THE HIGH COURT

[2017 16 FJ]

BETWEEN

BEDFORD BOROUGH COUNCIL

APPLICANT

AND

M & ANOR.

RESPONDENT

[2017 966 SS]

BETWEEN

A & ORS.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

[2017 680 JR]

BETWEEN

A & ORS.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

[2017 703 JR]

BETWEEN

A & ORS.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

[2017 709 JR]

BETWEEN

A & ORS.

APPLICANT

AND

CHILD AND FAMILY AGENCY

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 29th day of September, 2017

1. The present proceedings consist of five High Court actions - an application to set aside an order recognising EU family law orders, three judicial reviews and a habeas corpus application, all of which I directed should be heard together. As the then current interim care order under challenge was due to expire on 25th September, 2017 I directed a hearing as a matter of some urgency on 19th and 20th September, 2017. The parties are the parents and their three year old child, represented by Ms. Berenice McKeever B.L., the Child and Family Agency represented by Mr. Feichín McDonagh S.C. and Ms. Sarah McKechnie B.L. (who also addressed the court), and Bedford Borough Council, represented by Mr. David Leahy B.L., and I am grateful to all counsel for their very helpful submissions.

Facts and procedural history

2. The parents' relationship began in 2012. The child was born in another EU member state on 20th December, 2013 and is a citizen of that state.

3. The father acknowledges that his relationship with the mother has at times been somewhat unstable, though he states that this has in no way affected the well-being of the child.

4. The relationship involved certain argumentative and violent incidents including verbal arguments in January, 2014, February, 2015, and April, 2016 and an assault on the mother in July, 2016. These resulted in police visits, and in the case of the first incident a social work assessment which concluded that no intervention was required.

5. It was accepted by the agency in the District Court that when a social worker spoke to the mother in August, 2016 an assessment was discussed in terms of it being voluntary rather than compulsory.

6. There were some limited attempts by social workers to make contact with the parents in October, 2016 but this does not seem to have been followed up.

7. On 17th February, 2017 social workers sent a text and phoned the maternal grandmother indicating a wish to assess the child and threatening to institute court proceedings. The English social workers appear to have made limited efforts to follow up with the parents, who then decided, essentially out of a fear and mistrust of the English care system, to move to Ireland, which they did in February, 2017.

8. Around this time Bedford Borough Council then sought a care order in relation to the child. It is fair to say on the basis of the evidence that the main motivating factor for the care order was their inability to assess the welfare of the child, due to the failure of the parents to engage with them. The affirmative evidence of positive acts by the parents that would give rise to a likelihood of actual harm to the child was quite sketchy – this was a case where the risk was unknown, Bedford wanted to assess it, and sought a care order to do that.

9. On the 24th February, 2017, the English High court (Baker J.) made an interim care order in respect of the child, providing that he be placed in the care of Bedford, and made a further order providing that the child be delivered into care (a "*collection order*"). That order was made without the parents being represented on the date it was made.

10. In May, 2017 the family moved into a boat in a coastal location in Ireland.

11. On 19th July, 2017 Bedford were informed by Interpol that the family had been located on the boat.

12. On the 19th and 20th July, 2017 an emergency care order was applied for in Cork District Court and granted by Judge Constantine G. O'Leary for the duration of eight days. On the 25th July, the agency made an application for an interim care order pursuant to s.17 of the Child Care Act, 1991. The applicants' counsel Ms. McKeever arrived 35 minutes after the hearing had commenced, and their solicitor was not in attendance. Judge O'Leary held that the threshold criteria for such an order was met, though only granted a short order in accordance with fair procedures, to permit the applicant time to prepare their defence.

13. On 20th July, 2017 the two English orders were served on the parents.

14. On 25th July, 2017, the interim care order was extended by Judge O'Leary.

15. On the 31st July, 2017 following a further hearing, the learned judge held that the child's habitual residence was in the UK and that the Irish court had no jurisdiction save for protective measures. Judge O'Leary was satisfied that the threshold for s.17 criteria was met, and made a 29 day order. The reasons given by the court for this decision emphasised the dangers inherent in the applicants' proposed plans to sail to Spain.

16. The father avers (uncontradicted, which I accept) that the social worker Ms. Higgins has told him that the foster carer "*had advised that she had absolutely no concerns in relation to [the child's] care*". He says that agency social workers have said things like "*he is clearly missing you (i.e., the parents) and is distressed*". He says "*[w]e witness at each access just how being forcibly kept away from us is affecting him and just how upset he is. He keeps asking to go home and the following are examples of his direct quotes and reactions …* 'do you not love me anymore'; 'I want to be with my mummy and daddy', 'I love you', 'do you miss me'; *that he will* 'tell the man to leave mummy alone and let us be together again' … 'how is … (our dog)', 'are you sad when I'm gone', 'I miss you so much', … *at the end of access … [h]e has hidden under the table and held on to the table legs crying and saying* 'no, no, no, no, no, I'm not going, I want to be with my mummy and daddy'." (para. 111).

17. The father also avers (uncontradicted, which I accept) that social workers have said that "'*we must be very proud' and that he* 'is a credit' *to us and have said again to us that* 'there's no question of your parenting ability'. *Ms. Higgins, social worker, has told us that she* 'can tell that [he] is a cared-for child'." (para. 112).

18. Indeed in substance Ms. Higgins confirmed some of these aspects in her own evidence in the District Court on 25th July, 2017. She stated that she had not formed any opinion as to the child being likely to be harmed by his parents and had not found any evidence to suggest that he would be (p. 39 of the transcript).

19. On 22nd August, at a hearing commencing at around 11.52 a.m., Barrett J. granted an *ex parte* application by Bedford for orders recognising the English orders. Later that day in an application commencing around 2.55 p.m. he granted the parents leave to apply for judicial review of the order of 31st July, 2017. He then stayed his earlier *ex parte* order in favour of Bedford, in the light of submissions from the parents.

20. The applicants then set about notifying Bedford and the agency of the stay. Bedford stated that if the court's written order was not furnished to its English office by 5 p.m. that the child would be brought to the airport and removed from the jurisdiction by its social worker and that 5.30 p.m. was its cut off point in order to prevent this from happening. The father also phoned the English social worker to inform the council that it would be contempt of court to ignore the order and she hung up. Mr. Smyth avers that the English social worker informed him that removal would occur absent a written order being furnished, after which she hung up. I pause to observe here that while the status of solicitors as officers of the High Court is sometimes associated with, and quoted in, situations where they are in hot water of some kind, it has an upside which is that when a solicitor informs a third party of a court order, he or she does so with either the express or implied authority of the court as one of its officers. It is as much a contempt to ignore a court order communicated verbally by a practising solicitor as it is to ignore an order communicated in writing. Third parties can by all means request written confirmation but on peril of contempt they should not while awaiting such confirmation act contrary to orders communicated (whether verbally, by email or otherwise) by officers of the court. The stance adopted here was thus inappropriate.

21. The first collection order was due to expire on 24th August, 2017. A second collection order was made in England on 23rd August, 2017, and I directed that if Bedford wished to apply to have this enforced they should bring a motion before the court by 13th September, 2017. However they did not do.

22. The second order is due to expire on 23rd February, 2018. Mr. Leahy has hinted that it is envisaged that some further collection order needs to be applied for.

23. On 24th August, 2017 Binchy J. declined *ex tempore* to continue the stay on the *ex parte* order, apparently on the grounds that he had no jurisdiction to do so.

24. On 28th August, 2017 the agency applied for an extension of the interim care order for a further 29 days, which was granted by Judge David Waters.

25. The applicants then brought *habeas corpus* proceedings seeking the release of the child by the agency. I directed an inquiry, and in parallel with that subsequently granted the applicants leave in a further judicial review primarily challenging the proposed removal of the child from the State and also in a third judicial review challenging the order of 28th August, 2017. I stayed the removal of the child from the State pending determination of all of the foregoing proceedings. In order to case manage this multi-faceted set of interlocking proceedings I directed that all matters travel together and ultimately be heard together. I also directed the parties to prepare an indicative issue paper which while not binding has nonetheless been useful in making a first stab at identifying the issues.

26. The matter was heard at some length on 19th and 20th September, 2017. The care order at that point was due to expire on 25th September, 2017. In order to obviate the need for an immediate decision and to give me space to prepare a judgment, very helpfully the parties agreed that an order extending the care order for 2 weeks would be made on consent on 25th September, 2017 on the basis that if the order of 28th August, 2017 was quashed, the order of 25th September, 2017 would be quashed also, and if it was upheld, the applicants would have the opportunity to contest any further extension when the matter was next before the District Court on 9th October, 2017. Such a procedure preserves everyone's rights and gives the court more of a breathing space to consider the issues, so perhaps that type of procedure could usefully be adopted in future cases where review is sought of repeating orders with limited lifespans. I am grateful to all of the parties for their assistance in this regard.

Does the court have jurisdiction to set aside the order of Barrett J. or can it only proceed by way of "*appeal*" under the Council regulation 2201/2003?

