

## THE HIGH COURT

[2014 No. 9943 P]

**IN THE MATTER OF K.J., A MINOR, BORN ON 5TH MARCH 2008 AND IN THE MATTER OF THE CHILDCARE ACT 1991 (AS AMENDED) AND IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 OF 27TH NOVEMBER 2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY AND IN THE MATTER OF THE INHERENT JURISDICTION OF**

## THE HIGH COURT

BETWEEN:

THE CHILD AND FAMILY AGENCY

PLAINTIFF

AND

C.J. AND C.S.

DEFENDANTS

**Judgment of Ms. Justice Bronagh O'Hanlon delivered on the 11th day of December, 2014.**

1. On the 25th November, 2014, the Child and Family Agency made an *ex parte* application before the High Court by way of plenary summons seeking a declaration under article 17 of Council Regulation (E.C) 2201/2003 ("the Regulation") that the Courts of Ireland do not have jurisdiction under the Regulation in respect of matters concerning parental responsibility for the infant named in the title herein, "K.J.", a minor, born on the 5th March 2008. In the alternative, orders were sought under article 15 of the Regulation, directing the Court to proceed to transfer this matter back to the Courts of Scotland.

2. On the 25th November, 2014, this Court made orders for short service on the first named defendant and for service out of the jurisdiction on the second named defendant. The High Court of Ireland heard this case on the 9th December, 2014, within two weeks of the *ex-parte* application being made to the Court. This action was necessitated on the basis that there was an Interpol alert for the infant and a high level of concern for the infant's safety and wellbeing.

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

4. Article 17 of the Regulation provides as follows:

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

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

6. The interesting submission is made that in England and Wales, all proceedings under the Regulation, so far as it relates to jurisdiction, recognition and enforcement in parental responsibility matters, have been assigned to the Family Division of the High Court of England and Wales under the Supreme Court Act 1981 (Schedule 1, 3(f)(v)). The Oireachtas has not enacted any legislation specifically stating that the High Court is vested with jurisdiction in respect of the functions under Part II of the Regulation. It is clear the Regulation is an EU legislative measure of the most binding quality which automatically has the full force of law in every Member State without the need for any action by that Member State. Thus, legislative action does not appear to be necessary, as the Regulation is directly applicable to all European member states.

7. This Court notes that article 68 of the Regulation places an obligation on Member States to notify the European Commission on the redress and court procedures regarding enforcement and recognition of judgments in that Member State. The underlining intention of this obligation on Member States is to expedite the enforcement of judgments. Regulation four of the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations S.I. No. 112/2005 designates the Irish High Court as the Court responsible for all applications for recognition or enforcement under the Regulation.

8. The High Court has addressed the issue of jurisdiction regarding applications grounded upon other articles under the Regulation. In *A.O.K v M.K* [2011] 2 IR 498, a question arose as to whether the District Court or The High Court was the relevant forum to hear an application under article 11(7) of the Regulation, in the context of seeking the return of a child who was wrongfully removed from the jurisdiction. In her judgment (at pg 518), Finlay Geoghegan J held that the High Court was the appropriate jurisdiction to hear applications under article 11 of the Regulation, due to the complexity and novelty of the legal issues arising from such applications and the court time necessitated to consider same. Moreover, the Court held that in regards exclusive jurisdiction of child abduction

and article 11 proceedings, jurisdiction is vested in the High Court, and it is the High Court who has experience and knowledge of such applications. Another feature of child abduction cases in this jurisdiction is that there has been a judicial liaison judge taking an additional role in relation to the operation of the Regulation and regarding child abduction cases. This Court notes that the management of child abduction cases in Ireland has significantly been dealt with by a single High Court judge in what is, by any standards, considered to be a specialised area of law.

