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Re Z (Recognition of Foreign Judgments) [2016]

[2016] EWHC 784 (Fam)

08/04/2016

Barristers
Henry Setright KC
Private: David Williams QC
Michael Gration KC

Court
Family Division

Practice Areas
International Children Law

Judgment considering the exercise of the court's powers under the inherent jurisdiction to recognise and enforce orders concerning the medical treatment of children made by the courts of another member state of the European Union.

Z is a girl in her early teens who lives in Ireland. She developed a very serious eating disorder. It became clear in 2016 that she required specialist treatment, incorporating nutrition, hydration and psychiatric treatment, including the use of restraint which was not available in Ireland. Her doctors made arrangements for her to be admitted to an English hospital. These arrangements were sanctioned by an order of the Irish High Court, after hearing evidence from Z's treating physician.

The Health Service Executive for Ireland ("the HSE") applied under the inherent jurisdiction for an order authorising the treatment of Z in an English hospital. The application was supported by Z's parents, but the correct jurisdictional basis for making such an order was disputed. The HSE submitted that this case fell within Council Regulation (EC) 2201/2003 ("Brussels IIA"). Z's parents submitted that it did not fall within Brussels IIA, but that such an order could be made under the inherent jurisdiction of the High Court.

Baker J held that the order sought did fall within Brussels IIA because it fell within the meaning of Article 1(2)(c), namely it concerned 'the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child'. Even if this is incorrect, it was held that such an order plainly amounts to a measure for the protection of the child and thus, having regard to recital (5) in the preamble, comes within the scope of the Brussels IIA. Baker J accepted the submission on behalf of CAFCASS that the court was asked to make a decision in relation to parental responsibility, not to supplant that of the parents, but to support their parental responsibility in circumstances where the hospital requires authority over and above the parents' consent to provide medical treatment for their child against their wishes.

Having determined that Brussels IIA applied, Baker J noted the process contained within FPR Part 31 for the recognition and enforcement of foreign orders under Brussels IIA, including the interim enforcement of foreign orders pending completion of the process. Such an interim power only arises, however, where the order has been registered. The anecdotal experience of the legal representatives involved was that there was a short, but potentially significant, delay between the filing of an application and the registration of the order. Baker J surveyed a number of authorities as to the appropriate use of the inherent jurisdiction and determined that it is open to the court to invoke it in urgent cases to make orders providing for the immediate recognition and enforceability of orders of a court of a member state of the EU, pending an application under FPR Part 31.

In so determining, Baker J stated the following at paragraph 19:

'I accept that making an order that protects a child who is not a British national and who has never resided in this country may represent an extension of the use of the inherent jurisdiction. It could be said that such an order goes beyond the parens patriae origins of the jurisdiction. But if the modern function of the inherent jurisdiction is to supplement the statutory code where necessary, its use will inevitably evolve over time and, given the globalisation of family law, that evolution will, in appropriate circumstances, extend to embrace international cases.'

Baker J also agreed with the parents' submission that Article 56 Brussels IIA did not apply. The order sought was not to place Z in institutional care and nor was this a case of a public authority intervening in a domestic case of child protection, particularly given that the parents consented to the treatment. As such, there was no obligation on the Irish court to consult the English Central Authority.

Finally, Baker J concluded that there was no requirement for Z to be represented in these proceedings. She was represented in the Irish proceedings and such proceedings are subject to regular review. Given that an English Guardian would simply support the order being made, it was unnecessary for Z to be represented before making an emergency order under the inherent jurisdiction.

Neutral Citation Number: [2016] EWHC 784 (Fam)
Case No: FD16P00105

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2016

Before :

THE HONOURABLE MR JUSTICE BAKER
– –

IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003 OF 27 NOVEMBER 2003
IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF Z (RECOGNITION OF FOREIGN ORDER)

Between :

THE HEALTH SERVICE EXECUTIVE OF IRELAND Applicant
– and –
Z (1) Respondents
Z'S FATHER (2)
Z'S MOTHER (3)
AN ENGLISH NHS TRUST (4)
– –
– –

Henry Setright QC, Victoria Butler-Cole and Michael Gration (instructed by Bindmans LLP) for the Applicant
David Williams QC (instructed by Penningtons Manches) for the 2nd and 3rd Respondents
Melanie Carew (of Cafcass Legal) as Advocate to the Court

Hearing dates: 23rd March 2016
– –

Approved Judgment
I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
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THE HONOURABLE MR JUSTICE BAKER
IMPORTANT NOTICE
This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment may be identified by name or location and that in particular the anonymity of the child and members of her family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

THE HONOURABLE MR JUSTICE BAKER :
Introduction
1. This judgment considers the exercise of the court's powers under the inherent jurisdiction to recognise and enforce orders concerning the medical treatment of children made by courts of another member state of the European Union.

