THE HIGH COURT

[2020] IEHC 580

[2019 No. 7 FJ]

IN THE MATTER OF THE COUNCIL REGULATION (EC) No. 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY

– AND –

IN THE MATTER OF ORDER 42A OF THE RULES OF THE SUPERIOR COURTS OF IRELAND

BETWEEN

R

APPLICANT
(HERE RESPONDENT)

– AND –

W

RESPONDENT
(HERE APPELLANT)

JUDGMENT of Mr Justice Max Barrett delivered on 17th November 2020.

I

Introduction

1. This is a case in which two children who enjoy dual Irish-UK nationality have been removed from Ireland following the making of an *ex parte* order allowing their return *abroad but before the service of proceedings on the mother*. As a result, the mother, with whom the children were living for some years, has, for now, lost physical custody of two children, hitherto resident in Ireland, without her side of matters ever having been heard by the Irish courts. That is a most serious matter. Perhaps the mother might have succeeded in resisting the removal of the children, perhaps she might have failed; the court has no view as to how she would have fared in this regard. But that she was not even heard on the issue is a grave wrong. Lest it be thought that this is a one-off occurrence (it is not) or that this is just one judge 'sounding off' (it is not), it is worth noting that the illegal practice of removing a child from the jurisdiction on foot of an *ex parte* order and before the service of proceedings on any affected parent/s has been the subject of trenchant criticism by the Court of Appeal, which has pointed to the need for such occurrences to stop and to the potential for punishment by the courts where such removals occur. Thus, Hogan J. in *Hampshire County Council v. C.E. and N.E. (otherwise N.C.)* [2018] IECA 154, a case involving a public authority, but the points he makes apply with equal rigour in the context of the within proceedings, observes, *inter alia,* as follows, at paras. 45-46:

> *"45. At all events, this practice of removing the children before the service of the proceedings on the parents is a wholly unlawful one. It is utterly at odds with the constitutional guarantee of fair procedures, because an ex parte order of this kind cannot validly have irreversible effects of this kind: see* DK v. Crowley *[2002] IESC 66, [2002] 2 I.R. 712. It is equally at odds with the concept of a democratic State based upon the rule of law guaranteed by Article 5 of the Constitution of which this Court has so frequently spoken in recent times, given that the right of access to the courts is not only a constitutionally guaranteed right deriving from*

Article 34.1, Article 34.3.1 and Article 40.3 of the Constitution, but as (the not altogether dissimilar case of) The State (Quinn) v. Ryan [[1965] I.R. 70] *itself shows, albeit in a different context, it is a cornerstone of a democratic state based on the rule of law. One might equally observe that the practice sets at naught the procedural guarantees – explicit and implicit – provided for in Chapter III of the Brussels II bis Regulation and is also inconsistent with the guarantees of an effective remedy contained in both Article 47 of the EU Charter of Fundamental Rights and Article 13 ECHR.*

46. This practice of taking and then returning the children following the making of the ex parte enforcement order but before the parents are served with the enforcement proceedings clearly compromises the procedural rights of the parents to object to the making of that enforcement order in the first place and, if necessary, to apply for a stay. It is the clear duty of the courts to direct that this practice…must stop immediately. If it does not, then I fear that it may lead to some altogether unpleasant consequences for those acting in this fashion in any future case, for the prospect of contempt proceedings…were this practice to re-occur must be a very real one."

2. The threat of contempt proceedings may not suffice to prompt the return of a child in any one case, it may even make matters more difficult if it induces fear in a wrongdoing parent from ever returning to this jurisdiction. So care is required in this regard. But Hogan J. is clearly right that as a systemic matter such removals cannot be tolerated and must stop and be stopped.

II

Background

3. This is an appeal against an order made by the Master of the High Court on 1 May 2019. That order arises in the following circumstances.

4. Mr R (a UK national) and Ms W (an Irish national) were married in the early years of this century. They had two children who are now respectively of early-secondary/late-primary school age. The children enjoy dual Irish-UK nationality. The family lived between the UK and another EU Member State (the 'relevant EU Member State') where Mr R has business interests.

5. Unfortunately, the marriage between the parties ended in divorce, following which Ms W initially lived in the UK. After the divorce, the parties entered into an agreement in the relevant EU Member State which formed the basis of the divorce decree; this agreement effectively gave primary care and custody of the children to Ms W who, it was then contemplated, would live in the relevant EU Member State or a particular UK city.

6. In fact, following on the divorce, Ms W returned to Ireland in or about the middle of the last decade. She claims that, before she moved here, the move was discussed with Mr R and his mother at his parents' home, the view being (rightly or wrongly) that one of the

children of the onetime marriage, being a child who has special educational needs, would be better supported in Ireland.

7. For a number of years the Irish-based arrangement appears broadly to have worked, contact was maintained between the children and Mr R, and the children spent a portion of their holidays each year with Mr R, either in the UK or the relevant EU Member State. However, at some point, it seems in 2017, Mr R commenced proceedings before the courts of the relevant EU Member State which resulted in an order of 31 October 2018 (the 'Relevant Member State Court Order') ordering Ms W to return to that Member State or, alternatively, to live in the United Kingdom with her children.

8. On or about 1 May 2019, Mr R made an *ex parte* application to the Master of the High Court seeking orders for the recognition and enforcement of the Relevant Member State Court Order in accordance with Art.28 of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ("Brussels IIa Regulation"). The *ex parte* notice of motion states, *inter alia*, as follows:

"THE HIGH COURT

2019 No 7FJ

In the Matter of Council Regulation (EC) No. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility and In the Matter of Order 42A of the Rules of the Superior Courts

Between:

R

APPLICANT

– AND –

W

RESPONDENT

EX PARTE DOCKET

WE DESIRE TO TRANSACT THE FOLLOWING BUSINESS, *VIZ*:

1. A declaration pursuant to Article 28 of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility of the [Relevant Member State Court Order]…of the 31st day of October, 2018 of [Named Judge];

2. Further, an Order directing a member of An Garda Síochána to assist the Applicant in enforcing the Order referred to at Paragraph 1 herein;

3. Further, an Order directing the Respondent to provide to the Applicant all travel documents in her possession, power or procurement which required for the children (including the children's current British passports) for the purposes of enforcing the Order of the 31st of October, 2018 (referred to in paragraph 1 herein).