27. The general law is that an *ex parte* order is always available to be set aside at the suit of a party affected: *Adam and Ors. v. Minister for Justice and Equality* [2001] 3 I.R. 53, *per* McGuinness J. As Hardiman J. put it, "*any order made ex parte must be regarded as an order of a provisional nature only*" (p. 77). While an *ex parte* order can in theory also be appealed, it is a more appropriate remedy to apply to set it aside (as suggested by Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed. (Dublin, 2010) at pp. 708-709) as not only is this normally much quicker but more fundamentally an application to set aside ensures that the contest between the parties occurs at first instance level rather than at appellate level. This perhaps explains the comment of McCarthy J. in *The State (Hughes) v. O' Hanrahan* [1986] I.L.R.M. 218 at 221 to the effect that an *ex parte* order cannot be appealed save by the applicant. Perhaps the conception is that an appeal could be regarded as theoretically existing but an appellate court might in practice be minded to dismiss such an appeal in limine on the basis that the respondent to the order should more appropriately have applied on notice to set aside in the court in which the order was made.

28. The grounds on which Ms. McKeever seeks to set aside the order boil down to an allegation of non-disclosure in the application to Barrett J., together with a complaint that the order was not recognisable under Council Regulation (EC) 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 ("Brussels II (bis)"). Mr. Leahy submits that the more appropriate (or only appropriate) procedure is to apply by way of "*appeal*" (which requires some explanation) rather than by way of an alleged general jurisdiction to set aside.

29. In my view the argument that there is no jurisdiction to set aside an *ex parte* order under the Council regulation (on grounds such as non-disclosure) is unconvincing. The general jurisdiction to set aside an *ex parte* order is a rule of the national legal system, which can be applied to EU law rights and procedures subject to the principles of equivalence and effectiveness. It is being applied in an equivalent manner to EU law as it is to domestic law, and likewise there is no suggestion that the application of this jurisdiction to set aside to EU-related orders renders European rights impossible or unduly difficult to uphold. I would therefore consider that there is a general jurisdiction to set aside any *ex parte* order, even one arising from EU law, and that jurisdiction applies here.

Should the parents' complaints regarding the order of Barrett J. be dealt with by way of a set aside application or by way of "*appeal*" under the Council regulation?

30. The existence of a jurisdiction to set aside does not mean that it should be exercised. As noted above, the parents' complaints relate essentially to non-disclosure and to non-compliance with the Council regulation. Mr. Leahy accepts that the latter points can be dealt with by way of "*appeal*" under the Council regulation.

31. As regards the allegation of non-disclosure, failure to put adequate evidence to justify the order is a ground to set aside (*Adam*) as is where there is material non- disclosure or lack of *bona fides* (*Adams v. D.P.P.* [2001] 2 I.L.R.M. 401 (Kelly J., as he then was)).

32. It is clear that some confusion had broken out in the sense that Barrett J. was moved to grant a stay on the recognition order later in the day on which it was granted. But confusion is not to be equated with non-disclosure or misleading the court. I understand from Mr. Leahy that he opened the relevant exceptions in the Council regulation, referred to the English order having been made without notice and referred to the logistical arrangements, *i.e.*, the proposal to move the child to England. In the absence of any application having been made prior to the day of the hearing before me to obtain the DAR, there is nothing to contradict those assurances apart from the subsequent developments before Barrett J. which are capable of innocent explanation. Therefore the claim of non-disclosure has not been made out, the onus being on the party so alleging. Given that the remaining issues can be dealt with by way of an "*appeal*", I will proceed in that manner rather than by further entertaining an application to set aside.

33. Some corresponding attempt to criticise the applicants was made on the ground that they did not say to Barrett J. that the collection order would expire if stayed. But Ms. McKeever informs me, and I entirely accept, that she had no knowledge or consciousness of any such consequence at that time. So no breach of duty arises there either.

To whom is the "appeal" from a High Court order under 33 of the Council regulation?

34. Article 33 of the Council regulation provides that a "*decision on an application for a declaration of enforceability may be appealed against by either party*" (para. (1)), *to be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to art. 68*" (para. (2)). Such an appeal "*must be lodged within one month of service"* of the declaration of enforceability, or 2 months if the party "*is habitually resident in a Member State other than that in which the declaration was given*" (para. (5)).

35. The latest list under art. 68 is published in OJ C 85/6 of 23.3.2013 and provides that an application under arts. 21 and 29 and an appeal under art. 33 shall be lodged with the High Court. This makes conventional sense where the original order is made *ex parte* by the Master, under O. 42A r. 13(1) of the Rules of the Superior Courts. However, as with any matter before the Master, the

requirement to apply to him can be dispensed with by the court, which was done by Barrett J. – see also *Carmarthenshire County Council v. C.D.* [2016] IEHC 418 *per* Finlay Geoghegan J. at para. 16. In the latter case Finlay Geoghegan J. heard the application to enforce an English order by way of a notice of motion which would have involved notice to the respondent.

36. But one then has to confront a semantic hurdle because where the original *ex parte* order is made by a High Court judge, the "*appeal*" under arts. 33 and 68 remains to the High Court. We would conventionally call this a re-hearing on notice, or perhaps an application to set aside, and would reserve the term "*appeal*" for an application to a higher court. But (not for the first time) it must be recognised that words in EU law have autonomous meanings separate from how they are used in national law, and one must not get distracted by the word "*appeal*" so as to overlook the fact that the regulation provides a procedure to challenge the order which can only be invoked before the court specified in the art. 68 notice. This is the High Court. Therefore what the regulation calls an "*appeal*" is more akin in practice to an application to the court on notice to set aside its own order. The regulation cannot be read as meaning appeal to a higher court because that would do violence to the principle that the courts involved have to be expressly specified – as the U.K. Supreme Court held when it found that it had no jurisdiction to hear an appeal under the Council regulation as it was not so specified, emphasising that jurisdiction must be carried out strictly in accordance with the art. 68 list (In *re D* [2016] A.C. 1117).

37. Thus Ms. McKeever's motion by way of "*appeal*" under the Council regulation is properly brought in this court, on notice, as Mr. Leahy accepts.

Does the enforcement of an EU order require prior express recognition?
38. As a ground to set aside the enforcement of the English orders, Ms. McKeever first submits that an EU order cannot be enforced without a prior positive Irish decision expressly recognising such EU order. Mr. Leahy relies on art. 21.1 to the effect that a judgment shall be recognised in the other member states without any special procedure being required. The argument is that judgments are self-recognising, without an order recognising them being required. This is similar to the "*full faith and credit*" clause in Article IV, Section 1 of the U.S. Constitution, applied, for example, recently in *V.L. v. E.L.* 577 U.S. ___ (2016) so as to require the Alabama courts to recognise a same-sex adoption under the law of another state. As noted *per curiam* in slip op., p. 3, the clause serves "*to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation"* (*Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 277 (1935)).

39. Ms. McKeever submits that the EU order requires an affirmative act of prior recognition before it can be enforced. This does not appear to be the correct interpretation of the regulation, but in any event the point is not relevant because the orders here were the subject of an order of recognition prior to enforcement. EU law proceeds on the basis that the order is self-recognising unless and until "*an order of non-recognition has been made*" (Case C-92/12, *Health Service Executive v. S.C.* [2012] ECR I-255 para. 105). In my view the intent of the Council regulation is that the order (provided it is recognisable) is self-recognising without the need for a specific declaration in that regard. An order which is self-recognised is fully capable of being the subject of a declaration of enforceability, even without a declaration of recognition.

40. As I have mentioned, Order 42A r. 17 of the Rules of the Superior Courts uses the laconic formula that an application for recognition shall be made in accordance with the preceding rules, but does not say which of the preceding rules; some involve an *ex parte* application (e.g. r. 5) whereas others involve motion on notice (r. 13(1)). It would be helpful to be more specific. Nor does the Order refer to an application for non-recognition; to this extent there appears to be a lacuna in the rules. Furthermore it would be inappropriate to seek an order for non-recognition (especially *ex parte*) if there was already an order for recognition in existence. The appropriate course would be to apply (by way of "*appeal*", i.e., rehearing on notice) to have the order for recognition set aside. A declaration of non-recognition would then follow as a consequential relief. Drafting more specific rules to encompass all of these situations might not be a straightforward task.

41. Applying that view of the law to this case, Barrett J. has made an affirmative order recognising the English orders, as well as one enforcing those orders. It would be illogical and contradictory for the court to also entertain an application for non-recognition while this order is outstanding. The appropriate procedure therefore would be either set aside the order of Barrett J. coupled with an order for non-recognition, or an appeal (i.e., a rehearing) under the regulation, without prejudice to the application to set aside.

42. Under this heading then, the absence of a specific prior recognition is not a bar to enforcement; but in any event the order of Barrett J. did expressly recognise the orders so the point does not really arise.

Should the order of Barrett J. recognising and enforcing the English orders be set aside on art. 23 grounds?
43. Chapter III of the Council regulation is headed "Recognition and Enforcement". However, these are clearly distinct concepts. Section 1 of Chapter III is headed "Recognition".

44. Section 2 of Chapter III is headed "Application for a declaration of enforceability", reinforcing the point that enforceability is separate from recognition.

45. Art. 28(1) provides that a judgment on the exercise of parental responsibility which is enforceable in a member state of origin and has been served shall be enforced in another member state "*when, on the application of any interested party, it has been declared enforceable there*".

46. Thus enforceability depends on:

(i) impliedly, the order being recognised or recognisable, although oddly this is not expressly stated;

(ii) the order having been served (art. 28(1)); and

(iii) the order having been declared enforceable in the receiving member state.