2. On 4 March 2016, I made an interim order in respect of a girl, Z, who lives in the Republic of Ireland, declaring that orders made by the High Court of Ireland on 2 March 2016 should stand as orders of this court, thereby permitting emergency admission for treatment in a hospital in this country. At a hearing on is notice on 23rd March, I made a further interim order to that effect. This judgment set out the reasons for those orders.

Background
3. As this judgment will be published, albeit anonymously, I propose to recite little of the factual background. Suffice it to say that Z is a girl in her early teens who has developed a very serious eating disorder. She received treatment at a number of hospitals in Ireland but by early 2016 it became clear that she required special treatment, incorporating nutrition, hydration and psychiatric treatment, which would include, if necessary, the use of restraint, and which could not be provided in her home country.

Her doctors therefore made arrangements for her to be admitted and treated in a specialist unit in an English hospital which is able to provide the treatment required. Her parents supported this proposal although Z herself did not agree.

4. On 25th February 2016, the Health Service Executive for Ireland ("the HSE") filed an application in the Irish High Court seeking an order authorising the treatment in the English hospital. On 2nd March, the application came before the President. At the hearing, Z was represented by her parents as litigation friends. Evidence was given by her treating physician who reported that Z's condition was so serious that she required admission to a specialist eating disorder unit which provide specialist psychotherapeutic support and treatment to adolescents with severe eating disorders and nasogastric feeding to ensure weight restoration. The doctor also reported that Z did not agree to being treated in the English hospital. At the conclusion of the hearing, the President made an order (1) authorising and permitting the HSE to transfer Z to the English hospital and to take all reasonable and proportionate measures to ensure her safety transfer, (2) authorising the English hospital to take all necessary measures to provide Z with such hydration, sustenance, medication and treatment as may be clinically indicated, (3) authorising the English hospital to use reasonable force and/or restraint in the cause of those medical procedures to the extent which may be necessary and in Z's best interests, and (4) authorising the English hospital to take all reasonable and proportionate measures to prevent Z absconding from the hospital. The court listed the matter for a review hearing on 11th April. An independent guardian was appointed to represent Z at that hearing.

5. The plan was to transfer Z to the English hospital on Monday 7th March. An urgent application was therefore made to me ex parte by the HSE late on the afternoon of 3rd March. In the course of that telephone hearing, I raised the question as to the jurisdiction under which the court could recognise and enforce the Irish order, and, in particular, whether the case fell under Council Regulation (EC) 2201/2003, ("Brussels IIA"). I therefore adjourned the matter to the following morning to allow those representing the HSE, Henry Setright QC and Victoria Butler-Cole, to take instructions on that point and a number of other issues. At the resumed hearing, I was shown a number of documents including an email from the NHS trust responsible for the English hospital agreeing to the application. Mr Setright explained that the HSE's preliminary position was that the case did not fall under Brussels IIA. My provisional view was that it did. In view of the urgency of the matter, however, I decided to make an interim order under the inherent jurisdiction that the Irish court order of 2 March should stand as an order of this court, thereby permitting the English hospital to admit and detain Z and provide her with such treatment as it considered appropriate in the absence of her consent. The order recorded inter alia that the urgency of the case warranted invoking the inherent jurisdiction to supplement the provisions of Brussels IIA; that recognition of the Irish court order would not be manifestly contrary to public policy, taking into account the best interests of the child; that Z was a party to the Irish proceedings, acting through her parents as litigation friends; and that her wishes and feelings about the proposed order had been put before the Irish court. In view of the ongoing issue as to jurisdiction, however, I decided to list the matter for a further hearing on 23rd March to consider inter alia the applicability of Brussels IIA, the relevance of Article 56 of that regulation, the use of the inherent jurisdiction, and the continuation of the order. I invited Cafcass Legal to attend the next hearing.