4. Such further or other Order as to this Honourable Court shall seem meet.

Dated the 1st day of May 2019."

9. This application yielded the following order of the Master on 1 May 2019:

"THE HIGH COURT

2019 No 7FJ

WEDNESDAY THE 1ST DAY OF MAY 2019

BEFORE THE MASTER

IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY AND IN THE MATTER OF ORDER 42A OF THE RULES OF THE SUPERIOR COURTS

BETWEEN:

R

APPLICANT

– AND –

W

RESPONDENT

Upon application of Counsel for the Applicant made *Ex Parte* unto the Court on this day.

Whereupon and on reading the Affidavit of R filed in Court this day and the documents and exhibits therein referred to including the Judgment of [Stated EU Member State Court] bearing Judgment Number 260/2013 and entitled as between:-

R

APPLICANT

– AND –

W

RESPONDENT

And on hearing said Counsel

THE COURT DOTH DECLARE pursuant to Chapter 111 of Council Regulation 2201/2003 that the aforesaid judgment dated the 31st day of October 2018 and the consent order made by the parties be enforceable in the State and accordingly doth order…

THE COURT DOTH DIRECT that

1. the Applicant be at liberty to request the assistance of An Garda Síochána in securing the return of the children whether accompanied by the Applicant or

> Respondent to [Stated EU Member State] and for the enforcement of the Applicant's entitlement to recover possession of Travel Documents including Passports for such travel.
>
> 2. the Court doth lift the in camera rule only in respect of that part of the Order being recognised and enforced which specifies the parents have agreed a consent order that the children reside either in [Stated EU Member State] or [Stated European City] and not in Ireland said communication to be made to An Garda Síochána and the Principal(s) of the schools) where the children are currently attending.
>
> 3. And the Court doth make no order as to costs."

10. The court notes in passing that Judgment No. 260/2013, as referred to in the above order, was given by the court of the relevant EU Member State on 31 October 2013. However, the judgment given by the court of the relevant EU Member State on 31 October 2018 was Judgment No. 316/2018. Both judgments were given on 31 October of the relevant years but the substantive order is the order made in 2013 (and incorporates a settlement that the parties had entered into at that time). What was made in 2018 was an enforcement order of a court of the relevant EU Member State. (In effect, a form of execution was taking place at that stage).

11. Following on the making by the Master of the *ex parte* order, the children were removed from Ireland. There are somewhat conflicting accounts on the part of each party as to what happened following on the order. However, it seems to the court that the following facts can safely be stated.

12. First, Mr R attended at the children's school with his solicitor on 2 May 2019. Second, Mr R and his solicitor had attended at the local Garda station prior to arriving at the school with the intention of procuring the assistance of the Gardaí in giving effect to the Master's order (the former solicitor for Mr R avers*, inter alia*, in this regard that *"I say that I brought him to…[X] Garda Station to look for their assistance in effecting the Master's Order. I further say again that the Order specifies that my client could request the assistance of An Garda Síochána")*. Third, Ms W attended at the school and the Gardaí also attended at the school. Fourth, with the assistance of the Gardaí, Mr R removed the children from the school and took them to a hotel where he was staying. Fifth, on 3 May 2019, Ms W attempted to obtain a stay of the Master's order in the High Court. The High Court judge indicated that she would grant a stay pending a hearing of Ms W's motion, the motion being made returnable for the 13 May. Sixth, when counsel for Mr R attended in court, he indicated that his client was already on a plane bound for the relevant EU Member State via a UK city. Seventh, it is clear from the affidavit of the solicitor for Mr R that Mr R intended to remove the children from Ireland on foot of the *ex parte* order. Thus, she avers, *inter alia*, as follows:

> *"[O]n the evening of 1 May 2019 my colleague…telephoned*…[Ms W's] *solicitor to inform her of the existence of the Master's Order and to ascertain if there was any way in which it could be handled by the parties with the assistance of their solicitors and therefore effected in the least distressing way possible for the children, but this was not possible to negotiate. I also say and believe that therefore my colleague told* [Mr R]…*that he should telephone* [Ms W]…*to inform her of the Order and to try and agree a way to bring the children back from Spain without causing them or her distress".*

13. All the just-described action was taking place in May 2019. Yet the law as to removals pursuant to *ex parte* orders had been expressly stated by Hogan J. for the Court of Appeal in the clearest of terms a year previously in *Hampshire County Council v. C.E. and N.E. (otherwise N.C.)*, op.cit., at para. 45:

> "[T]*his practice of removing the children before the service of the proceedings on the parents is a wholly unlawful one. It is utterly at odds with the constitutional guarantee of fair procedures, because an ex parte order of this kind cannot validly have irreversible effects of this kind*….[T]*he practice sets at naught the procedural guarantees…provided for in Chapter III of the Brussels II bis Regulation and is also inconsistent with the guarantees of an effective remedy contained in both Article 47 of the EU Charter of Fundamental Rights and Article 13 ECHR."*

14. But even if Hogan J. had never given his judgment in *Hampshire County Council*, how could it be, acting even on first principles, that it would be lawful for children to be removed from the custody of a mother in Ireland and brought by a father to another jurisdiction by virtue only of an order obtained on an *ex parte* basis and without proper service of the proceedings on the mother of the children? And as will be seen later below there was not proper service on Ms W.