47. Art. 31(1) provides that neither the child nor any person against whom enforcement is sought shall be entitled to make any submissions on the application. Such an approach, which not only permits an *ex parte* application but appears to preclude any other kind of application, appears to run contrary to Irish (and possibly Charter) conceptions of the requirements of the separation of powers: *Cashman v. Clifford* [1989] I.R. 121 *per* Barron J. at 124.

48. Article 23 provides that *inter alia*:

"*A judgment relating to parental responsibility shall not be recognised:*

> *(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;*
>
> *(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;*
>
> *(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document 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 the judgment unequivocally;*
>
> *(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard"*

49. The grounds for non-recognition should be kept to a minimum and construed narrowly (*Belfast Health and Social Care Trust v. D.S.* [2012] 3 I.R. 815 applying *Re S* (Brussels II: Recognition: Best Interests of Child) (No. 1) [2004] 1 F.L.R. 571*; Bamberski v. Krombach* (Case C-7/98) [2001] 3 W.L.R. 488; In *re D* [2016] 1 W.L.R. 2469 at 2497, para. 108 *per* Briggs LJ.)

50. The applicants seek to set aside the *ex parte* order of Barrett J. of 22nd August, 2017 recognising two English orders of 24th February, 2017 pursuant to chapter III of the Council regulation, for a number of reasons. While complaint is made under exceptions to recognition (a) and (b) (in particular under the latter heading, Ms. McKeever submitted that there was no evidence that the need to hear the voice of the child had been complied with (see In *re D* [2016] EWCA Civ 12, [2016] 1 W.L.R. 2469 at p. 2479 para. 26 *per* Ryder L.J.), that the English court had to apply its own mind to this issue and failure to do precludes recognition, and that if the court is not provided with full information as to the circumstances of making of the original order, it may be that such gaps in evidence also precludes recognition or enforcement), I do not need to determine those issues having regard to my conclusions on exception (c).

51. It is clear that it is not the case that the parents have "*accepted the judgment unequivocally*". The issue under para. (c) then boils down to whether the parents were "*not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence*".

52. The collection order itself states that the order was made at a hearing without notice to the parents. Mr. Leahy submits that para. (c) does not apply because he says that the parents were served with "*the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence*". He attempts to rely on In *Re D* [2016] EWCA Civ 12, [2016] 1 W.L.R. 2469. The passage relied on at p. 2496 paras. 100-101 relies on *Klomps v. Michel* [1981] R.C.R. 1593 at para. 11 which refers to "*any document … service of which enables the plaintiff, under the law of the state of the court in which the judgment was given, to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention*". That is clearly not the case here. Service of an order after the event is not such a document. The regulation clearly refers to an initiating document of some kind.

53. The paragraph regarding service in the grounding affidavit for the application before Barrett J. unfortunately misses the point because it focuses only on service of the English orders after they were made, and does not mention the fact that the orders were made without advance notice.

54. Mr. Leahy points out that the parents were served with the English orders, after they were made, and submits that this is an "*equivalent document*". However orders are not an equivalent document to documents which institute the proceedings. The instituting documents precede any order and are meant to afford a reasonable opportunity to contest the order before it is made. For the purposes of the Council regulation, orders made without such prior service and an opportunity having been meaningfully given are not recognisable and therefore not enforceable. The order of Barrett J. must therefore be set aside. In fairness to Barrett J. he was dealing only with an *ex parte* application and did not have the benefit of the full argument which I have heard. Furthermore, the stay which he granted has very helpfully enabled matters to be freeze-framed to allow that full argument to take place.

55. While Mr. Leahy submits that there was no jurisdiction to stay enforcement, I read the situation as being one where it is not a question of having to stay the entire order pending a hearing but rather staying the removal of the child from the State (objection to which O'Donnell J. in the arguably different but related context of *Child and Family Agency v. C.J. and Anor*. [2016] IESC 51 described as "*disturbing*" (para. 14)). The Council regulation does not seem to exclude such a more limited stay, and indeed if it did that would raise a question as to whether the regulation is to that extent contrary to the right to an effective remedy under art.47 of the Charter of Fundamental Rights and art.13 of the European Convention on Human Rights.

56. The lack of possibility of a stay raises a fair procedures issue in terms of the hearing at the enforcement stage. Mr. Leahy says there is no problem because you get a hearing in the member state of origin. But one does not get a hearing on the issue of enforceability. By analogy, the Luxembourg court has recently held (Case C-63/15*, Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, 7th June 2016) that a person subject to transfer under the Dublin regulation has the right to challenge procedurally the criteria for transfer (specifically, that "*an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation*"). Could it be seriously said that a third-country national has more rights to challenge the transfer of persons across a frontier than an EU citizen has? That seems a highly questionable proposition and could raise issues of discrimination contrary to the Charter.

57. It was held in *Health Service Executive v. S.C.* para. 125 that, in the light of the need for urgency under the regulation, an order becomes "*enforceable at the point in time that the requested member state declares… that the order is enforceable*" – in this case 22nd August, 2017. As stated in para. 129, it follows that "*appeals brought against [a] decision [on an application for a declaration of enforceability] of the court of the requested member state must not have a suspensive effect*". This is repeated in para. 133.

58. Mr. Leahy interprets this to mean that there cannot be a stay, and says that that was his argument before Binchy J. But that confuses the issue of suspensive effect with that of staying any element of the order. To say that an appeal does not have suspensive effect merely means that the appeal *in and of itself* does not suspend the decision appealed against. That is a fundamentally different thing to saying that the court has no jurisdiction to stay any element of the decision.

59. The entitlement of the court to stay an order could be viewed as simply a rule of national civil procedure which can be applied to EU obligations as long as that is done in conformity with the principles of equivalence and effectiveness. Such a rule in no way contravenes those principles. There is no doctrine that EU obligations are somehow immune from normal and general rules of the

national legal system, unless, as I say, the application of those rules would be carried out in a non-equivalent manner or in such a way as to impair the very substance of an EU law right. That is not the case in the context at issue here.

60. It is notable, as mentioned above, that in C.J., O'Donnell J. said that it was "*disturbing*" that the agency "*resisted an application for the stay in the High Court with a consequence that an irreversible order was made an order moreover which the Court of Appeal and … this Court considers to have been wrongly made*" (para. 16).

61. Mr. Leahy suggests that a stay was available in the *C.J.* case because no return order was made by the Scottish court, and therefore there was no EU law obligation to proceed without a stay and submits that the situation here is different. But there is clearly something, perhaps much, to be said for the contrary position, as set out above. Fortunately I do not need to pursue that issue further because for the reasons set out above, I am setting aside the order so the question of staying any element of its enforcement does not arise.

Is the proposed return of the child unlawful in the absence of an order of the English court expressly requiring return?
62. In *Child and Family Agency v. C.J.*, O'Donnell J., at para. 14, says that a High Court application by the agency was "*quite misconceived*" for the removal of a child to the U.K. where the U.K. court had not made an order that removal to there was in the best interest of the child. Merely because another jurisdiction is that of habitual residence (assuming *arguendo* that to be the case here), it does not follow that the child must be sent there "*without any court considering if that was in the best interest of the child*". Return does not automatically follow from a determination of habitual residence (para. 18).

63. In *Western Health Board v. K.M.* [2002] 2 I.R. 493 the District Court (Judge Mary Devins) stated a case seeking answers on whether a health board can lawfully place a child with relatives outside the State and whether the District Court could do so. The Supreme Court answered these questions in the negative and affirmative respectively. But that approach involves an affirmative order of removal.

64. On such an approach, a care authority such as Bedford would not be entitled merely by virtue of being a custodian of the child to remove the child to England. It would have to obtain some form of court order to do so.

65. The English orders were in the context of a family in England some months ago, and were designed to ensure that the child could be assessed. That situation has changed very considerably. All members of the family are now here and the English court has not expressly ordered that the child be relocated from Ireland to England, nor has such an order been made enforceable here. In those circumstances the proposed return of the child to England without further order is and was unlawful.

66. It is contended by the parents that a move of the child now to England is not in his best interests, and that such best interests militate in favour of keeping him in Ireland. Such matters would have to be expressly and properly considered by any court minded to make an order specifically requiring the removal of the child from the State.

Was there an abuse of rights by reason of a proposal to remove the child from the country without an *inter partes* hearing?
67. What is at issue under this heading is the allegation that Bedford and the agency were intending or attempting to remove the child from the jurisdiction at minimal notice without having any prior form of *inter partes* hearing or even notice sufficient to allow an effective opportunity to challenge that removal. It has been clear ever since the Supreme Court in *The State (Quinn) v. Ryan* [1965] 1 I.R. 70 that such an opportunity has been a requirement of Irish law.

68. Even if (which I do not accept) the English order once enforced *ex parte* was enough without more to remove the child, it is a breach of rights to remove a child (or any person) from the country without a reasonable opportunity for the removal to be challenged. The right to an effective remedy under the Charter and (via the ECHR Act 2003) the ECHR, frequently referred to in substance as the right of access to the court in Irish jurisprudence, is virtually the most fundamental right of all, because without it, any other catalogue of rights has little or no meaning. To allow steps to be taken adverse to a person which deprive that person of any opportunity of challenge is a negation of rights.