6. Following that order, Z was transferred to the English hospital and remains there at present. I understand that she is making good progress. Her parents are in regular attendance at the hospital.

7. The hearing on 23rd March was attended by counsel on behalf of HSE, and also by David Williams QC on the half of the parents, and by Melanie Carew on behalf of Cafcass Legal. All parties were united in support of the continuation of the order, but there was some disagreement as to the basis on which the order should be made. By this point, the HSE had concluded, on further reflection, that the case did fall

within Brussels IIA and therefore invited the court only to extend the order for a limited time to enable an application to be made under the provisions of Part 31 of the Family Procedure Rules to facilitate the recognition and enforcement of the Irish order under the regulation. On behalf of the parents, Mr Williams, whilst stressing that his clients' focus was on the substance of the order rather than its form, submitted that the case fell outside Brussels IIA.

8. The issues which therefore arose before me were as follows.

(1) Does this case fall within Brussels IIA?

(2) If so, (a) does the court have power under the inherent jurisdiction to make an order for the recognition and enforcement of the Irish High Court order and (b) does the case fall within Article 56?

(3) Is it necessary for Z to be represented for this court on an application for recognition and enforcement of the Irish order?

(4) If the case does not fall within Brussels IIA, what power does the court have to make an order for recognition and enforcement of the Irish order?

(5) Should the court extend the order under the inherent jurisdiction recognising and enforcing the Irish order and, if so, on what terms?

Brussels IIA
9. Brussels IIA is directly applicable in UK law. Its provisions have also been incorporated into the statutory rules governing jurisdiction in certain categories of case involving children in Part I of the Family Law Act 1986. The regulation contained rules as to jurisdiction in Chapter 1, in particular, so far as parental responsibility for children is concerned, in Articles 8 to 15. The principal basis for jurisdiction under Article 8 is that the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that member state at the time the court is seised. The regulation also contains rules as to the recognition and enforcement of orders in Chapter III, Articles 21 et seq.

10. The scope of the regulation is defined in Article 1, which under paragraph (1) provides that, with regard to matters of parental responsibility,

"whatever the nature of the court or tribunal, in civil matters relating to … (b) the attribution, exercise, delegation, restriction or termination of parental responsibility."

Article 1(2) provides that

"The matters referred to in paragraph 1(b) may, in particular deal with

(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;

(d) the placement of the child in a foster family or in institutional care;

(e) measures for the protection of the child relating to the administration, conservation or disposal of the

chart's property."

The list of matters in Article 1 (2) is not exhaustive. In Case C-435/06 [2008] 1 FLR 490, the CJEU stated (at paragraph 30) that

"the use of the words 'in particular' in Article 1 (2) of that regulation implies that the list contained in that provision is only to be used as a guide."

The Court further attention to recital 5 in the preamble to the regulation which provides that

"in order to ensure equality for all children, this regulation covers all decisions on parental responsibility, including measures for the protection of the child …."

The question in that case was whether the jurisdiction extended to an application to take a child into the care of a local authority, and the court was therefore able to rely in addition on the terms of Article 1 (2) (d), accepting the opinion of the Advocate General that

"…taking into care and placement are closely linked acts …the placement of a child against the will of the parents is possible only after that child has been taken into care by the competent authority" (paragraph 35).

More recently, the CJEU has also held in HSE v SC and AC (Case C-92/12) [2012] 2 FLR 1040 that a judgment of a court of a member state which ordered the placement of a child in a secure institution providing therapeutic and educational carer situated in another member state, and which entailed that, for her own protection, the child was declined of the liberty for a specified period, was within the material scope of Brussels IIA.

11. An order authorising the HSE to transfer Z to a hospital unit, and further authorising that unit to treat her and, where necessary and appropriate, to use proportionate and reasonable force and restraint in the course of the treatment, is different from an order placing a child in the care of a local authority. Nonetheless, such an order is plainly for the protection of the child, and in my judgment it deals with "the designation and functions of … a body having charge of the child's person … assisting the child", within the meaning of Article 1(2)(c). Even if such an order does not fall within that category, it plainly amounts to a measure for the protection of the child and thus, having regard to recital (5) in the preamble, comes within the scope of the regulation.