15. To take a child from the custody of any primary carer is always a harsh step, albeit sometimes (regrettably) a necessary one. It follows that for solicitors advising in such matters the utmost care is required to ensure that all procedural steps, such as service of the proceedings on the affected parent/s, are duly done. That this should be so is not born out of some strange judicial proclivity for technicality. As Hogan J. makes clear, service of the proceedings on the affected parent/s ensures that, *inter alia*, the constitutional guarantee of fair procedures is observed. So a protection guaranteed by the most basic (and most important) law of Ireland is at stake. And, if the court might be forgiven a word to the wise, solicitors involved in such proceedings need to take a care for their own personal welfare, as well as their professional careers. As Hogan J. observed in *Hampshire County Council*, op. cit., at para. 46:

> *"It is the clear duty of the courts to direct that this practice…must stop immediately. If it does not, then I fear that it may lead to some altogether unpleasant consequences for those acting in this fashion in any future case, for the prospect of contempt proceedings…were this practice to re-occur must be a very real one."*

16. Hogan J. is, if the court might respectfully observe, the most courteous of judges, so for him to put matters so strongly in a judgment for the Court of Appeal, is indicative of the risk that now presents for all those who positively assist in the removal of children pursuant to an *ex parte* order and before the service of proceedings on the affected parent/s. And if the risk to which Hogan J. referred in *Hampshire County Council* was a "*very real one*" in 2018, how much more real it must be as we approach 2021.

17. It is clear that before the children were removed from this jurisdiction, Mr R and his former solicitor knew that Ms W was applying for a stay on the *ex parte* order. That this is so is clear from the affidavit evidence of Mr R's former solicitor who avers, *inter alia*, that "*Some time later* [this was on 2 May when Mr R and his former solicitor called to [X] Garda Station]…*another Garda told us that*…[Ms W] *had applied for a stay on the Order*". In a remarkable averment, the said solicitor then moves on to aver that "*Neither I nor my colleague nor* [Mr R] *had been notified that*…[Ms W] *intended to make any such application as she would have been required to do".* Two points might be made in this regard:

> first, it is ironic that the solicitor should refer to the need for the observation of formalities in the context of a failure properly to serve on Ms W notice of the application in which the *ex parte* order had issued.
>
> second, a solicitor confronted with what the Garda said here ought, at a minimum, to seek to ascertain the truth of what has been said by the member of An Garda Síochána (Gardaí not typically being personages given to making loose remarks) and not assist further in the physical removal of a child from the jurisdiction unless and until the stay application is heard. As the solicitor who acted for Mr R was not before the court at the hearing of this application, the court does not consider it appropriate to explore this aspect of matters further, nor should the foregoing observations, which the court has sought to make in general terms, be construed as a criticism of that solicitor.

18. Turning briefly to the nature of the Relevant Member State Court Order, the (enforcement) order of 31 October 2018, the operative part of that judgment, as officially translated, states as follows:

> "*I* [the judge] *agree to continue with the forced enforcement under the terms of the Order of this Court of 20th March 2017, asking the executed party for a period of THIRTY DAYS to comply with the Regulatory Agreement signed by the parties on 29th July 2013 and, particularly, of Agreement VII in its terms, by which the executed party* [Ms W] *must establish the domicile of their children in* [the relevant EU Member State]…*or* [a particular UK city] *and warning her with the use of non-personal constraints or coercive fines…in the event of non-compliance*".

19. A number of observations might be made in respect of the above-quoted text. First, the order is an enforcement order concerned with the execution of a previous order. Second, the order directs Ms W to re-establish her home with the children in one or other of the

stated places within a 30-day period. Third, on its face, the order, notably, does not direct or permit Mr R to do anything, including the removal of the children from the care of their mother and/or removing them from Ireland without her consent. It directed Ms W to do something as opposed to permitting Mr R to do something without Ms W's consent.

20. The order of the Master of 1 May 2019 not only declared the order of 31 October 2018 to be enforceable but also the "*consent order*" made by the parties, which quoted phrase appears to refer to the order of 31 October 2018. Under the Brussels IIa Regulation a certificate must issue identifying the order to be enforced. Here, the certificate refers only to the order of 2018. It does not refer in any way to the order of 2013. So the Master, unfortunately, sought to enforce an order which was not the subject of the certificate received.

21. The reference in the portion of the Relevant Member State Court Order quoted above to the "*Regulatory Agreement"* is a reference to the agreement of 29 July 2013, which, in the translated version before the court, provides*, inter alia*, as follows:

> *"I. – …The children shall be under the care and custody of the mother, with whom they will coexist* [presumably 'live']….
>
> *VII. – Because* [Stated UK city] *is a city where both spouses have roots and family ties, they agree that in case wife's economic prospects are better in* [Stated UK city] *by having at her disposal a suitable job to family interests or undertake any kind of business, with no need of husband further consent, the wife can move to [Stated UK city] with the children, as the parent with full custody, just communicating the circumstance to the husband.*
>
> *By way of this Convention* [presumably 'agreement'], *the spouses submit to the judge authorisation, without needing further submission or communication to judge, the chance that the mother moves to [Stated UK city] with the common children for the previous change in the circumstances."*

22. The court cannot but note that by seeking to insist on one part of the order (clause VII), a difficulty has presented under clause I. Presumably Mr R would contend that the agreement falls to be read as a whole, without pitting clause against clause. However, if that is his preferred reading, then surely his aim should have been to bring about compliance with the entirety of the agreement, not just elements of same. (By way of comparison, one often gets an order in child abduction cases whereby children are to be returned and a specific person is to bring them back, precisely to avoid a separation of the type that has occurred here; there is no such order extant in the within proceedings).

III

Some Law

a. General Scheme of the Brussels IIa Regulation.