69. Again, the argument that rights can be vindicated in the other EU state is misconceived because that state cannot address the question of whether the order should have been recognised in the receiving state. Any challenge on the latter issue is negated by peremptory removal of the child.

70. In this case, the English orders being enforced were made in February, 2017. They were recognised 6 months later by order of Barrett J. on 22nd August, 2017. That order arrived by fax in the office of the applicants' solicitor Mr. Smyth at 12.45 pm on the day the order was made. There was no urgency whatsoever in bundling the child onto a plane that very evening and indeed to do so would only have had the effect of eliminating any reasonable opportunity for challenge.

71. Ms. McKeever submits that "*This manoeuvre was pushed through so quickly that had we not happened to be in the High Court that day, the child was due to fly out that evening."*

72. Mr. McDonagh suggests that it is "*far fetched*" to suggest that the agency acted inappropriately and that there was no evidence to this effect. His attitude to removal was that "*there was a High Court order that permitted that …There's nothing to see here*".

73. Mr. Leahy submits that there is no constitutional difficulty because EU law takes priority, and EU law is predicated on the basis of (absolute) mutual trust. He rejects any tension between EU law and the ECHR. There was no conspiracy because EU law was followed. He says that they had to act swiftly by virtue of art. 31 of the regulation and by virtue of the best interest of the child.

74. But EU law is subject to general human rights principles as set out in the Charter, and a removal of a child at the sort of breakneck speed involved here (especially where the child is in care and so not at imminent risk) contravenes such principles.

75. Mr. Kelleher avers in his replying affidavit that the agency is obliged to comply "*with any valid order which is enforceable within this jurisdiction to return the child … and indeed could be held in contempt of court for failing to comply with any such order"* (para. 13). However this misunderstands the position and obscures the point that the issue under this heading is not so much what the agency were doing as the fact that they were doing it in such a way as to nullify access to the court prior to removal. Firstly as noted above, the order was not an "*order … to return the child*" in the sense of relocating the child from Ireland to England. Relocation was not expressly provided for in the order. But secondly, the order (and certainly that of Barrett J.) did not require immediate removal. In this regard a prohibitory order could be different from a mandatory order. A prohibitory order would, generally, require instant compliance – stop doing whatever it is you are doing that the court objects to. A mandatory order on the other hand generally involves a time scale, either expressed or implied, for the taking of specified steps. If none is expressed then generally a

reasonable time applies. Such an order is to be seen in context. While I appreciate that Mr. Kelleher's averment was probably inserted on legal advice rather than being something he dreamed up himself, the notion that the agency would be in contempt of court for not implementing the instant removal of a child from the country under an *ex parte* order is absurd. The reverse is the case: the Supreme Court has held that it is a contempt of the court to attempt to circumvent the court's jurisdiction by removing someone from the State so speedily that the right to challenge the removal in court is by-passed.

76. In *The State (Quinn) v. Ryan* [1965] I.R. 70 the Supreme Court held that it is contempt of court for police officers to arrange to remove a prisoner out of the jurisdiction of the Irish courts on an English warrant with such speed that he or she has no opportunity to apply to the Courts to question the validity of such warrant or to apply to the court for an order of *habeas corpus.*

77. When landmark constitutional principles like this are established in the most dramatic manner possible by the Supreme Court a lifetime ago in 1965, complacency can set in and one can assume that we are now well beyond the point where such things can happen. But the present case is in substance the same situation. Had the proposed transfer not been blocked by the last-minute stay ordered by Barrett J., the child would have been removed without any effective opportunity to challenge the process. That is not a lawful procedure within either an Irish or an EU frame of reference.

78. While the applicants seek declaratory relief to this effect (and regarding the need for an affirmative order expressly allowing removal) in the second judicial review, it is not necessary to grant a specific declaration in order to make the legal position clear. That can more effectively be accomplished by addressing the matter in this judgment as I have attempted to do.

79. I should also mention that complaint is also made that the agency directly suggested to the parents to drop the judicial review proceedings. This was inappropriate. There is however no need to grant specific declaratory relief to that effect in order to make that clear.

Does any issue with enforceability of the English orders affect the validity of the care order?
80. It seems to me that this question should be answered in the negative on the specific facts of this case. The District Court did not purport to rely on the English orders when making the orders currently under challenge.

Did the agency have jurisdiction to bring the interim care proceedings?
81. The complaint under this heading is that the proofs for the application were not in order and no assessment had been offered to the family. Particular emphasis was placed on s. 3 of the Child Care Act 1991 requiring it to be the case that adequate care and protection was not being provided before an application could be made.

82. In my view it is not necessary to answer this question in the form posed in order to resolve the proceedings. Any shortcomings in the jurisdictional base of the application or in the agency's proofs creates a corresponding issue going to the validity of the order made and can be examined under that heading. Such issues do not require separate treatment or discussion under this heading.

83. I would therefore refuse the relief at para D(i) of the first judicial review. Having said that, one hopes and anticipates that any issues that do arise in any given proceedings with District Court orders made will be duly taken into account in future decisions by the agency as to whether to bring proceedings and if so of what nature. But it is not necessary to judicially review decisions of the agency to bring proceedings in order to achieve that outcome.

Did the agency improperly acted as an agent or vehicle for Bedford?
84. Ms. McKeever submits that the agency is improperly acting as a "*holding agent*" for Bedford.

85. Mr. Padraig O'Driscoll stated in evidence to the District Court (Q. 41) that "*that is what we are seeking[,] to facilitate the safety of the child until the UK Orders are executed*".

86. Mr O'Driscoll said in evidence that "*our main concerns is a flight risk*" (Q32). His evidence was that the application was made "*As a courtesy to our colleagues in the UK and obviously for imminent child protection concerns, we acted upon that. They subsequently provided evidence, Judge, to the courts. They are seeking the return of the child to complete their assessment and to ensure the child safety*".

87. Reliance is placed on *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550 where *Quinn* was applied. A scheme whereby the prisoner was held on a makeweight basis so as to be available for detention for the purposes of extradition was held to be a conscious and deliberate violation of his constitutional rights (*per* Finlay C.J. at p. 577).

88. Whether the agency was primarily motivated by a desire to provide a courtesy to their English colleagues, or by *bona fide* imminent child protection concerns, is something that could only really be answered adversely to the agency after cross-examination of its deponents. In the absence of any application in that regard I would not be prepared to uphold the allegation that the agency essentially inflated its case against the parents in order to provide a courtesy to Bedford. That does not of course mean that its case was weighty or substantial, quite the contrary; just that I would not be prepared on the current state of the evidence to find it was advanced improperly. Nor does it mean that if the agency were to obtain any future order of this nature, and be cross-examined on their basis for doing so, that they might not be open to such a finding if such were established. But I might be forgiven for saying that, judging from what is on the papers and what I have heard from counsel (including the position that the ocean trip is being shelved), unless there are any radically significant new developments, the agency might profitably pause to reflect on the state of the material overall before seeking to bring any further care proceedings in relation to this child. Certainly it should only do so if there were valid and sufficiently pressing imminent child protection concerns (not readily apparent from the materials in the present circumstances), and not by way of seeking a holding position, addressing flight risk or offering a courtesy to Bedford.

Are the applicants' contentions appeal points rather than judicial review points?
89. Mr. McDonagh submits (relying on *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 Barron J., discussed at para. 16-17 in Hogan and Morgan, *Administrative Law in Ireland*, 4th Ed. (Dublin, 2010)) that many of the points being raised by the applicants are more appropriate for an appeal rather than for judicial review. He submits that any argument that the learned judge got the balance wrong between parental rights and risk to the child is an appeal point not a judicial review point. It is not enough for the High Court to determine that it might have come to a different view. Weight of factors is generally a matter for the decision-maker. But the complaints made here go well beyond having struck the wrong balance – indeed the whole balancing exercise is more or less absent from the decisions made. That is not a complaint about something properly within the domain of the decision-maker or something more appropriate to an appeal.

90. The appellants did not appeal any of the District Court orders but that does not preclude them from seeking judicial review if they

have a judicial review point (*Crowley v. A.I.B.* [2016] IEHC 154). An appeal point does not become a judicial review point merely because no appeal is taken. At the same time, a judicial review point does not cease to be a judicial review point simply because an appeal is available. The dividing line is that appeal points deal with merits; judicial review points deal with legality (*Sweeney v. Fahy* [2014] IESC 50 (Unreported, Supreme Court, 31st July, 2014) *per* Clarke J. at paras. 3.8 to 3.15), and here we are in the territory of the latter.

91. While the applicants did have a right of appeal to the Circuit Court, given the 28 day nature of the orders it is not clear whether that remedy could have been effectively exercised in the limited time but even if it could, their points go to legality rather than merits and are appropriate therefore to judicial review.

Should the first set of judicial review proceedings be dismissed as moot?
92. The first set of judicial review proceedings relates to the first interim care order, which is challenged on numerous grounds. As I pointed out in *O'Connell v. Solas* [2017] IEHC 242, *"[a]ny temporary but repeating process is a candidate for an exception to the mootness doctrine. The classic scenario for departure from the mootness doctrine is in relation to short term matters which are "capable of repetition, yet evading review"* (*Southern Pacific Terminal Co. v. Interstate Commerce Commission* 219 U.S. 498 (1911) at p. 515 cited by Blackmun J. in the context of pregnancy in *Roe v. Wade* 410 U.S. 113 (1973) at p. 125)." Interim care orders have a limited lifespan and thus come well within the category of matters capable of repetition, yet evading review (see also *Goold v. Collins* [2004] IESC 38).