12. On behalf of the parents, Mr Williams submitted that it is not a decision about the exercise of parental responsibility, and pointed to the fact that the parents actively support the course proposed by the HSE. But the purpose of the order is to authorise the HSE and the English hospital to take action on the child's person that involves a deprivation of liberty against the child's wishes. In her helpful submissions, Ms Carew informed the court that Cafcass was of the view that the court was making a decision in relation to parental responsibility, not to supplant the parental responsibility of the parents but, rather, to support it in circumstances where the hospital needs authority over and above the parents' consent to provide treatment for their child against her wishes. I agree. In my judgement, this case falls within the scope of Article 1.

Recognition and enforcement under the inherent jurisdiction
13. Article 21(1) of Brussels IIA provides that

"a judgment given in a member state shall be recognised in the other member states without any special procedure being required".

Article 23, headed “Grounds of non-recognition for judgements relating to parental responsibility”, provides that

“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 interest 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;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the member state in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another member state or in the non-member state of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the member state in which recognition is sought; or

(g) if the procedure laid down in Article 56 has not been complied with.”

Article 28 (1) provides:

“a judgment on the exercise 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.”

14. In England and Wales, Part 31 of the FPR lays down the process whereunder an interested party may apply to the relevant court for the registration, recognition or non-recognition of a judgment to which Brussels IIA applies, and, following registration, the enforcement of the order. The application to this court, however, was for recognition and enforcement of the Irish High Court order under the inherent jurisdiction of this court. The question therefore arises as to the extent of the court’s powers to make such orders under its inherent jurisdiction.

15. The regulatory framework in Part 31, supplemented by Practice Direction 31 A, is wide-ranging, but it does not meet every eventuality. It includes powers for interim enforcement of foreign orders pending completion of the process prescribed under the rules, but those powers only arise after the order has been registered (see rule 31.17(1A) and rule 21.22). I was informed by Mr Setright that the experience of his instructing solicitors is that there is now a short but potentially significant delay between the filing of the application in the Principal Registry of the High Court and the registration of the order. In those circumstances, Mr Setright submits that the High Court should be ready to utilise its powers under the inherent jurisdiction to supplement the regulatory code where urgent recognition and enforcement are required.

16. It is well established that the High Court may in appropriate circumstances use its inherent jurisdiction to supplement a statutory scheme. As Lord Hailsham observed in Richards v Richards [1984] AC 174 at p199,

"… where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case, it is not open to litigants to bypass the special Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes."

On the other hand, as Lord Donaldson of Lymington observed in the Court of Appeal in Re F (Mental Patient: Sterilisation) 1990] 2 AC 1 at p30, in a passage approved by the House of Lords on appeal:

"The common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process—that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle."

The correct approach was summarised by Roderic Wood J in Westminster City Council v C [2007] EWHC 309 at para 119, in a passage subsequently approved by McFarlane LJ in the Court of Appeal in Re DL [2012] EWCA Civ 253 at para 62. Roderic Wood J observed that

"consistent with long-standing principle, the terms of the statute must be looked to first to see what Parliament has considered to be the appropriate statutory code, and the exercise of the inherent jurisdiction should not be deployed so as to undermine the will of Parliament as expressed in the statute or any supplementary regulatory framework."

As Lord Sumption succinctly observed recently in Re B [2016] UKSC 4,

"the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme."

For this reason, in a different context, I declined in a recent case to exercise the inherent jurisdiction so as to place a child for adoption abroad in circumstances prohibited by statute: see Re JL and AO [2016] EWHC 440 Fam.

17. Applying these principles, it is open to the court, in my judgment, to invoke the inherent jurisdiction in urgent cases to make orders that provide for the immediate recognition and enforceability of orders of a court of a member state of the EU, pending an application under Part 31 of FPR. In taking this course, the court is complying with its obligations under Article 21. The court is not making an order under Article 20 which empowers the court to make urgent protection orders pending the determination by the court of the member state having jurisdiction, since the court having jurisdiction – in this case, the Irish High Court – has already taken the measures it considers appropriate. Instead, under Article 21, the court should make an order which mirrors that made by the Irish High Court.