23. The Brussels IIa Regulation is concerned with issues of jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. It provides*, inter alia,* as follows:

"Article 21

Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required….

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State 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….

[Court Note: It follows that the type of judgment referenced is not enforceable until it has been declared enforceable. (Certain exceptions apply, *viz.* as regards rights of access and the return of a child entailed by a judgment given pursuant to Art.11(8) of the Brussels IIa Regulation (see in this regard, *inter alia*, Arts.40(1), 41(1) and 42(1)). However, these exceptions are not relevant and so not considered here). The grant of a declaration of enforceability allows the use of execution procedures in the state where enforcement is sought. Without such a declaration, the execution procedure cannot be invoked in the State which is addressed.]

Article 47

Enforcement procedure

1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State".

[Court Note: What the Brussels IIa Regulation contemplates in essence is that a person gets a declaration of enforceability (save in excepted cases) and can then use the execution mechanisms in the State addressed as if the order had been made in that State.]

b. Procedure for Obtaining a Declaration of Enforceability.

24. When it comes to the procedure for obtaining a declaration of enforceability, the Brussels IIa Regulation provides, *inter alia*, as follows:

"Article 30

Procedure

1. *The procedure for making the application shall be governed by the law of the Member State of enforcement….*

[Court Note: In Ireland the designated authority to whom that application is made is the Master of the High Court. Thus O.42A, r.5(1) of the Rules of the Superior Courts provides that "*An application for the enforcement of a judgment pursuant to Chapter III of Regulation No. 2201/2003 or sections 7 or 20E of the 1998 Act shall be made ex parte to the Master*".

Article 33

Appeal against the decision

1. *The decision on the application for a declaration of enforceability may be appealed against by either party….*

5 *An appeal against a declaration of enforceability must be lodged within one month of service thereof….*

[Court Note: Order 42A, r.13(1) RSC provides as follows in this regard:

> *"If enforcement is authorised by the Master, the party against whom enforcement is sought, may, subject to sub-rules (2), (3), (4) and (5), appeal against the relevant order to the High Court within one month of service thereof or, where the relevant order is made under the Maintenance Regulation, within thirty days of service thereof."*

In Ireland, what the Brussels IIa Regulation calls an "*appeal"* has in effect been transmuted in the Irish law context into an application on notice for the court to set aside its own order. In this regard, the court recalls the decision of the High Court in *Bedford Borough Council v. M and Anor*. [2017] IEHC 583, at para. 36, where it is stated, *inter alia,* as follows:

> "[W]*hat the regulation calls an 'appeal' is more akin in practice to an application to the court on notice to set aside its own order."*

c. Order 42A and the Granting of the Declaration of Enforceability.

25. Rule 10 sets out certain requirements that an order granting a declaration of enforceability shall comply with. For example, rule 10(2) provides as follows:

> *"A relevant order made under Regulation No. 2201/2003 shall:*
>
> *(i) state the period in accordance with Article 33(5) of Regulation No.2201/2003 within which an appeal may be made against the relevant order for enforcement, and*
>
> *(ii) contain a notification that execution of the judgment or decision may issue before the expiration of that period, and*

(iii) contain a notification that execution of the judgment or decision may be stayed on application to the Court in the event of an ordinary appeal in the Member State of origin, and

(iv) specify the protective measures (if any) granted pending execution."

26. These are all requirements providing for things that must be in the order granting the declaration of enforcement. And they are mandatory requirements.

27. Moving on, rule 11 makes provision as regards the service of notice of a relevant order, providing. *inter alia*, as follows:

> *"Notice of the making of a relevant order shall be served together with the relevant order on the person against whom the relevant order was made by delivering it to him personally, or in such other manner as the Master may direct."*

28. As to the substance of a notice of enforcement, rule 12 provides as follows:

> *"The notice of enforcement shall state:*
>
> *(a) full particulars of the judgment or decision declared to be enforceable and the relevant order,*
>
> *(b) the name and address of the party making the application and his address for service,*
>
> *(c) the protective measures (if any) granted in respect of the property of the person against whom the judgment was given,*
>
> *(d) the right of the person against whom the relevant order was made to appeal to the High Court against the relevant order, and*
>
> *(e) the period within which an appeal against the relevant order may be made."*

29. So, as can be seen, this is a whole series of requirements that concern not the order (those requirements were in rule 10(2)) but rather the notice of enforcement which must accompany the order.

d. The Requirement for Proper Service and the Decision in *Hampshire*.

30. The requirement for proper service when a declaration of enforceability has been granted has been addressed by the courts on a number of occasions, perhaps most notably by the Court of Appeal in *Hampshire County Council v. C.E. and N.E.* [2018] IECA 365.

31. There is an extraordinary level of litigation in the *Hampshire* matter, including judgments of the High Court, the Court of Appeal and the European Court of Justice. By way of 'potted' history as to what was happening in the matter at the time this judgment of the Court of Appeal was given, the County Council had got an order in England rendering certain children wards of court and that the children be delivered into the court's

jurisdiction. The Council then got an enforcement order, and before the order was served they arranged with the Child and Family Agency to get the children and brought the children to England. The parents attempted to appeal the enforcement decision but unfortunately for them their appeal was, on one view, two days out of time. The High Court therefore declined to proceed with the appeal. In a subsequent appeal of this declinature to the Court of Appeal, Hogan J. considered that matters were not as straightforward as it had seemed to the court below and the Court of Appeal referred to the Court of Justice the issue of whether it could be the case that people could be left with no appeal in circumstances where they were simply two days out of time or whether there was a power to extend granted under the Brussels IIa Regulation. The Court of Justice found that there was no power under the Regulation to extend the time for appeal (the Advocate General had advised that there was such a power).

