have sufficient regard to the onus being on the father to establish that the habitual residence of N remained in France on the 20th July, 2014. Second, that the trial judge failed to treat as the overriding consideration the question as to where in fact the centre of interest of N lay as is now required by the judgments of the CJEU. This requirement, it was submitted, followed from what was stated by the CJEU in *C. v. M.* at para. 50 that the concept of habitual residence which grounds the jurisdiction of courts under the Regulation is "shaped in the light of the best interests of the child, in particular on the criterion of proximity". While it was accepted that the absence of consent by the father was a factor to be taken into account, it was contended that this could not be determinative and was itself subject to the court's assessment of where the child's centre of interest lay. Furthermore, it was submitted that the trial judge failed to have proper regard for the fact that N was a very young child, entirely dependent upon her mother, and since, as a matter of probability, the mother had changed her habitual residence to Ireland by July 2014 that the proximate family and social connections of N were accordingly with her mother in Ireland. Third, it was argued that the trial judge erred in distinguishing this application on its facts from those in *Mercredi*. It was submitted that the fact that the father has rights of custody/parental rights herein went only to the question of wrongful retention and not habitual residence. Finally, it was submitted that the trial judge had placed undue weight on the periods N spent in France in May and June 2014 and incorrectly concluded that N's residence in Ireland from March 2014, had been intermittent.

19. Counsel for the father submitted that the trial judge was correct in her conclusion that N was habitually resident in France on 20 July 2014 and her decision should be upheld in this Court. He further submitted that she reached her decision in accordance with a correct application of the criteria set out by the CJEU in the three judgments cited, to the facts herein. Counsel further drew attention to what she submitted would be the far reaching implications for the concept of wrongful retention under the Hague Convention and the Regulation if the submissions of the mother were accepted. She did not consider it necessary, however, on this appeal to seek to rely upon the earlier approach of the Supreme Court *A.S. v. C.S. (Child Abduction)* [2010] 1 I.R. 370, 386 and *P.A.S v. A.F.S.* [2004] IESC 95 and *S.R. v. M.M.R.* (Unreported, Supreme Court, 16th February, 2006) in relation to the necessity for parental consent to change the habitual residence of a young child.

20. Accordingly on the submissions made in the appeal, I propose considering the appeal against the decision of the High Court judge on the question of habitual residence in accordance with the relevant judgments of the CJEU.

Assessment of Habitual Residence of N

21. In my view, the trial judge correctly approached the question which she had to determine by recognising that the onus was on the father to establish that the habitual residence of N remained in France immediately prior to the 20th July, 2014. She referred to this requirement at para. 12(i) of her judgment. It was accepted by counsel on behalf of the mother that no case was made in the High Court that N had simply lost her French habitual residence by the 20th July, 2014. At all times the case made was that N had

acquired a habitual residence in Ireland as of that date. In those circumstances it was appropriate for the trial judge to consider - as she did - whether or not N had acquired a habitual residence in Ireland as of that date prior to reaching the conclusion that N's habitual residence remained in France.

22. For the reasons already set out, it is not now in dispute between the parties that this Court should determine whether the conclusion and findings reached by the trial judge that the habitual residence of N was in France immediately prior to the 20th July, is correct in accordance with the approach of the CJEU in the three decisions already referred to. There was, however, some dispute as to what those three judgments cumulatively required with each party placing emphasis on different parts of the judgments.

23. The mother relied upon the re-statement by the CJEU of the proper approach to the determination of a child's habitual residence for the purposes of the Regulation in its judgment in *C. v. M* and its restatement of what it had said in its earlier judgments in Re A. and *Mercredi*. The judgment in *C. v. M* is of particular importance to this appeal. The judgment was given in a preliminary reference from the Supreme Court which related to the determination of the habitual residence of a child for the purposes of Article 2(11) of the Regulation and Article 3 of the Hague Convention in the context of an alleged claim of wrongful removal.