18. In invoking the inherent jurisdiction in these circumstances, the court must comply with Article 23, so that, for example, recognition should be refused if it would be manifestly contrary to public policy taking into account the best interests of the child; or if the order in the original member state was made (except in urgent cases) without the child having been given the opportunity to be heard,; or on the request of any person claiming that the order infringes his or her parental responsibility and that they were not given an opportunity to be heard in the original member state; or if the procedure in Article 56 (if

applicable) was not complied with (as to which, see below). But provided that none of the grounds for non-recognition in Article 23 arise, the court may in appropriate and urgent cases make an order under the inherent jurisdiction pending the making of an application under Part 31.

19. I accept that making an order that protects a child who is not a British national and who has never resided in this country may represent an extension of the use of the inherent jurisdiction. It could be said that such an order goes beyond the parens patriae origins of the jurisdiction. But if the modern function of the inherent jurisdiction is to supplement the statutory code where necessary, its use will inevitably evolve over time and, given the globalisation of family law, that evolution will, in appropriate circumstances, extend to embrace international cases. Furthermore, just as the inherent jurisdiction has evolved, so has the principle of comity. As US Supreme Court Justice Breyer observed in his book The Court and the World (2015), pp91-92, in a passage quoted by Baroness Hale of Richmond in Re B, supra, at para 61:

" … The court must increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web. In this sense, the old legal concept of 'comity' has assumed an expansive meaning. 'Comity' once referred simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations stepping on one another's toes. Today it means something more. In applying it, our court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives."

20. In the present case, making an order in urgent circumstances under the court's inherent jurisdiction to secure the recognition and enforceability of an order to protect the safety and welfare of Z so that she can come to this country to receive life-sustaining treatment is an entirely appropriate interpretation of our domestic law, allowing it to work in harmony with the laws of the Irish Republic to achieve the common objective of protecting the best interests of the child.

Article 56
21. Article 56(1) provides:

"where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and whereas such placement is to take place in another member state, it shall first consult the central authority or other authority having jurisdiction in the latter state where public authority intervention in that member state is required for domestic cases of child placement."

22. Counsel on behalf of the HSE made detailed submissions on this point. To my mind, the matter is determined by a straightforward interpretation of the wording of the Article. As Mr Setright observes, it is clear that the Article applies to placements involving foster families and to care orders facilitating placements in a secure institution providing therapeutic and educational care: HSE v SC and AC, supra. Mr Setright submits that it is difficult to envisage the term "placement in institutional care" applying to the temporary admission to hospital of a child who needs treatment for a physical disorder. The term connotes the provision of care for a child as a whole, not for a transient or treatable disorder or disability. It connotes a setting in which the responsibility for the child's welfare, as a whole, is placed in the hands of persons other than the child's family. Mr Setright therefore submits that, in all the circumstances, it is difficult to apply the terms of Article 56 to the factual circumstances of this case. The parents have not delegated their parental responsibility to any other institution or person, and they retain control of the decision that has been made to place the child in hospital in this country. Further, the effect of the Irish order is not to "place" the child in the care of the hospital, but to authorise her treatment there by way of

implementation of the parental decision.

23. I agree with these submissions. It should also be noted that the obligation imposed on the court by Article 56 (1) to consult the authorities of the member state in which the order is to be implemented only arises "where public authority intervention in that member state is required for domestic cases of child protection". To my mind, that confirms that the provision does not extend to cases where a child is transferred to a hospital for treatment in another member state since, manifestly, public authority intervention is not required for domestic cases in such circumstances, except where the parents do not consent to the treatment. Save in those circumstances, arranging a child's admission to a hospital in another member state does not amount to the placement of a child in institutional care within the meaning of Article 56.

Representation of the child
24. As set out above, one matter which a court must consider before making an order for the recognition of a foreign order under Article 23 is whether the child has been given an opportunity to be heard before the foreign court. The order cannot be recognised if it was given without the child having had such an opportunity, except in cases of urgency. Part 31 of FPR does not provide for the automatic joinder of a child as a party to an application for registration, but rule 31.6 gives the court power to give such directions as it considers appropriate, thereby permitting the joinder of the child as a party in appropriate circumstances.