32. Despite the judgment of the Court of Justice, the *Hampshire* case had not yet run its course. For up to the time of this judgment the parents had accepted that they were served on a particular day, that the time ran from that day, and that they were out of time. Thereafter, possibly informed by certain observations of the Advocate General in the Opinion that preceded the judgment of the Court of Justice, when the matter came back to the Court of Appeal the parents sought leave to introduce a new argument, viz. that the time limit did not run from the date that the parents had originally thought to be the applicable date because, it was claimed, they had not been properly served. The Court of Appeal allowed this argument as to service to be made. Thereafter, the above-cited judgment issued from the Court of Appeal offering what is, at this time, the definitive judgment on what is required under the Brussels IIa Regulation when it comes to service. (*Hampshire* developed still further after this judgment of the Court of Appeal, but that aspect of matters does not require to be considered here).

33. Whelan J., for the Court of Appeal, makes clear in her judgment that Order 42A of the Rules of the Superior Courts must be construed and interpreted in such a manner as to ensure that rights derived from the EU Treaties and Charter will be amenable to effective exercise, observing as follows, at para. 81:

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

34. Whelan J. also observed that a person against whom a decision is granted *ex parte* is entitled to certain information as to the manner in which the application which resulted in that decision was made, including information as to the conduct of the application, what documents were relied upon in the application, the issues which arose, and the representations of counsel. Thus, per Whelan J., at para. 86:

> *"The appellants, as the respondents named in the ex parte orders, were entitled to the essential information as to the manner in which HCC had purported to demonstrate to the High Court that the application could be granted in its favour. The conduct of the application, documents relied upon in the application, the issues which arose and the representations of counsel all clearly informed the reasoning underpinning the ex parte decision and order. Same were a prerequisite to ensure in this case that "full particulars of the judgment or decision declared to be enforceable" were provided to the affected parties as mandated by Order 42A, r. 12 of the Rules of the Superior Courts."*

35. At the just-quoted part of her judgment, Whelan J. was dealing with EU rights and obligations. She then moved on to consider matters from an Irish domestic law perspective, observing, *inter alia*, as follows, at para. 93:

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

36. Here what was at play was not a permanent removal, but it was a removal, nonetheless.

37. In summary, what can be seen from the foregoing is that the requirement for the documentation underlying the application and full particulars derives not just from European Union law but domestic law also, and if there were any doubt about this, Whelan J. copper-fastens the point when she observes, *inter alia*, as follows, at para. 100 of her judgment:

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

IV

Application of Law to Facts at Hand (Part 1)

38. The court turns now to apply the above-mentioned law to what actually occurred in this case.

39. First, the order of the Master (quoted in full previously above) did not satisfy the requirements of O.42A, r.10(2). The period for bringing an appeal was not stated. The order did not contain a notification that an execution of the judgment or decision might issue before the expiration of that period. The order did not contain a notification that execution of the judgment or decision might be stayed on application to the High Court in the event of an ordinary appeal in the Member State of origin. These are not minor requirements. They are part of the method whereby a person's fundamental rights are protected. Therefore, their omission cannot be seen as a minor slip/irregularity. And the failure to include these matters had a particular significance in the within proceedings. (Given that these are standard inclusions, the court would respectfully suggest that it may be that the applicable precedent order relied upon in these types of *ex parte* applications may need to be revisited to ensure that it contains the relevant text as standard).

40. Second, there is no evidence that any form of notice of enforcement was ever served, and it would appear that no such notice was ever served. By definition, therefore, Ms W did not have the benefit of receiving full particulars of the judgment/decision declared to be enforceable, and the relevant order. There is a contest of fact between the parties as to what extent and in what circumstances Ms W was shown a copy of the order of the court. However, it is not necessary for the court to resolve this contest of fact. Why so? Because even if one proceeds on the version of events as recounted in the affidavit of the former solicitor for Mr R, sworn on 20 August 2019 (considered below), it is clear that proper service of the order and necessary documentation was never effected on Ms W. Turning briefly to that affidavit, it contains, *inter alia,* the following averments:

> *"I say that the Appellant and the Gardaí then arrived at the school. The Appellant informed us that she had been in the Central Office of the High Court. She also complained that she had not been served with the Order. I say that at that stage I had only been in possession of the Order for a couple of hours. I tried to hand a copy to her, but she refused to take it from me. She told me that she would not take it and that she did not need to take it because she already had a copy. It seems that the Appellant in fact received a copy of the Order before I did."*

41. It appears from the above that the solicitor for Mr R attempted to show/give Ms W a copy of the *ex parte* order. However, that was the extent of the service that was attempted to be effected in the circumstances. Notably, it appears from the above text that Ms W had 'clicked' to something that the solicitor for Mr R may not have fully appreciated (the court does not know), *viz*. that notwithstanding that Ms W already possessed a copy of the order, she had never been served in the manner contemplated by law, as considered in this judgment. There is no suggestion in the just-quoted text that there was any attempt to serve Ms W with the underlying documentation, much less the synopsis of the submissions of counsel at that application, it does not appear that she was given any of the particulars required under the Rules, and, perhaps most notably of all, no notice of enforcement. None of these omitted documents were provided, on anybody's view of

what happened in this case, by the time that the children were removed from Ireland pursuant to the Relevant Member State Court Order.