93. However, more fundamentally there is another element to the order of 31st July, 2017 which is the determination that the respondents and the child are habitually resident in England. That element of the order is not moot on any view and I understood this to be accepted by Mr. McDonagh.

94. The challenge in the first judicial review to the order of 25th July, 2017 might on one view be moot given that the initial care order has now expired. While review of repeating, time-limited orders should normally focus on the current order rather than raking over history (*Grant v. Governor of Cloverhill Prison* [2015] IEHC 768, *W.Q. v Mental Health Commission* [2007] 3 I.R. 755), in the present case given the fundamental issue of breach of fair procedures that affected that hearing discussed below, and given that protective measures were purportedly ordered under art. 20 of the Council regulation, it seems appropriate to proceed to entertain that challenge in the present circumstances.

Should the second set of judicial review proceedings be dismissed on jurisdictional grounds?
95. Mr. Leahy raises a jurisdictional question regarding reliefs (v) and (vi) in JR 2017/703 JR which seek to restrain the removal of the child from the jurisdiction or his transfer to a third party without parental consent or an order of the court. He submits that such relief goes to parental responsibility as defined in art. 2(7) of the regulation (see also art. 2(10)). By virtue of arts. 16 to 20 of the regulation, unless the Irish court has jurisdiction (which he says is not the case), the court is limited to provisional including protective measures (art. 20), not a substantive injunction.

96. The fallacy with the argument that there cannot be a substantive injunction is that even if *arguendo* one accepts that the court is limited to protective measures, these can be provided in the form of a substantive injunction such as that (apart from the situation of parental consent) the child cannot be removed from the State without an express order. That is substantive in form but provisional or protective in substance. The proposal to remove the child without any form of express Irish court order in that regard makes such relief appropriate.

97. In terms of relief sought on the second judicial review, it is not necessary to grant declarations in order to clarify the legal position. That can be frequently done by way of a judgment just as effectively as by way of a declaration, if not more so. Thus because I consider that the findings as set out in this judgment are sufficient for this purpose, I would decline to grant the declarations sought at paras. (i) to (iv) in the second judicial review on the grounds that such relief is unnecessary given the position outlined in this judgment. However I would grant injunctive relief, albeit in somewhat narrower terms than is sought at paras. (v) and (vi) pursuant to O. 84 r. 18(2).

Should the order of 31st July, 2017 including the determination that the applicants are habitually resident in the U.K. be quashed on the basis of a lack of fair procedures in the District Court?
98. The order including the determination that the applicants are not habitually resident was challenged on two essential grounds, insufficiency of evidence and lack of fair procedures.

99. It is not necessary to deal with the first ground for reasons that will become apparent. To put the challenge to the fair conduct of the proceedings in context, I might mention that in another recent case, what I had thought to be a relatively innocuous comment by a judge (about which the judge said at a later hearing that he would not recuse himself because, as he said, "*do you know something I cannot even remember seeing you, not alone saying anything so I won't*" and when further queried on the matter said he could not remember making the comment - "*I haven't a clue … to be quite honest and if I did say anything I won't hold it against you anyway*") was recently held by the Court of Appeal (reversing an *ex tempore* decision of mine) to give rise to grounds for leave to seek judicial review: *Towey v. D.P.P.* [2016] IECA 185 *per* Sheehan J. para. 9. The court applied the judgment of Denham J. (as she then was) in *Bula Limited v. Tara Mines Limited* (No. 6) [2000] 4 I.R. 412. (at p. 441). The test is "*… whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person*." (See also *Goode Concrete v. CRH Plc. & Ors* [2013] IESC 39 and *Commissioner of An Garda Síochána v. Penfield and Another* [2016] IECA 141). The court considered that there were grounds to contend that the judge "*did not address his mind to the relevant question when he was faced with the recusal application*". Furthermore "*the instantaneous rejection by the District Judge of the appellant's application that he recuse himself lends support to the appellant's claim*". Both of the factors and many more apply here in circumstances far more technicolour than anything that happened in *Towey*.

100. The fair procedures challenge can be summarised under the following headings:

> (i) It is pleaded that Judge O'Leary "*from the inception and through the hearing made inappropriate and derogatory comments towards counsel and solicitor (to a lesser degree) for the applicants herein in a way which was insulting, unfair and attacking/undermining of their professional competence, in the presence of all persons and which demonstrated that the court was not impartial ... and was 'hostile' for want of a better description*"; there are related complaints regarding failing to allow counsel to read notes of the customs officer. Matters kicked off unhappily with the case commencing in the absence of counsel, which led to a frosty exchange when counsel did arrive. There was ultimately a request to the judge to recuse himself which he instantaneously refused in absolutist terms.

(ii) The father's affidavit (para. 24) reinforces this by referring to the judge having "*stated effectively that we would be better off with representation locally*". (The judge did not specifically say "*locally*" on the DAR but that is perhaps one legitimate interpretation of his remarks.) He states that the court ordered counsel "*in quite a forceful way that the case would go on and ordered counsel to sit down*". The father later states that "*[t]he court's demeanour towards Ms. McKeever and the court's comments or approach concerned us. This was constant through the overall hearings to various degrees … [a]dditional to the court's over statements were constant pointed or inflected remarks it made in passing whilst smiling at the CFA solicitor or comments it was making about our counsel or comments negative about some aspect regarding us/our case, whilst again looking at the CFA social workers or solicitor and smiling*".

(iii) The father avers (para. 78) that when Ms. McKeever stated that she had not had the chance to take proper instructions the response of the court "*was to adopt an extremely trenchant borderline angry and sarcastic tone and in an extremely undermining and pointed tone stated that* 'there is no evidence that you have spoken to your clients … your clients are entitled to a better service'."

(iv) It is pleaded that "*The court repeatedly indicated through the proceedings and particularly that of July 31st that it had its mind made up*". This is borne out on the DAR by a number of interventions rejecting or tending to reject (prior to conclusion of the proceedings) points being advanced by the parents.

(v) It is pleaded that "*The court … demanded [that] the applicants hand up their iPad which had been sitting on the desk all along accusing directly or indirectly, the applicants of recording the proceedings and … demanded that the court be furnished with the device*", as well as an allegation that other persons with electronic devices were not so singled out. The father's affidavit (which I accept, uncontradicted) refers to their "*shock*" at this and that the mother "*was almost crying*". "*We were concerned to say the least about these matters and how the court appeared to be receiving us generally*" (para. 25).

(vi) It is pleaded that extensive material was introduced without time to properly consider or read such material.

(vii) Complaint is made that counsel was cut off from opening relevant authorities.

(viii) It is pleaded that "*The court then proceeded to treat the [father] in a manner which if not designed to unnerve, did unnerve and the judge's demeanour and repeat statements by the judge that the applicant asking a question to be repeated demonstrated or could be inferred by him to be suggestive of lying and then later said* 'unless you have a hearing problem' *when it was then stated by the applicant that he had a loss of hearing from his time as a soldier".* The father avers that this was "*in a very deliberate or pointed tone".*

101. These matters are simply not addressed in any meaningful way in the replying affidavit of Padraig O'Driscoll. There is a bald assertion that "*the applicants had the full benefit of legal representations and fair procedures*" but that is meaningless in the context of the detailed allegations made which have not been engaged with. It is in any event merely an assertion effectively by way of submission, rather than evidence as such. The affidavit of Pat Kelleher contains the bald assertion, really a legal submission, that "*at all material times the applicants were afforded fair procedures in the making of the said orders*" and lists out various steps taken that involved offering fair procedures to the applicants, such as allowing cross-examination, calling of witnesses and submissions, and so on. But these are givens. Just because a court allows some fair procedures does not preclude the possibility that it may have taken other steps which were not fair. Those other steps are simply not engaged with by Mr. Kelleher – presumably because the agency was not in a position to disagree. More fundamentally I have the benefit of the transcript of the DAR which unfortunately bears out the thrust of the complaints made. I accept the essentially uncontradicted evidence of the father but in any event the DAR puts the matter beyond doubt.

102. I accept the father's evidence regarding the sarcastic and hostile tone of Judge O'Leary's interventions as well as the smiling and looking at the other side's solicitor and witness. Such an approach undermines in the mind of a reasonable and well-informed observer the requirement of a fair and open-minded hearing and that justice be seen to be done.

103. The learned judge's comment (pp. 13-14 of the DAR of 25th July, 2017) to Ms. McKeever that "*if you could not undertake to be here on time perhaps you should not have undertaken the burden of representing these people so that they would be properly represented by somebody who would be here*" and that the parents should have been represented "*by somebody who is here rather than by somebody who lets them down by not being here*" may have been seen by the learned judge as merely firm case-management, but unfortunately it goes much too far. For a judge to suggest that parties should have engaged some other counsel blows out of the water the possibility of a perception of a fair hearing. Doubly so where the judge was on the one hand criticising her lack of complete availability while on the other hand facilitating a witness for the agency who was due to fly back to England that evening. Absent the most extraordinary circumstances which do not remotely apply here, a comment that a party should not have engaged a particular lawyer can only subvert the perception in the mind of a reasonable, well-informed bystander, of justice being done. One can only imagine the undermining effect that would have in the minds of the parents – indeed the father makes reference to this in his affidavit.