25. Whether or not a child should be joined will depend on all the circumstances. Where a child has been a party to and represented before the foreign court, it will generally not be necessary for him or her to be a party before the court on an application for recognition and enforcement of the foreign court order, given the limited scope of the enquiry required of the court considering the application for recognition and enforcement. In this respect, the position is similar to cases involving orders in respect of adults under Schedule 3 of the Mental Capacity Act 2005 – see Re PD [2015] EWCOP 48, paragraphs 31 to 35. In some cases, the joinder of the child may be necessary, but in the vast majority of cases it will not. As pointed out in Re PD, the Court of Protection Rules, in particular the new rule 3A, provide flexibility as to how the incapacitated adult may be represented before the Court of Protection in such cases. Although the FPR do not provide the same range of procedural options, the processes of the Family Division and the Family Court do provide a degree of flexibility, in particular by the availability of advice and assistance through Cafcass and Cafcass Legal.

26. In Re PD, I said at paragraph 36:

"This is an area where the principles of comity and co-operation between courts of different countries are of particular importance in the interests of the individual concerned. The court asked to recognise a foreign order should work with the grain of that order, rather than raise procedural hurdles which may delay or impede the implementation of the order in a way that may cause harm to the interests of the individual. If the court to which the application for recognition is made has concerns as to whether the adult was properly heard before the court of origin, it should as a first step raise those concerns promptly with the court of origin, rather than simply refuse recognition.

The same observations apply in children's cases.

27. In this case, I asked Cafcass Legal to attend the hearing. Miss Carew duly attended and produced a most helpful position statement. She informed me that a discussion had taken place within the Cafcass High Court team as to whether there was a need for Z to be represented. She is now 15 years old and the court making decisions about treatment should hear from her, even if only indirectly. She is, however,

represented in the Irish proceedings, where an independent guardian has now been appointed. In those circumstances, Miss Carew submits that it is not clear that appointing another person to represent Z in the proceedings in this court would assist her or the court. Having discussed the matter with a member of the High Court team, she added that it was inconceivable that a guardian appointed in the proceedings before this court would recommend anything other than enforcement of the treatment order. Furthermore, the order of the Irish High Court provides for regular reviews and this, coupled with the appointment of the independent guardian in those proceedings, provides oversight of the treatment and continued assessment of Z's best interests. In those circumstances, Miss Carew did not press for Z to be represented before me.

28. In my judgment, it is unnecessary for Z to be represented before making an emergency order under the inherent jurisdiction for the recognition and enforceability of the Irish order.

What if Brussels IIA does not apply?
29. In written submissions, and briefly in their supplemental oral submissions, counsel considered the options for recognition and enforcement of medical treatment orders in cases that fall outside Brussels IIA. As set out above, it was Mr Williams' submission on behalf of the parents that the case did indeed fall outside Brussels IIA. He invited the court to make use of the jurisdiction, well established in cases of international child abduction, for the making of mirror orders, as first analysed by Singer J in Re P (A Child: Mirror Orders) [2000] 1 FLR 435 and endorsed by the Court of Appeal in Re W (Jurisdiction: Mirror Orders) [2011] EWCA Civ 703. On behalf of the HSE, Mr Setright, whilst adopting the position at the hearing on 23rd March that the case fell within Brussels IIA, argued in the alternative that, if the court concluded that it did not so that the provisions of Part 31 of FPR were not available, the mirror order mechanism could be used.

30. However, the hearing on 23rd March took place with some limitations of time because the matter came on before me while sitting as the urgent applications judge. In the circumstances, there was insufficient time for counsel to develop these submissions. The jurisdiction to make mirror orders, whilst well established and in common use in cases of child abduction, has not hitherto been used as a means of recognising foreign orders in respect of medical treatment and in my judgment the ramifications of using it in this context requires careful consideration. Having concluded that this case does fall within Brussels IIA, I do not consider it necessary or appropriate to say anything further about the use of mirror orders as a freestanding remedy for the recognition and enforcement of foreign orders falling outside the regulation. I agree that, in urgent cases, a mirror order can be used – as in this case – for the short term recognition and enforcement of an order pending registration under Part 31, but the question whether such orders could be made to provide for indefinite or long term recognition and enforcement of foreign orders falling outside Brussels IIA is an issue to be considered on another occasion.