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

10. It is clear from the pleadings in this case that the infant, the subject matter of these proceedings, is and was at all material times habitually resident within the jurisdiction of England and Wales, with predominant residence in Scotland. On the 9th October, 2014, a childcare and protection comprehensive assessment recommended a Children's Hearing be called under the Children's Hearings (Scotland) Act 2011 before the Courts of Scotland within the jurisdiction of England and Wales. The purpose of this hearing was to consider the infant's circumstances. The assessment concluded that the infant was in need of compulsory measures of care. It was reported that the infant's emotional wellbeing appeared to have deteriorated as his mother's anxious behaviour with respect to school heightened. A date was set for the Children's Hearing and that date was the 12th November, 2014.

11. It is clear that the first named defendant left that jurisdiction before the 12th November, 2014. On the aforesaid date, a Children's Hearing took place in Dundee in her absence. It is uncontested that the first named defendant and the infant were located in Ireland on the 17th November, 2014. Enquiries have shown that they stayed in a hotel in the proximity of Dublin Airport on the night of the 8th November, 2014. The first named defendant's car was delivered to her in Dublin on the 13th November, 2014. On locating the infant, the Gardai exercised their powers under s.12 of the Childcare Act 1991, and removed the infant from his mother's care and placed the infant in the care of the Child and Family Agency in Dublin. On the 18th November, 2014, on foot of an application by the Child and Family Agency and on foot of evidence tendered, the Dublin Metropolitan District Court granted an emergency care order for one week in respect of the infant.

12. On the 26th November, 2014, the District Court of Ireland heard an application for interim care order concerning the infant, "K.J". At the hearing the first named defendant confirmed in her oral testimony under oath before the District Court, 20 Dolphin House, East Essex Street, Dublin 2, that she had been served with an envelope containing the Scottish Court proceedings. The first named defendant stated that she knew what was in the envelope but decided not open it. Instead, she handed the envelope to her solicitor. Thus, this Court takes the view that the first named defendant was aware that the hearing was scheduled to take place on the 12th November, 2014. An interim care order was made in respect of the infant on the 26th November, 2014, said order is due to expire on the 17th December, 2014.

13. In the context of the case before this Court, the infant named in the title herein was born within the jurisdiction of England and Wales where the infant's parents have been habitually resident and where the infant has lived with his mother, mainly in Scotland, but in England for a short period in or about 2011. Not only does the infant's mother have a rented apartment in Dundee, Scotland where her own mother is guarantor and where she and the infant have lived and where their belongings are, but the infant is registered with a primary school in Dundee, Scotland and attended there as recently as the 10th October, 2014, when the school broke up for a two-week holiday. The infant's grandparents also live in England and the infant often stays with them in Scotland. There is nothing to suggest that the infant has any established or familial connection with anyone or any place in this jurisdiction, nor does the infant appear to have any relations in this jurisdiction. The only stated explanation for the infant being in this jurisdiction is that the first named defendant admits to seeking to evade Social Services in Scotland. In terms of the habitual residence "test", therefore, this Court accepts the submission of Counsel for the plaintiff and the remarks of Lady Hale in *Re A (Jurisdiction: Return of Child)* [2013] UKSC 60, where she references *Mercredi v Chaffe* (Case C-497/10 PPU) as follows (para. 50):

"The concept of habitual residence' must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State - other than that of her habitual residence - to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State, and for the mother's move to that state, and second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State."

The infant named in the title in this case is habitually resident in Dundee, Scotland. The submission that the infant is habitually resident there is not contested. The particular jurisdiction to be exercised will lie within the system established for childcare cases in Scotland pursuant to article 8 of the Regulation.

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

"The removal or the retention of a child is to be considered wrongful where:

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a

judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

15. This Court accepts that the second named defendant was aware at all times of the proceedings and did wish to have the infant named herein returned to Scotland and to his school there.

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

17. Article 20 (1) provides in part as follows:

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

18. On the 8th December, 2014, a *guardian ad litem* was appointed in the Dublin Metropolitan District Court, Ireland. This Court has considered the extensive report prepared by the *guardian ad litem*, Ruth Moore O’Ferrall appointed by the District Court. At pages 11-17 of the Report, the guardian sets out the wishes and feelings of the infant as well as the position of the first named defendant. The opinion and recommendations of the *guardian ad litem* reflect the views of the infant named herein. At para. 85 the guardian concludes:

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

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

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

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

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

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