42. Third, there appears to be a suggestion from Mr R's side that any failure/deficiency as regards service was remedied by the fact that Ms W had seen a copy of the order and perhaps obtained a copy of the order. However, as a matter of European and Irish law, no subjective knowledge of the person against whom enforcement is sought could come to be considered as a factor in determining whether service is complete. That this is so is clear from the judgment of Baker J. in *Haier Europe Trading SRL v. Mares Associates Ltd* [2017] IEHC 159, which is cited with approval by Whelan J. in the above-considered Hampshire case, Whelan J. observing as follows at para. 94 of her judgment:

> *"As Baker J. correctly observed in Haier Europe Trading SRL v. Mares Associates Limited [2017] IEHC 159:*
>
> *'49. In Verdoliva v. J.M. Van der Hoeven BV & Ors, Case C-3/05, the CJEU, on a preliminary ruling concerning the interpretation of Article 36 of the Brussels Convention as amended, answered the question of whether in cases of failure of, or defects in, service of a decision authorising enforcement, the mere fact that the party against whom enforcement is sought had notice of the decision by whatever means was sufficient to cause time to run for the purposes of the Convention.*
>
> *50. The Court answered the question in the negative and noted that service performed a dual function: it fixes the time for appeal, and in that regard noted the strict and mandatory time limits for appeal provided in Article 36 of the Regulation, and serves to protect the rights of the party against whom enforcement is sought. In that context the Court considered that the procedural requirements for service 'are more stringent than those applicable to transmission of that same decision to the applicant'. Therefore failure of, or defect in, service had to be construed strictly and no subjective knowledge of the person against whom enforcement was sought could come to be considered as a factor in considering whether service was complete.'"*
> [Emphasis added].

43. It follows that there is an obligation to serve in a particular way and with particular documents so as to give certain information to the person served. That is a strict obligation and the subjective knowledge of the other person (the person on whom service is to be made) does not remove the obligations as to service on the person serving.

V

The Procedural Requirements of Constitutional and Natural Justice

44. Constitutional and natural justice require that an order should not be enforced pursuant to an *ex parte* order *before* the person who is the subject of the order so made has been properly served with it and given an adequate opportunity to challenge the order. Authority for this uncontroversial proposition is to be found in the judgment of Hogan J.

for the Court of Appeal in *Hampshire County Council v. C.E. and N.E*. (otherwise N.C.) [2018] IECA 154, which judgment came at the point in time when the Court of Appeal had to decide whether the appeal (which had been found in the High Court to be out of time) was out of time or not and ended up making a reference to the Court of Justice. In the course of his judgment, Hogan J., as mentioned previously above, observes, *inter alia,* as follows at paras. 45-46:

"45. At all events, this practice of removing the children before the service of the proceedings on the parents is a wholly unlawful one. It is utterly at odds with the constitutional guarantee of fair procedures, because an ex parte order of this kind cannot validly have irreversible effects of this kind: see DK v. Crowley [2002] IESC 66, [2002] 2 I.R. 712. It is equally at odds with the concept of a democratic State based upon the rule of law guaranteed by Article 5 of the Constitution of which this Court has so frequently spoken in recent times, given that the right of access to the courts is not only a constitutionally guaranteed right deriving from Article 34.1, Article 34.3.1 and Article 40.3 of the Constitution, but as (the not altogether dissimilar case of) The State (Quinn) v. Ryan [[1965] I.R. 70] *itself shows, albeit in a different context, it is a cornerstone of a democratic state based on the rule of law. One might equally observe that the practice sets at naught the procedural guarantees – explicit and implicit – provided for in Chapter III of the Brussels II bis Regulation and is also inconsistent with the guarantees of an effective remedy contained in both Article 47 of the EU Charter of Fundamental Rights and Article 13 ECHR.*

46. This practice of taking and then returning the children following the making of the ex parte enforcement order but before the parents are served with the enforcement proceedings clearly compromises the procedural rights of the parents to object to the making of that enforcement order in the first place and, if necessary, to apply for a stay. It is the clear duty of the courts to direct that this practice…must stop immediately. If it does not, then I fear that it may lead to some altogether unpleasant consequences for those acting in this fashion in any future case, for the prospect of contempt proceedings…were this practice to re-occur must be a very real one."

[Court Note: In passing, on reading para. 45 of Hogan J.'s judgment, one's first inclination might be to ask 'What is the point in getting an *ex parte* order then? Should you not always proceed on notice?' The answer to this is that on occasion one just has to get an *ex parte* order because the urgency of the situation may require it. And it may sometimes be necessary to operate on foot of the *ex parte* order very quickly, though never so quickly that one acts in breach of applicable law.]

VI

Procedural Fairness Pursuant to European Law

45. Having considered procedural fairness from an Irish-law perspective, it is necessary to consider the same issue from a European Union law perspective because what is in issue in the within proceedings is the due application of a European instrument.

46. European Union law requires that a person against whom a declaration of enforceability is made be given an effective opportunity to challenge the decision before enforcement takes place. That this is so was made clear by the Court of Justice in Joined Cases C-325/18 PPU and C-375/18 PPU *Hampshire County Council v. C.E. and N.E.* [ECLI:EU:C:2018:739], the court observing*, inter alia*, as follows, at paras. 72-73, 75 and 82:

> *"72 The possibility of applying, in accordance with national law, for such a decision to be stayed constitutes an essential safeguard of the fundamental right to an effective remedy and, more generally, of the rights of the defence, which may be granted, in particular, if enforcement of a decision carries a risk of manifestly excessive consequences.*
>
> *73 In those circumstances, while, as the Advocate General noted in point 119 of her Opinion, the person against whom enforcement is sought must have the opportunity to lodge an appeal in order to be able to raise, in particular, one of the grounds of non-recognition set out in Article 23 of the regulation, it must be noted that enforcement of the return order, before the order had even been served on the parents concerned, prevented them from challenging in good time the 'declaration of enforceability' within the meaning of Article 33(5) of Regulation No 2201/2003, and, in any event, from applying for a stay of the order.*
>
> *75 In those circumstances, it must be held that enforcement of a decision of a court of a Member State, which directs that children be made wards of court and that they be returned and which is declared enforceable in the requested Member State, prior to service of the declaration of enforceability of that decision on the parents concerned is contrary to Article 33(1) of Regulation No 2201/2003, read in the light of Article 47 of the Charter. [Emphasis added].*
>
> *82 The answer, therefore, to the second and third questions is that Article 33(1) of Regulation No 2201/2003, read in the light of Article 47 of the Charter, must be interpreted as precluding, in a situation such as that at issue in the main proceedings, enforcement of a decision of a court of a Member State which directs that children be made wards of court and that they be returned and which is declared enforceable in the requested Member State, prior to service of the declaration of enforceability of that decision on the parents concerned. Article 33(5) of Regulation No 2201/2003 must be interpreted as meaning that the period for lodging an appeal laid down in that provision may not be extended by the court seised."*