Conclusion – the order in this case
31. On 4th March, at a hearing when the HSE was provisionally contending that the case did not fall within Brussels IIA, I made an interim emergency order under the inherent jurisdiction authorising the recognition and enforcement of the Irish High Court order until a further hearing on 23rd March. At that latter hearing, I extended the order, but only until such time as an application could be lodged under Part 31 and considered by the relevant court. The need for this order arose because of delays in considering applications under Part 31. Plainly, there is a need for a process where under urgent applications can be considered immediately. Changes in the arrangements of the Principal Registry, and the introduction of the Central Family Court, may have led to difficulties in this respect which I shall draw to the attention of the President of the Family Division.

32. The order made is in the following terms:

UPON the High Court of the Republic of Ireland having made inter alia the following findings and Orders on 2 March 2016:

i) That Z has a mental disorder of a nature and degree that warrants her detention in hospital to receive treatment and that Z is at real and immediate risk of death without such detention and treatment;

ii) That Z lacks capacity to make decisions about treatment for her anorexia by reason of her age and the effects of her mental disorder

iii) That the Health Service Executive, its servants or agents, be authorised and permitted to transfer the defendant from her current placement in [the Irish hospital] on the 7th March 2016 or as soon as practicable thereafter to [the English hospital] and place her there pending further order of this Court for the purposes of receiving treatment there together with any welfare and therapeutic services subject to review and further Order of this Honourable Court;

iv) That the Director/Manager of [the English hospital] his/her servants or agents, his/her servants or agents, be authorised to do the following:

i. Take all proportionate and reasonable measures to prevent Z from absconding from [the English hospital];

ii. In the event of Z absconding from [the English hospital] and/or during the course of any authorised mobilities the Director/Manager of [the English hospital, his/her servants or agents, be authorised to seek the assistance of the police force to immediately search for, arrest without warrant, detain in their custody for a reasonable period of time and to return as soon as practicable Z into the custody of the Director/Manager of [the English hospital] in the event that Z absconds from the said care facility pending further order of this Honourable Court;

iii. To take all necessary measures to provide the defendant with such hydration, sustenance, medication and treatment as may be clinically and/or medically indicated to include the following:

a. Passing a nasogastric tube should the current tube be displaced or removed;

b. Administering nutrition through the nasogastric tube;

c. Inserting an intravenous cannula should efforts to hydrate orally or via nasogastric tube fail;

d. Performing blood sampling and other means of physical monitoring, including regular monitoring of her vital signs, ECG readings, and other necessary assessments as they arise.

e. To administer such minimal sedation or anaesthesia to the defendant as may in their opinion be necessary for the purposes of carrying out such medical treatment.

iv. Use proportionate and/or reasonable force and/or restraint in the course of the said medical procedures to the extent to which it may reasonably be necessary and in the best interests of the defendant, which said force and/or restraint is to be conducted by appropriate personnel trained in therapeutic management of aggression and violence

v. to take all necessary steps to promote Z’s welfare in accordance with their policies and procedures and to provide to this Honourable Court such medical reports as may be requested from time to time in the currency of this order;

vi. in the event of the clinical team at [the English hospital] reaching an opinion that Z would not meet the criteria for detention under section 3 of the Mental Health Act, 1983, that they do immediately procure a report from such responsible Clinician at the hospital and take urgent steps to alert the plaintiff so that the matter can be brought back before this Honourable Court for immediate review;

v) That the HSE, its servants or agents do make application forthwith to the Courts of England and Wales seeking an order for the recognition and enforcement of this Order.

AND UPON the court having made interim orders in respect of the 1st Respondent's transfer to [the English hospital] on 4 March 2016 and the 1st Respondent being admitted to [the English hospital] on 7 March 2016

AND UPON the court being satisfied that the 2nd and 3rd Respondents are the joint holders of parental responsibility in respect of Z and that no other person or body holds PR in respect of Z.