24. The facts of *C. v. M.* are of some importance to a consideration of the judgment of the CJEU. In that case the mother had been permitted by a judgment of a Tribunal de Grande Instance delivered on the 2nd April, 2012 to bring the child from France (where it was habitually resident) to Ireland. The judgment expressly permitted the mother to "set up residence in Ireland" with the child. The father appealed against the judgment. On the 12th July, 2012, the mother travelled to Ireland with the child. On the 5th March, 2013, the Cour d'Appel overturned the first instance judgment and ordered that the child should reside with the father. Following certain other steps, in May 2013, the father brought an action in the High Court in Ireland seeking an order pursuant to Article 12 of The Hague Convention and Article 11 of the Regulation for the return of the child to France upon the basis of an alleged wrongful retention of the child in Ireland. In the High Court the action was dismissed and it was determined that the child had been habitually resident in Ireland prior to the decision of the Cour d'Appel in France. On appeal, the Supreme Court referred a number of questions to the CJEU. The Court of Justice set out its understanding of the questions referred relevant to habitual residence as follows:

> "45. Consequently, having regard to the considerations set out in paragraphs 37 to 42 of this judgment, it must be held that, by its first and third questions, the referring court seeks, in essence, to ascertain whether Article 2(11) and Article 11 of the Regulation must be interpreted as meaning that, in circumstances where the removal of the child has taken place in accordance with a judgment which is provisionally enforceable and which is thereafter overturned on appeal by a judgment fixing the residence of the child at the home of the parent who lives in the Member State of origin, the court of the Member State to which the child has been removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the specific circumstances of the case before it, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention."

25. Having considered Articles 2(11) and 11(1) of the Regulation and Article 3 of the Convention, the Court of Justice concluded that Article 11(1) of the Regulation "can be applied for the purposes of granting an application for return only if the child was, immediately before the alleged wrongful detention, habitually resident in the Member State of origin". It then continued at paras. 50 to 57 as follows:-

> "50 As regards the concept of 'habitual residence', the Court has previously stated, in interpreting Article 8 of the Regulation in the judgment in A (EU:C:2009:225) and Articles 8 and 10 of the Regulation in the judgment in *Mercredi* (EU:C:2010:829), that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgments in A, EU:C:2009:225, paragraphs 31 and 35, and *Mercredi*, EU:C:2010:829, paragraphs 44 and 46).
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> 51. In those judgments the Court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in A, EU:C:2009:225, paragraphs 37 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47 and 56). The Court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in A, EU:C:2009:225, paragraphs 38 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47, 49 and 56).
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> 52. The Court explained that, to that end, account must be taken of, inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State (judgments in A, EU:C:2009:225, paragraphs 39 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 48, 49 and 56). The Court also held that the intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in A, EU:C:2009:225, paragraphs 40 and 44, and *Mercredi*, EU:C:2010:829, paragraph 50).
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> 53. Further, in paragraphs 51 to 56 of the judgment in *Mercredi* (EU:C:2010:829), the Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.
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> 54. The concept of the child's 'habitual residence' in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the abovementioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in paragraphs 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.
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> 55. When examining in particular the reasons for the child's stay in the Member State to which the child was

> removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.
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> 56. Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in paragraph 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.
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> 57. In the light of all the foregoing, the answer to the first and third questions is that Articles 2(11) and 11 of the Regulation must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it."

26. It thus appears that the fundamental approach of the CJEU is that "a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case". In each of the judgments the CJEU has indicated what those "circumstances of fact" may be, in the context of or by reference to the underlying facts in the case in which the reference was made.

27. I would agree with the trial judge of the importance in noting that *Mercredi* was a reference to the CJEU on the issue of determining habitual residence for the purposes of Articles 8 and 10 of the Regulation and, more importantly, in the case of an infant who had left England, its habitual residence of origin, with its mother who had sole parental rights and the sole right to determine at the time she left England in which State the infant might live. This was, in my view, an important consideration. It appears to me that this must be borne in mind in considering what was stated by the CJEU in *Mercredi* in its conclusion at para. 56 of that judgment:-

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

28. Hence the factors identified by the CJEU to be taken into consideration in the above passage must be must be understood by reference to the fact that the mother alone was entitled to make the definitive decision that she and the infant leave England and move to the territory of France. That fact must also be borne in mind when considering certain of the more general statements of principle set out in the earlier paragraphs of its judgment in *Mercredi* and repeated in paras. 50 to 53 in *C. v. M.*

29. By contrast in *C. v M.* the CJEU was considering the determination of the habitual residence of the child in the context of an allegation of wrongful retention. Further and more importantly it was considering the determination by a national court of habitual residence in circumstances where the mother had moved the child lawfully in the sense that she did so pursuant to a court order but one which, as was stated, "could be provisionally enforced" and against which an appeal had been brought. In such circumstances the CJEU specified at para 57 of its judgment that it is important that the national court as part of the assessment of "all the circumstances of fact specific to the individual case" take account of "the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it".