47. It follows from the above that enforcement of an order prior to the service of a declaration of enforceability is contrary to Article 33 of the Brussels IIa Regulation and

Article 47 of the EU Charter of Fundamental Rights, the latter of which is concerned with the right to an effective remedy and to a fair trial and provides*, inter alia*, that "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."*

VII

Application of Law to Facts at Hand (Part 2)

48. On the facts of this case a number of issues arise in terms of procedural fairness.

49. First, the Master's order states, *inter alia,* that "*the…judgment dated the 31st day of October 2018 and the consent order made by the parties* [doth] *be enforceable in the State"*. There are no temporal or other restrictions on enforceability identified. This, unfortunately, is despite the fact that as a matter of domestic and European Union law, the Relevant Member State Court Order was not entitled to be enforced in the State until Ms W was properly served with the declaration and given an adequate opportunity to challenge.

50. Second, the Master was, unfortunately, in breach of the requirements of domestic and European Union law in failing so to limit the temporal effects of the declaration (in order to protect the rights of the Ms W). Domestic and European Union law required that the Master restrict and limit the effect of the declaration of enforceability until Ms W had been properly served and had an adequate opportunity to apply for a stay.

51. Third, the scope of the Master's order was, unfortunately, such as to declare the Relevant Member State Court Order to be enforceable at a time when as a matter of domestic and European Union law the Relevant Member State Court Order was not enforceable. The Master granted an open-ended declaration which in effect stated the Relevant Member State Court Order to be enforceable from the moment the Master's order was given, even though as a matter of Irish and European Union law it was not enforceable prior to proper service and an effective opportunity to get a stay.

52. Fourth, the Master's failure to constrain his order in accordance with domestic and European Union law was, unfortunately, an error of law on the part of the Master.

53. Fifth, the unfortunate consequence of the foregoing was that Mr R sought to enforce a foreign court order at a time when as a matter of domestic and European Union law it was not enforceable.

54. Sixth, the cumulative effect of the foregoing was to bring about a situation in which Ms W's fundamental rights – under the Constitution and under the EU Charter of Fundamental Rights (in particular Art.47 of same) – were, most regrettably, breached.

VIII

Some Other Issues Presenting

i. Power of the Master

55. When dealing with an application for a declaration of enforceability, the only power of the Master is either to grant such a declaration or to refuse it. Obviously, the Master can, *e.g.,* put a temporal element into his order if granting the declaration*, i.e*. 'The order is enforceable from such and such a date'. However, the Master does not have the power to grant provisional/protective measures pursuant to Art.20(1) of the Brussels IIa Regulation, which provides:

> *"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 laws of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter".*

56. An example of a protective measure that might be made by the High Court is an order *ex parte* directing that the person against whom the order is sought and being made would lodge the children's passports with the High Court, thus ensuring that a step that might be taken to stymie the process contemplated by law could not readily be taken. But that is an order that can only be made by the High Court. That the Master does not have like power is clear from O.42A, r.2 which provides that *"An application for relevant provisional measures shall be made ex parte to the High Court*". There is no evidence before the court that any application was ever made to the High Court in this regard.

ii. Effect in Law of a Declaration of Enforceability.

57. As mentioned previously above, Art.47(2) of the Regulation provides as follows:

> *"Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State".*

58. Regulation 5 of the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112 of 2005) provides that *"A declaration of enforceability granted pursuant to Section 2 of Chapter III of a judgment on the exercise of parental responsibility in respect of a child shall be of the same force and effect for all purposes as if it were an order of the District Court."*

59. The implication of reg.5 is that the Relevant Member State Court Order that was the subject of the declaration of enforceability had the same force and effect for all purposes as if it were an order of the District Court and thus could be enforced in the same way as any other order of the District Court made in family proceedings between two ex-spouses.

60. Save as may otherwise be provided in legislation, the Gardaí ordinarily have no function in the enforcement of orders in civil matrimonial cases between parties in the District Court, any such matter being, to use a colloquialism, 'a civil matter'. The court therefore does not see, with respect, that the Master could properly order, as was ordered in his order, that "*the Applicant be at liberty to request the assistance of An Garda Síochána in*

securing the return of the children whether accompanied by the Applicant or Respondent to [Stated EU Member State] and for the enforcement of the Applicant's entitlement to recover possession of Travel Documents including Passports for such travel". Even if one accepts that for the Master to make this last-mentioned order was the making of a provisional/protective order (and the court admits to the greatest of scepticism that the just-quoted order can properly be so described), the Master, for the reasons indicated above, does not have the legal power to make a personal/protective order. Additionally, the court notes that this was a matter which simply had nothing to do with the Gardaí when one bears in mind the effect of the declaration of enforceability: all a declaration of enforceability countenances is that one may invoke the execution procedures as applicable in Ireland, i.e. as if what one had was a District Court order in family proceedings, and the Gardaí typically have nothing to do with the execution/enforcement of such an order.

IX

Points Made by Mr R

61. In fairness to Mr R, he went to the courts of the relevant EU Member State with his lawyers, obtained a court order there, then came to Ireland and engaged a solicitor here in a bid to enforce the Relevant Member State Court Order. So he went a long way towards doing matters right, though he ought not to have proceeded with the removal of the children in the face of the knowledge that Ms W was seeking a stay on the order that Mr R had received from the Master.