104. When Ms. McKeever very reasonably suggested that a way out of the difficulty might be, rather than ram-rodding things through, that an interim order might be granted "*without prejudice to the fact the case hasn't been heard and we adjourn the matter for a correct hearing in due course*", the judge radically changed tack, and said "*And who said I'm not going to?".* Shortly thereafter the following exchange took place:

MS MCKEEVER: Judge –

JUDGE: I'm sorry, the conversation is over Ms. McKeever.

MS MCKEEVER: Okay. Well I –

JUDGE: No, this conversation is over. If you continue to speak I will cite you for contempt of court.

MS MCKEEVER: is the DAR running?

JUDGE: Of course it is.

105. A judicial intervention of that level of magnitude without grounds of corresponding magnitude is unfortunately not consistent

with the requirement for justice to be seen to be done. There was no basis for the judge to demand that counsel cease to address him or to threaten her with contempt of court. Such a threat to a professional practising barrister or solicitor is virtually unheard of and would create an unfortunate but vivid perception in the mind of a reasonable, well-informed person is one of hostility and bias, if not of throwing judicial weight around gratuitously. This goes well beyond firm case-management.

106. The judge's intervention in relation to the iPad is particularly unfortunate. It commences by way of an interruption to oral evidence, out of the blue: "*Can I have the iPad please*". When asked why he said "*I want to see if it's turned on to see if it's recording*" … "*I'm entitled to control procedures in the courtroom*." When both parents said it wasn't recording he said "*I don't know that*". When counsel intervened she only got as far as "*Judge with due respect* – " before being cut off with "*No I'm very sorry, he's not entitled to record the proceedings, as you well know*". Such an intervention ("*he's not entitled* …") carries with it the entirely unfounded implied contention that such an entitlement was being or might be being asserted by somebody. It would be seen by a reasonable and well-informed bystander as an implied accusation. There was nothing to suggest that the father had been recording the proceedings. The mother denied recording again, and then very intelligently and presciently observed "*Why would we record, it's recorded anyway*". The judge then escalated matters by saying "*I'm ordering you to hand it to the Sergeant, to hand it to me so that I can inspect it*". He then demanded "*Will you put in the pass code please*." Ms. McKeever then very reasonably and legitimately said "*Judge, with due respect, is there anything to suggest that they have been recording*". There was some discussion of why the iPad was on the bench and the matter then petered out.

107. Standing back, this is of a piece with the peremptory threat to counsel regarding contempt of court. One has a sad picture of the weight of judicial office being thrown around gratuitously. There was, clearly, nothing to suggest that the parents had been recording proceedings. The attempt to draw oneself to the full height of judicial dignity by demanding equipment and passcodes by standing on the right to control procedures in the courtroom reminds one of nothing so much as the description of judicial conduct at issue in *R. v. Gray* [1900] 2 Q.B. 36 ("*If anyone can imagine Little Tich upholding his dignity upon a point of honour in a public-house* …"). Maybe there was a time, perhaps in the last century, when electronic devices in court legitimately warranted comment, but that time has long passed. But apart from the anachronistic nature of this unfortunate scene, more important is the effect these interjections reasonably had on the minds of the parties and their entitlement to a fair hearing, both as to the fact of happening at all and as to the pointed and accusatory manner of the judge's conduct, singling out the parents from any other person in court. Such an intervention can only be destructive of the entitlement to have justice seen to be done. The parents' apprehensions of bias were entirely reasonable.

108. Unfortunately matters continued in this vein on 31st July, 2017 when an issue arose regarding Ms. McKeever's request to consult notes of a customs officer. The officer asked for his notes back and following exchange took place

> JUDGE: "… Ms. McKeever would you please return the notes forthwith?".
>
> MS MCKEEVER: Yes Judge but I haven't actually finished reading them yet.
>
> JUDGE: Well it took me about 15 seconds to read them. I don't understand why it would take an intelligent person like you so much longer. Would you please give them back to Mr. Jones now.
>
> MS MCKEEVER: Judge I-
>
> JUDGE: Ms. McKeever, I'm directing you.
>
> MS MCKEEVER: Very good judge except I haven't had an opportunity to read them.
>
> JUDGE: You haven't taken advantage of the opportunity that you had, would you please return the notes to Mr. Jones now.
>
> MS MCKEEVER: Well I'd like a brief …
>
> JUDGE: Next question…

109. Again, a dispiriting picture emerges. The perception that would legitimately be formed in the mind of the reasonable, well-informed bystander (particularly when put in context of the hearings overall) is one of rapid, almost immediate resort to peremptory demands and orders, and an impression of intolerance of discussion. Interruption of counsel in the spirit of reasoned and spirited but respectful discourse between equals is one thing - I would say a very good thing. Interruption in the *de haut en bas* spirit of closing down anything the judge does not want to hear is quite another.

110. Further on in the transcript, the judge returned to the previous day's theme and said "*it's finding fault with your service to your clients and I'm entitled to do that. Your clients are entitled to a better service than you've provided*" (p. 100 of transcript). Sadly, in my view, the learned judge was not entitled to do that, or at least not without far more substantial cause. There was no such cause. Ms. McKeever was courageously attempting to deal with a complex case of huge importance to her clients under great time pressure at very short notice. Yes, in broad principle a judge can case-manage proceedings, direct that certain things must be done by certain times or within time limits, and where appropriate bring the shutters down if such things are not so done. And yes, lawyers can fail to comply and on occasion may need to be held to account. And I also appreciate that on occasion, conduct by advocates can be very provoking. But if criticism be called for it should be focused on the specific and limited issue at hand and on the overriding need to manage the proceedings justly, rather than degenerating into overall denigration such as a suggestion that a party would be better off with someone else. The learned judge's criticisms were unbalanced and out of proportion, and fatally undermined the principle that justice must be seen to be done. Such comments would have and did create a reasonable apprehension in the minds of Ms. McKeever's clients that their case was not being received with the court's full attention or with a sympathy and concern equal to that being given to the other side. That unfortunately is objective bias.

111. Eventually and only after what was clearly a great deal of provocation, Ms. McKeever suggested that "*I feel the court's comments are graded against the – against myself and -*" (p. 109). The judge interrupted: "*Yes I find – I find your conduct inadequate and unfair to your clients*". She then, very reasonably and correctly, asked him to recuse himself. The response was immediate – "*Certainly not*". Here one recalls the doctrine enunciated by the Court of Appeal in *Towey* that immediate rejection of a recusal application reinforces the argument that failure to recuse was unlawful. Ms. McKeever very reasonably then said "*because I do not think that you're an impartial court anymore are … on the comments you've made*". The judge replied "*The comments I have made are related to your performance of your duties*". Ms. McKeever replied, in my view entirely correctly, "*No judge, they're totally unacceptable*". She then asked if the DAR was running. The DAR ceased to record shortly thereafter. (It has subsequently come to

my attention that this was because at that time the DAR was automatically set to turn off at 8.30 pm. This has apparently now been corrected.)

112. It would take a touch of heroism for counsel to proceed in an unflustered manner after such a sequence of events, but Ms. McKeever soldiered on. While the judge's comments about whether the father had hearing loss are not recorded on the transcript due to it having been cut off, I accept the father's uncontradicted evidence in this regard. Those who suffer from hearing loss or any disability or impairment deserve equality before the law and where possible reasonable accommodation. To meet such impairment with sarcasm falls well below the minimum standard of judicial conduct. Doubly so where the father's impairment was acquired in the course of serving his country and, through it, the international community. Maybe there was a time, in the last century, when "are you deaf?" or an equivalent inquiry was thoughtlessly considered by some to be a socially acceptable riposte if a person asked for something to be repeated. But we live in more civilized times now.

113. On multiple levels the learned judge's conduct of the proceedings was violative of rudimentary principles of fair procedures. Any one of these incidents would be a basis for his orders to be set aside.

114. It is not clear to me that any further District Court proceedings are required or are appropriate in this case. O'Donnell J. in the related although slightly different case of *C.J.* indicated that depending on circumstances habitual residence might change to Ireland (para. 25). If the need for such further proceedings does arise, if and when the Irish courts come to review the question of current habitual residence afresh, that issue will have to be considered in the light of current circumstances at the time of such consideration.

Should the District Court order of 28th August, 2017 be quashed?

115. Apart from any other consideration, the order of 28th August, 2017 depends on the jurisdictional basis of the prior determination regarding habitual residence made by Judge O'Leary. The quashing of the earlier order means that the domino of the orders of 28th August, 2017 and 25th September, 2017 must also fall.

116. However, separately from this issue, a challenge is also made on the basis of a failure to comport with the appropriate legal test. The test for an interim care order is that an application for a care order has been made and that "*there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or (c)(of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child's health or welfare that he be placed or maintained in the care of the [agency] pending the determination of the application for the care order*" (s. 17(1)(b) of the 1991 Act).