30. Further, as appears from para. 55 of the judgment the CJEU was of the view that "those factors are not conducive to a finding that the child's habitual residence was transferred since that judgment was provisional and the parent concerned could not be certain at the time of the removal, that the stay in that Member State would not be temporary". This comment emphasises the approach of the CJEU to cases such as the present one, where in contrast to the situation in *Mercredi*, the parent who has moved the child does not have the absolute or sole right to determine that the child should move to live in another Member State.

31. In my view, the CJEU in paras. 55 -57 of its judgment in *C. v. M.* makes it clear that, where a national court is determining habitual residence for the purposes of Article 2(11) of the Regulation, part of its assessment of "all the circumstances of fact specific to the individual case" must include the conditions under which the child moved and reasons for the child's stay in the Member State to which it has been removed. On the facts of *C. v. M.* the relevant conditions and reasons which the CJEU identified were the court judgment authorising the removal, albeit one which could be provisionally enforced and the fact that it had been appealed against. In assessing the move by the mother of N from France to Ireland the conditions and reasons under which the move happened were that the father, who holds parental authority and rights of custody, gave consent to the child travelling to Ireland only for visits of limited duration during what he believed to be the mother's parental leave from her French employment and did not give consent to a change of ordinary residence of N. The CJEU in para. 56 of its judgment in that case makes clear that such factors are to be "weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal such as those mentioned in para. 52 of this judgment . . .".

32. Accordingly, in my judgement, counsel for the mother is not correct in her submission that when a national court such as the High Court is assessing "all the circumstances of fact specific to the individual case" an overriding consideration must be as to where in fact the centre of interests of the child at the relevant time lies, in particular by reference to her integration in a social and family environment in the Member State to which she has been removed and in which she is living at the relevant time for the assessment.

It is rather the case that, as appears from the judgment of the CJEU in C. v. M, all of the relevant factors must be taken into consideration, including of course the centre of interests of the child at the relevant time and where relevant, one weighed against the other. The reasons for the child's move and conditions under which she came to be in the second Member State are also relevant factors. In a case such as the present - where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live - a consent given for a visit of limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors. It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given an overriding consideration. The weight to be attached to each will depend on the facts of the individual case. Differing considerations will apply depending on all the different factors identified by CJEU.

33. It is accordingly clear from the case-law of the CJEU that a court should properly take into account as a factor the absence of consent of one parent who holds parental responsibility to a move of the habitual or ordinary residence of the child to another Member State. It follows that the court must weigh that factor against other relevant matters of fact identified which - as the CJEU put it in *C. v. M.* - might demonstrate a degree of integration of the child in a social and family environment in the State to which she has moved. Those latter facts may include the intention of the other parent to settle permanently with the child in the other Member State as manifested by steps taken and all the other potential factors identified by CJEU in paras 50-53 of C v.M. The question of parental authority may be of particular relevance to an assessment of the intention of the other parent who may wish to settle permanently with the child in the new Member State but may not be in a position to make that decision unilaterally if the other parent also holds parental authority.

34. If it were otherwise it could set at nought the entire concept of wrongful retention. In all cases of alleged wrongful retention, the child will have spent time in the Member State to which it has moved. It is of the essence of wrongful retention, as distinct from wrongful removal, that the child moved lawfully from its Member State of habitual residence to another State but has not returned at the end of the period for which the permission or consent was given. Wrongful retention will only arise if at the end of the permitted period the child remains habitually resident in its State of origin. Unless a court may give appropriate weight to the conditions and permissions under which or reasons for which the child moved together with all other relevant identified factors in assessing habitual residence it is difficult to envisage wrongful retention as a concept surviving.

35. Counsel for the mother referred to and placed emphasis upon the objective stated in recital 12 of the Regulation that, in matters of parental responsibility the grounds of jurisdiction are shaped in the light of the best interests of the child, in particular, on the criterion of proximity. It is however also important to note that recital 17 also states as an objective of the Regulation that:

> "In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of the 25th October, 1980, would continue to apply as complemented by the provisions of this Regulation, in particular Article 11 . . ."