62. By the time this matter came to hearing, Mr R was no longer legally represented. As a result much of the subject-matter of this judgment went unaddressed by him as he admitted that he was not competent to meet the points raised. He did provide the court with written submissions, for which the court is grateful, albeit that they focused on the substantive issues between the parties, rather than the subject-matter of the within application. In his oral submissions, Mr R raised three broad points which might usefully be addressed:

(i) he contended that this application concerns a technicality.

The court accepts that what is at issue is quite detailed law. However, it respectfully does not accept that what is in issue is a technicality. As a result of what occurred, the children were removed from Ireland without Ms W, who had physical custody of the children, ever being heard by the courts before the children were removed. Thus what presents are fundamental rights under Irish and European Union law and what has transpired involves a grave wrong to Ms W.

(ii) he contended that Ms W was served with a copy of the order.

The court accepts that Mr R is a non-lawyer and that it may seem to him, in good faith, that service was effected. In truth, on any view of the facts, Ms W was not given service in the form required by law – and again that a particular form of service is required is not a legal technicality; the requirement exists to ensure that Ms W's fundamental rights (and the rights of any affected parent/s in the position in which Ms W found herself to be) are protected.

(iii) he contended that Ms W is in breach of what was ordered in the relevant EU Member State.

Because of the way in which matters transpired, Ms W has been denied the opportunity to argue before the courts of Ireland whether the Relevant Member State Court Order was an enforceable court order or not. There seems very little point in her making that case when the children have already been removed from Ireland.

X

Conclusion

63. For all of the various reasons above, the court will allow the appeal and discharge the order made by the Master.

XI

Final Observations

64. Ms W has suffered a grave wrong as a result of the errors that present in this case. She, a mother who was living with her two children in Ireland for some years, has for now lost physical custody of those children, without her side of matters ever having been heard by the Irish courts. Perhaps, had she been heard, Ms W might have succeeded in resisting the removal of the children, perhaps she might have failed – the court has no view in this regard – but that she was not even heard on the issue is a grave wrong.

65. Are there any systemic lessons can be taken from all that has occurred in order to ensure that there is not a repeat occurrence of what transpired here and that affected parents (and their children) are adequately protected? Such lessons do not help Ms W but maybe they might help others. This judgment seeks to take a first step in this regard by setting out the (not un-complex) applicable law in what it hopes is a clear manner. However, three further possibilities occur:

(i) to take the Regulation, Order 42A and the 2005 Regulations, put them in brochure form and (i) annotate them so that practitioners have a 'one stop shop' in terms of knowing what to do, and (ii) explain the provisions in simple Citizens Information Board-type language so that everyone can understand them. No area of law is so complex that it cannot be deconstructed into something simpler, even if the detail of the law remains the same.

(ii) re-visit the standard template of the *ex parte* order that issues when a declaration of enforceability is sought so as to ensure that all the necessary detail which such order is required to contain appears in the precedent template and thus features in the order.

(iii) given the particular risks which present for professional lawyers in terms of inadvertently facilitating the removal of a child from the jurisdiction on foot of an *ex parte* order and before the service of the proceedings on the affected parent/s, perhaps the two legal professional bodies might usefully prepare a list of 'dos' and 'don'ts' for their members in this regard.

66. These are but possibilities, the court is not omniscient, and there may be better solutions; however, improvements are surely necessary to reduce the risk of the unlawful removal of children following an *ex parte* order but before the service of the proceedings on the affected parent/s. Unhappily, while the above and/or other measures might yield a better future, they cannot cure the past, and that is very much to be regretted.

TO THE APPELLANT/RESPONDENT:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Appellant/Respondent,

I have dealt in the preceding pages with various issues presenting in this application. Much of what I have written might seem like jargon. In this section, I identify briefly some key elements of my judgment and what it means for each of you. ***This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.***

I am grateful to you both for attending at the hearing. As I indicated at the end of the hearing, I am 'discharging' the order that issued from the Master of the High Court. That order ought not to have issued in the form that it did.

Three main points were made by 'Dad' at the hearing:

(i) he contended that this application concerns a technicality.

I accept that what is at issue is quite detailed law. However, I respectfully do not accept that what is in issue is a technicality. As a result of what occurred, the children were removed from Ireland without 'Mum', who had physical custody of the children, ever being heard by the Irish courts before the children were removed. So what is in issue are fundamental rights under Irish and European Union law, and that 'Mum' was not heard by the Irish courts before the children were removed from Ireland was a grave wrong to her.

(ii) he contended that 'Mum' was served with a copy of the order.

I accept that 'Dad' is a non-lawyer and that it may seem to him, in good faith, that service of the order was duly effected. In truth, on any view of the facts, 'Mum' was not given service in the form required by law – and again that a particular form of service is required is not a legal technicality; the requirements exist to ensure that the rights of any affected parent/s in the position in which 'Mum' found herself are duly protected.

(iii) he contended that 'Mum' is in breach of what was ordered in another EU member state.

Because of the way in which matters transpired, 'Mum' has been denied the opportunity to argue before the Irish courts whether or not what was ordered by the foreign court was enforceable. I do not know (and have no view) on whether or not 'Mum' would have succeeded in whatever arguments she might have put forward in this regard. However, a grave wrong has been done to her that she was not allowed to make these arguments before the children were removed from Ireland.

I note that 'Dad' was legally represented in the EU Member State that issued the order that is at the heart of these proceedings, and that he was legally represented when he sought to enforce that order in Ireland. So he clearly set out with the intention of complying with the law. However, the law was not duly observed in Ireland. At the latest, from the moment that 'Dad' knew that 'Mum' was applying for a stay on the order that issued from the Master of the High Court, he ought not to have proceeded with the removal of the children from Ireland until that application had been heard.

Yours faithfully

Max Barrett (Judge)