117. There are thus three key elements to the test, firstly that a (valid and appropriate) application for a care order has been made, secondly that one of the s. 18(1) factors applied and finally that it is necessary for protection of the child's health or welfare that he be placed in care.

118. There is a fundamental difficulty in relation to the first criterion. Statutory prerequisites must of course be complied with *The State (Holland) v. Kennedy* [1977] I.R. 193. The agency has never adopted the stance that it will actually try to obtain a full care order. The application for a s. 18 order was simply a vehicle for interim orders to be made under s. 17 for the purposes of art. 20 of the Council regulation pending enforcement of the English orders. It appears that there may be something of a lacuna in the law in the absence of any other legislative vehicle to make art. 20 orders.

119. Perhaps there is not a complete lacuna in that there may be other statutory bases for interim orders including s. 11 of the Guardianship of Infants Act 1964, the statutory power to grant injunctions when just and convenient under s. 28(8) of the Supreme Court of Judicature Act (Ireland) 1877, or the inherent jurisdiction of the High Court. But by invoking s. 18, the agency is firstly formally contradicting the notion that the English courts have jurisdiction, and secondly is acting in contradiction to its actual position and intentions. In my view the reliefs are being shoe-horned into ss. 17 and 18 when that is not the appropriate vehicle for art. 20 of the Council regulation.

120. Assuming (which I do not therefore accept) that s. 17 was properly invoked, I will go on to consider whether that section was properly applied. Judge Waters on 28th August, 2017 did not specify a s. 18(1) factor expressly but said that "*I am satisfied that there are circumstances that give rise to a risk that the child's health and development or welfare is likely to be avoidably impaired if the order is not made*". This suggests that the learned judge was focusing on s. 18(1)(c).

121. The test is not that there be a risk to welfare, but that "*there is reasonable cause to believe*" (s. 17) that circumstances existed whereby "*the child's health, development or welfare is likely to be avoidably impaired or neglected and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section*" (s. 18(1)(c)). Looking at the judge's earlier discussion of the interrelationship between ss. 17 and 18 (pp. 171-176) it seems to me that the learned judge has conflated risk with "*reasonable cause to believe*" that s. 18 grounds exist or have existed. Ms. McKechnie says reading the transcript as a whole, he merely mentioned the word risk but elsewhere in the transcript he referred to the correct criteria. However, it is of significance that the risk reference was in the ruling portion that was in itself very short.

122. There was thus a failure both to state and to apply the correct test. This is a judicial review point, not an appeal point. While Mr. McDonagh places emphasis on the fact that the father did not give evidence on 28th August, 2017 (and indeed perhaps it would have been better if the parents had), that does not get over the problem that the test is misstated. Mr. McDonagh valiantly describes this as an "*attempt to summarise*" and to "*look to the future*".

123. But there is a fundamental difference between being satisfied of a risk and being satisfied of reasonable cause to believe that grounds exist. Risk is unavoidable and social workers, police officers and other public officials may inevitably be tempted to see risk everywhere. They "have concerns" – there is little or no downside to such an approach. But that temptation must be resisted and a view formed as to whether there are reasonable cause to believe that harm is "*likely*". What judges do have in common with social workers however is the temptation to err on the side of "*safety*" – safety for the decision-maker that is. If a child comes to harm due to a failure to intervene, there can be a perception that that is on the social worker or the care agency. If a child comes to harm through a court order, there is a perception that that is on the judge. Although I am dealing with legal questions under the Council regulation, Article 40.4 and principles of judicial review, and not with an assessment of welfare, I should at the same time say that, on the basis of what is on the papers and what I have heard, I do not, for what it is worth, in fact believe that this child is likely to come to harm as a result of the order I am making today. Nonetheless I accept that if such an event were to happen, it would be seen as being on me. Such a possibility might make social workers and judges likely to err on the side of intervention or upholding intervention respectively. But what needs to be put front and centre in such a situation is that this is not about the decision-maker playing it safe and doing what is best for him or herself. Intervention in the form of removing a child from parents is in very many, albeit not all, cases a form of harm – certain, concrete and immediate. The child's best interests are presumptively with the parents,

and orders that interfere with that relationship frequently create immediate, actual harm, to be balanced against the possibly unpredictable risk of future harm. The actual present harm to this child caused by the District Court orders is evident. On the papers, the prospect of future harm here is flimsy. There are no solutions, only trade-offs. It would be cowardly for either social workers or judges to "play it safe" by choosing to minimise their own exposure through interventions that cause actual, immediate harm, unless the reasons to anticipate future harm are sufficiently weighty. We need a more mature conversation about risk. Child protection is a matter of risk management, not risk elimination. The populist idea that risk can be removed, or that child protection tragedies must never happen again, is fundamentally misconceived. Child protection is always a question of balance and proportionality and must not degenerate into a spurious and self-serving process of exposure minimisation. To that extent I have great and continuing sympathy for the difficulties the agency must have in maintaining such a position in the face of a great deal of potential misunderstanding.

124. I turn now to the question of the proportionality and evidential basis for the order.

125. Mr. O' Driscoll gave evidence that he had concerns (Q 38) "*as was based on my colleague's information from the U.K. (sic) social work department I would have to trust that my colleagues concerns are valid and evidenced (sic) based like our own thresholds here, Judge. I would also have concerns if the child was returned at this present moment in time. We don't [know where] the parents are actually residing*".

126. The father did not give evidence and the mother did not attend, although it should be noted that the hearing on 28th August, 2017 was in the context of a number of previous care order hearings which they had contested. According to the replying affidavit of Pat Kelleher, Padraig O' Driscoll team leader gave detailed evidence of the child protection concerns. These can be summarised as follows –

(i) 6 incidents of domestic violence, 5 verbal and one physical.

(ii) The child had not been seen by a public health nurse in the UK or by social workers for a number of months.

(iii) "*although the child appeared to be physically well cared for he could not rule out that the child may have suffered emotional harm and threat there was a potential risk to the child as a result of the domestic violence incidents and [the father's] mental health*".

(iv) Concerns about the parent's plan to sail to Spain with very limited sailing experience.

(v) A 2014 U.K. social work assessment and the concerns therein and noting that the father had been diagnosed with PTSD and was attending a psychologist.

127. With the tentatively possible exception of the (now mothballed) plan to undertake a trip to Spain (which the learned judge himself thought would not in itself warrant a care order (at p. 185 of the transcript)), these grounds are flimsy. The historic domestic violence issue is of course concerning in any context but the parents appear to have got past that issue in terms of their relationship and even acknowledging that domestic violence can in certain circumstances impact on children, there is no evidence that it did so in this case. Indeed in terms of the evidence below it appears to have been accepted that the child did not seem to have been affected by any arguments between the parents.

128. While one must be sensitive to the possibility of such an impact, a *presumption* of such a read-across to an impact on children is violative of the child's entitlement to the society of the accused parent (for an empirical view see Alison Perry, "Safety First? Contact and Family Violence in New Zealand: An Evaluation of the Presumption Against Unsupervised Contact" (December 5, 2011) *Child and Family Law Quarterly*, Vol. 18, No. 1, pp. 1-21, 2006). An inability to rule out emotional harm is a tendentious formula and not a legitimate basis on which to take a child into care. The lack of engagement with social services is a symptom of understandable fears about what the parents perceive as their disproportionate interventions much more so than it is a sign of child neglect. The reliance on the father's having been exposed to traumatic incidents in armed action must be galling indeed if that is the thanks being officially offered to him for his uniformed service to his flag and to the international community. The fact that he was seeing a psychologist is surely a good thing to be encouraged and intensified, and not a negative. One assumes that if he was not seeing a psychologist that would also be cited as a negative. Overall, a catalogue of negatives is not a proportionate and fair or a rational assessment of the situation. It is a utilitarian and instrumental measure to achieve a goal. Social workers and agencies must aim for a higher standard which seeks to acknowledge the positive factors (of which there are a number in this case, some adverted to above) and put them in balance with negative factors. Multiple weak negative factors taken together do not necessarily amount to more than the sum of their parts.

129. Of some – perhaps very great - significance is the fact that Mr. O' Driscoll said that the agency had never sought a care order in the type of circumstances at issue here (QQ 71-72).

130. It was accepted by Donna Higgins in the District Court on 25th July that the child was in "*perfect health*" and that "*all this could have been avoided if they had engaged with an assessment in the U.K."* (p 36). The child at access "*did not want to leave his parents … Absolutely*" (p. 38). The parents "*tried to handle that situation as best they could to abate his upset… [he] is in a lot of distress*". (p. 39). She "*didn't find any evidence to suggest that he would be harmed by his parents*". (p. 39).

131. The questionable nature of the level of risk was illuminated by responses from U.K. social worker Jennifer Hazelwood; on 31st July, 2017 (p. 46) she was asked if the child "*continues to remain at risk*" and responded that "*The risk ... remains unassessed. We had concerns – the information we had suggest that he may be at risk of significant harm but we have been unable to assess the risk …*" and agreed that this was "*[d]ue to evasion of the Social services by the couple*". She accepted that "*The fact that they weren't available was a ground for a care order*" … "*that was the decision from the legal planning meeting*" (p. 54).