Hence another of the objectives of the Regulation is that the prompt return of a child pursuant to the Convention in case of a wrongful retention continues to apply. The grounds of jurisdiction based on habitual residence under the Regulation cannot be intended to apply so as to undermine the concept of wrongful retention or the summary return of a child who has been wrongfully retained out of its Member State of habitual residence. The prompt return of a child wrongfully removed or retained is itself based upon the Convention policy that, in general, such a return is in the best interests of a child. There are of course exceptions where that is not so and it is permissible to refuse an order for return.

36. It follows that I do not accept the submission made on behalf of the mother that the fact that the father has parental authority is not relevant to the issue of habitual residence. In the present case it has been established that no consent was given by the father, enjoying parental authority, to a move of N to live in Ireland in the sense of a move of her ordinary or habitual residence. This is relevant to the court's assessment of the alleged settled intention of the mother to live in Ireland: see C.v. M. at para. 55. Whilst the mother herein plainly manifested an intention to settle back in Ireland, it was also critically her intention to settle in Ireland with N. She evidenced no intention to remain in Ireland without N. She stated that she considered a move of N to Ireland to be in N's best interests. By reason, however, of the parental authority of the father she was not in a position to make a unilateral decision that N move to live permanently in Ireland. This is a factor which affects the weight to be attached to the mother's intention and actions.

37. Finally, whilst I accept that a very young infant such as N is dependent upon her mother as the primary carer and that she had a social and family integration through her in Ireland in July 2014, she also had, in my view, a family and social integration with and through her father in France in July 2014. She had spent time with her father in France as late as the ten days between the 10th and 22nd June. Also, as a very young infant, she did not have a social integration outside of her immediate carers who were primarily her mother and, to a lesser extent, her father. This differentiates her position from an older child of school going age who, depending on the facts, may be considered to have integrated in a social situation outside of the immediate family.

Conclusion

38. Applying the above principles, on a consideration of all the circumstances of fact specific to this case (including that N was habitually resident in France on 23rd March 2014; the conditions under which and reasons for which N moved to and stayed in Ireland on dates from 23rd March, 2014; the duration of her three stays in Ireland prior to 20th July 2014; her trips back to France; her very young age and dependency on a day to day basis on the care of her mother; the fact that both parents had parental authority; the dual nationality of N; the family and social connections of N in France and her family and social connections in Ireland in July 2014; the intention of the mother to move back to live in Ireland with N manifested by the steps taken and the absence of the consent of the father to N moving to live in Ireland), I have concluded that on the evidence before the High Court the father discharged the onus on him to establish that the habitual residence of N remained in France up to and including the 20th July, 2014. Accordingly the trial judge was correct in her decision and the appeal must be dismissed.

Further Issue

39. There was some dispute as to the proper approach of this Court, as an appellate court, to the review of the decision of the High Court on habitual residence as it is a question of fact. On the evidence herein it was a finding of fact made by the trial judge from inferences drawn from primary facts. The evidence of primary facts was exclusively set out on affidavit. There was no cross examination of deponents. In such circumstances it was submitted that this Court is in as good a position as the trial judge to draw the relevant inferences and reach a decision on the question of fact.

40. Counsel for the father, however, drew attention to the approach of the Supreme Court in the judgment of MacMenamin J. in *G. v. G.* [2015] IESC 12 which is the judgment given in the proceedings in which the Supreme Court made a preliminary reference to the CJEU which is the subject of its judgment in *C. v. M.* already referred to. In that judgment, following the preliminary reference to the

CJEU, MacMenamin J. (with whom the other members of the Court, Denham C.J. and O'Donnell J. agreed) upheld the decision of the High Court on habitual residence upon the basis "there was sufficient evidence before the High Court concerning integration, family environment and the nature of the relationship between the child H and her parents, such as to allow the High Court judge to come to the conclusion she did". This Court's attention was also drawn to a recent judgment in the Supreme Court delivered by Charleton J. in *Ryanair Limited v. Billigfluege De GMBH and Others* [2015] IESC 15 in relation to the role of an appellate court on an appeal from the High Court in which there had been a "rigorous analysis of affidavit evidence".

41. Since I reached the same conclusion as did the trial judge on the evidence before the High Court it is unnecessary for the purposes of this judgment to consider whether or not in an appeal such as this, where all primary facts are on affidavit, there is no oral evidence and the High Court decision, albeit one of fact, is based upon inferences drawn from primary facts, this Court should defer to the inferences drawn by the High Court. That issue should be left over for another appeal.

Judge Kelly and Judge Hogan agreed with Judge Finlay Geoghegan