AND UPON the Court being satisfied in the light of the evidence it has considered that:

a) This is an urgent case, in light of the evidence as to Z's medical condition and need for specialist treatment;

b) The urgency of the case warrants the invoking of the court's inherent jurisdiction to supplement the provisions of Brussels IIA;

c) Recognition of the Order of the Irish High Court of 2 March 2016 would not be manifestly contrary to public policy, taking into account the best interests of the child;

d) The Order of the Irish High Court of 2 March 2016 was made in urgent circumstances; and in any event, Z was a party to the proceedings, acting through her parents as litigation friends, and has now been appointed a guardian in Ireland, and her wishes and feelings about the proposed order were put before the Irish High Court;

e) The Irish Order was not given in default of appearance in circumstances where there was a failure to give notice;

f) There is no person claiming that the Order of the Irish Court infringes their parental responsibility;

g) The Irish Order is not irreconcilable with a later judgment in any other State;

h) The child's circumstances are to be the subject of regular reviews by the High Court in Ireland, the next review being on 11.04.16

AND UPON the court holding that Brussels IIA applies in this case because the orders set out above constitute the attribution, delegation, exercise or termination of matters of parental responsibility within the meaning of Art 1.1(b) BIIA , but that the court's inherent jurisdiction can be relied on to supplement the Regulations in an urgent case
AND UPON the court holding that Article 56 of Brussels IIA does not apply in this case, as the arrangements for her treatment in hospital in England and the Irish Order were not made in contemplation of a placement in institutional care

AND UPON the HSE undertaking to apply to the Irish High Court forthwith for the issue of an Annex II Certificate and to then issue an application for registration, recognition and enforcement of the Irish

Order of 2 March 2016 under Brussels IIA

AND UPON the court considering whether and if so how the 1st Respondent's voice should be heard in these proceedings and being satisfied that

(a) her voice was heard by Kelly P prior to making the order;

(b) a Guardian has been appointed for her in the Irish proceedings; and

(c) Cafcass Legal has been present at this hearing
and therefore it is neither necessary or appropriate for her to be heard within these proceedings at this stage.

IT IS HEREBY IN THE INTERIM AND UNTIL REGISTRATION OF THE IRISH ORDER OF 2 MARCH 2016 ORDERED PURSUANT TO THE COURT'S INHERENT JURISDICTION AND ARTICLE 21 OF COUNCIL REGULATION (EC) 2201/2003 THAT:-
1. The measures of the High Court of the Republic of Ireland contained in the Order dated 2 March 2016 shall stand as orders of the High Court of England and Wales.

2. For the avoidance of doubt, paragraph 1 of this Order permits [the] NHS Trust to detain the child at [the English hospital] pending further Order of the High Court in the Republic of Ireland, and to provide the child with such treatment as it considers appropriate for her mental disorder, in the absence of her consent.

3. The above orders are made as being in the best interests of the child and are exercisable whether or not she consents thereto.

IT IS FURTHER ORDERED THAT:
4. The relevant court shall issue forthwith upon the same being presented by the Applicant the application herein for registration under the provisions of Council Regulation (EC) 2201/2003 of the Order of the Irish High Court dated 2 March 2016. Any future hearings in this matter are to be listed before, and reserved to, Mr Justice Baker if available.

5. If, for the avoidance of doubt, the Irish Court makes an order for continuation of the Order of 2 March 2016 on 11 April 2016 or any other date, there is no requirement for any fresh application for recognition or enforcement, and the said Order will remain applicable and in force in England and Wales.

6. In the event that the Irish Court makes a replacement or varied Order on 11 April 2016 or any other date but still to the effect that the child herein shall be detained and treated in England and Wales, this court shall, pending the determination of an application by the HSE for recognition and registration of the said new Order, and, in the exercise of the court's inherent jurisdiction and under Article 21, continue to authorise the detention and treatment of the child herein pursuant to the terms of this Order.

7. Paragraph 6 of this Order is subject to the following:

a. The HSE issuing an application within 14 days of the making of the order to seek registration and recognition of the new order;

b. The HSE forthwith and in any event within 7 days informing Mr Justice Baker (or another judge of the High Court if Mr Justice Baker is not available) of the terms of the new order;

c. Any party having permission to apply to the court by way of written submissions arguing that the relief in paragraph 6 of this order should not be granted;

d. On any such application, the court considering the application promptly and either determining the application without a hearing or directing that an oral hearing take place.

8. No order for costs.

Permission