132. An interim care order interferes with constitutional and ECHR rights under art. 8 of the Convention (as implemented by the ECHR Act 2003). There must therefore be a weighing of the proportionality of the measure (see e.g. *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701) and an examination of whether it is necessary in a democratic society for the purposes of art. 8 of the ECHR. There must be an acknowledgment of the principle that the child's best interests are presumptively to be found in the society of both of his or her parents.

133. In the present case there was no specific consideration by the learned judge of these matters in the decision and reasons, such as they were, and there was a failure to conduct a balancing exercise with regard to the constitutional and ECHR rights of the family and its members.

134. Furthermore the court did not specifically have regard to the rights and duties of parents and the principle that it is generally in the best interests of a child to be brought up in his or her own family as required by ss. 3 and 24 of the Act, or to the principle that the court should only intervene where the child is not receiving "*adequate*" care and protection. Furthermore, such orders can only be made where supports or other assistance would not be sufficient so as to remediate the situation.

135. In *North Western Health Board v. H.W.* [2001] 3 I.R. 622, the Supreme Court emphasised that the requirement for State intervention to vindicate the child's constitutional rights was exceptional. Hardiman J. indicated that the State was not an entity with general parental power or a court of appeal from a parental decision (p. 757). Even after the enactment of Article 42A, the principle that best interests presumptively coincide with parental custody applies and is a child-centred view. Any exception to that is by definition exceptional and the existence of exceptional circumstances remains the test.

136. The risk required is an immediate threat to the welfare of the child (see *per* Denham J. in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 p. 725). Care orders have no role in the case of children who are receiving adequate care and protection.

137. *N v. Health Service Executive* [2006] 4 I.R. 374 reinforced the view that presumptively, best interests coincide with parental custody and that the presumptive view that children should be nurtured by their parents is a child centred one (see also *Re J* [1966] I.R. 295). As I said in *P.H. v. CFA* [2016] IEHC 106 at para. 44, this remains the position post Article 42A.

138. While the initial reason for care intervention in England was to carry out an assessment there has been plenty of time for an assessment at least of the child to be carried out in the State. I am not aware of any recent refusals of the parents to engage in such a process. The necessity in a democratic society for, or proportionality of, even an interim care order is not immediately apparent.

139. In my view apart from the foregoing multiple reasons, the decision should also be quashed by reason of its vagueness and lack of reasons, as it is couched in highly general terms which render it unduly difficult to ascertain which elements of the evidence were considered to be decisive and which were not, and why.

140. In his decision the learned judge stated his conclusion without reasons as such, simply articulating the bottom line that he was satisfied that there was a risk that the child's health, development or welfare was likely to be avoidably impaired. Ms. McKeever then courageously asked for reasons, and the learned judge then referred somewhat vaguely to the totality of the evidence, including "*what may or may not have occurred in the UK, what has occurred here, the plans that the Respondents had in relation to the child, including the possible trip, and the circumstances of that, and all other circumstances*". It is hard to know what input UK matters had in the decision if they may not have occurred. The meaning of the reference to "*what occurred here*" other than the proposed trip is not immediately apparent. A further reason is "*the plans for the child including the proposed trip*". What is meant by "*plans*", other than the trip, is quite unclear. Overall the decision was not a great deal more than "a general rejection of all strands of the argument presented on behalf of the applicant", a situation that the Supreme Court thought was "*wholly unsatisfactory*". (*O'Mahony v. Ballagh* [2002] 2 I.R. 410 *per* Murphy J. at 416. The affirmative reasons (as opposed to the statement of a conclusion or of things that were not being taken into account) amounted to perhaps 11 lines of transcript (p. 233 lines 3 to 13) after a hearing taking up 231 pages. No specific facts are found other than the generalised conclusion.

141. The learned judge did not assay a specific ruling on the parents' various submissions in his ruling. While District Court judgments do not have to meet a criterion of academic excellence, they must deal with the principal contentions of the parties insofar as those contentions are relevant to the judge's decision (see *O'Mahony v. Ballagh*; *Clare County Council v. Kenny* [2009] 1 I.R. 22).

142. It must be emphasised that the tests and requirements for even an interim care order are significant thresholds and not a mere form of words. The making of an interim care order or a care order has a fundamental effect on the functioning of the family and strikes at the heart of the parent-child relationships.

143. Of significance here is the evidence, including that under cross-examination, that the child is being well cared for, was happy, healthy, normal, well presented and extremely attached to his parents. The child has clearly suffered significant distress on being removed from the parents. The English social workers accepted that the child had been seen by a doctor who had no concerns.

144. For any one of the various independent reasons set out above, the order of *certiorari* that must follow. It is not necessary to grant extensive or any declarations in addition. Thus it is unnecessary to make declarations in terms of paras. (i) and (iii) of the third judicial review.

If the current care order is quashed, should an order for immediate release under Article 40.4 be made?

145. It seems to me that release under Article 40.4 must be automatic where the order justifying the detention is quashed and certainly so where the detention strikes at the heart of the parental-child relationship protected by law, the ECHR and the Constitution. If there were child protection concerns arising from the now-shelved proposed trip, it might be observed that taking to the waves is itself a result of and a frightened reaction to the intense attentions of social work departments in Bedford. It could be somewhat Kafkaesque if the perhaps ill-thought out attempt to avoid engagement with social workers was itself the main ground on which a child was now to be taken into care, even on an interim basis.

146. I noted in *PH. v. Child and Family Agency* [2016] IEHC 106 para. 43 that conduct by applicants to lie doggo and resist official scrutiny is not necessarily so much suggestive of a propensity towards abuse and neglect as of a well-founded fear of the results of official attention.

147. The invalidity of the care order makes it appropriate both to quash the order by judicial review and to direct the release of the child under Article 40.4 of the Constitution. On the material before me, and bearing in mind that prediction is an inexact science, a matter discussed above, I do not discern any sufficiently substantial basis to conclude that returning the child to his parents will result in harm so there is no compelling reason to structure the release on anything other than an immediate basis.

If relief by way of judicial review is granted should the proceedings be remitted to the District Court?

148. Mr. McDonagh submitted that if orders were quashed, the matter would have to be remitted to the District Court, but remittal to the court or decision-maker below is not absolutely automatic following quashing of a decision. In this case remittal does not seem to be appropriate given my view that the idea of proceeding under s. 18 to create an ostensible basis to apply under s. 17 to make what are intended to be purely interim orders for the purpose of art. 20 is misconceived. No amount of remittal would make that an appropriate procedure on the premise discussed above.

149. Furthermore, I could be forgiven for hoping that all of the parties might avail of the opportunity to discuss whether there might

be some resolution other than everyone standing on their legal rights and engaging in further litigation. Perhaps if the parents might now co-operate with a social work assessment to be carried out in the State, there might be no need for further litigation. Such a procedure is not dissimilar to that adopted by the Supreme Court in *Child and Family Agency v. R.D.* [2014] IESC 47 where proceedings under art. 20 of the Council regulation were adjourned to enable such a possibility to be canvassed with the English courts. On the papers (and having regard to what I have heard including the parents' latest assurances that their sailing proposals have been put on ice), this does not seem to be a case that requires more heavy-handed intervention by way of care orders. Furthermore the question of whether remaining in Ireland might now be in the child's best interests is something that may warrant serious consideration in the light of the stance now being taken and conveyed to me by Ms. McKeever. If Bedford are not prepared to go down that route, I might be forgiven for requesting that they might bring this judgment and the foregoing views in particular to the attention of any future court to which they might apply in that eventuality.

Order

150. For the reasons set out above, I will order as follows :

(i) In the Bedford proceedings [2017/16 FJ], that:

(a) the motion (pursuant to the inherent jurisdiction of the court) to set aside the *ex parte* order of Barrett J. be dismissed; and

(b) the motion by way of appeal under art. 33 of Council regulation 2201/2003 from the *ex parte* order of Barrett J. be allowed and that in lieu of that order there be an order that the English orders the subject matter of that order are not recognisable or enforceable in the State.

(ii) In the first judicial review [2017/680 JR] that:

(a) the relief at paras. (i) be refused; and

(b) the relief at paras. (ii) and (iii) be granted, namely an order of *certiorari* removing for the purpose of being quashed the orders of the District Court of 25th July, 2017 and 31st July, 2017 and that as an ancillary order, if any further proceedings involving the applicants arise, such proceedings be dealt with by a judge other than Judge O'Leary.

(iii) In the second judicial review [2017/703 JR.] that:

(a) the relief at paras. (i) to (iv) be refused, and

(b) the relief at para. (v) and (vi) be granted in the amended form of an injunction pursuant to O. 84 r. 18(2) of the Rules of the Superior Courts restraining any person having notice of the order from transferring the child out of the State without the consent of the parents or further order of a court in the State expressly authorising such transfer, such order to be either made on notice or expressly notified to the parents in sufficient time in advance of the transfer to afford them an effective opportunity to seek to have it set aside prior to its execution.

(iv) In the third judicial review [2017/709 JR] that:

(a) the relief sought at paras. (i) and (iii) be refused; and

(b) the relief sought at para. (ii) be granted, in the form of an order of *certiorari* removing for the purpose of being quashed the orders of the District Court dated 28th August, 2017 and 25th September 2017.

(v) In the *habeas corpus* proceedings [2017/966 SS] that there be an order under Article 40.4 directing the immediate release by the agency of the child into the custody of the parents.