C v M
CASE C-376/14 PPU

Court of Justice of the European Union

M Ilešič, President of The Chamber; AÓ Caoimh; C Toader; E Jarašiūnas (Rapporteur); CG Fernlund, Judges; M Szpunar; L Hewlett; Principal Administrator

9 October 2014

Jurisdiction – Habitual residence – Reference for preliminary ruling – Mother and child relocated to Ireland following French order granting mother permission to do so – Order subsequently appealed – Whether the French court retained jurisdiction pursuant to BIIR – Whether the child was being wrongfully retained – Whether the child could establish habitual residence in Ireland

The British mother and French father married and had a child in France in 2008. When the marriage broke down the French court granted the parents joint parental authority, determined the child's habitual residence to be with the mother and made provision for contact between the father and child. The judgment which was provisionally enforceable provided that the mother was permitted to set up residence in Ireland if she wished. The father sought to appeal but a stay of the order was refused. The mother and child travelled to Ireland where they had now been living for 2 years. Nine months after their relocation, the father's appeal was allowed and the original French judgment was overturned. The court ordered that the child should live with the father and made provision for contact with the mother. The father applied to the High Court of Ireland for recognition and enforcement of the French order. The application was successful but the mother sought to appeal on a point of law. The father also applied to the High Court for a return order pursuant to the Hague Convention for a return of the child to France and for a declaration that the mother had wrongfully retained the child in Ireland. The application was dismissed and the court held that the removal of the child to Ireland was lawful since it took place on the basis of the French judgment. The High Court held that the child's habitual residence was not conditional upon the French judgment permitting the child's removal being overturned on appeal and that the child had been habitually resident in Ireland since the mother took her there with the intention of settling. The father appealed. The Supreme Court of Ireland stayed the proceedings and made a reference for a preliminary ruling to the CJEU in seeking to establish whether the French court retained jurisdiction in matters relating to the child in light of Art 12(2)(b) or Art 12(3)(a) and (b) of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (BIIR) or whether the mother and child were entitled to establish their habitual residence in Ireland. The court asked: (1) Did the existence of the French proceedings relating to the custody of the child preclude, in the circumstances of this case, the establishment of habitual residence of the child in Ireland? (2) Did either the father or the French courts continue to maintain custody rights in relation to the child so as to render wrongful the retention of the child in Ireland? (3) Were the Irish courts entitled to consider the question of habitual residence of the child in the circumstances where she had resided in Ireland for 2 years and her removal to Ireland was not in breach of French law?

Held – making a preliminary ruling –

(1) The relevant provisions were those of Art 2(11) of BIIR, which defined the concept of 'wrongful removal or retention' of a child, and of Art 11 of BIIR, which complemented the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (Hague Convention) and was applicable where, as in the main proceedings, a court within the European Union was seised, on the basis of that Convention, of an application for the return to a Member State of a child who has been wrongfully removed to, or retained in, another Member State (see para [43]).

(2) According to the definition of removal or retention given in Art 2(11) of BIIR, in wording very similar to that of Art 3 of the Hague Convention, a removal or retention, before being considered wrongful within the meaning of BIIR, must have taken place in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect, under the law of the Member State where the child was habitually resident immediately before the removal or retention. It followed that the identification of a wrongful removal or retention within the meaning of Art 2(11) of BIIR presupposed that the child was habitually resident in the Member State of origin immediately before the removal or retention and that there was a breach of rights of custody attributed under the law of that Member State (see paras [46], [47]).

(3) Articles 2(11) and 11 of BIIR had to be interpreted as meaning that where the removal of a child had taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it was important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it (see para [57]).

(4) The failure to return the child to the Member State of origin following the latter judgment was wrongful and Art 11 of BIIR was applicable if it were held that the child was still habitually resident in that Member State immediately before the retention. If it were held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on that provision was without prejudice to the application of the rules established in Chapter III of the Regulation relating to the recognition and enforcement of judgments given in a Member State (see para [69]).

(5) The possibility that a child's habitual residence might have changed following a judgment at first instance, in the course of appeal proceedings, and that such a change might, in a particular case, be determined by the court seised of an application for return based on the Hague Convention and Art 11 of BIIR, could not constitute a factor on which a parent who retained a child in breach of rights of custody could rely in order to prolong the factual situation created by his or her wrongful conduct and in order to oppose the enforcement of the judgment given in the Member State of origin on the exercise of parental responsibility which was enforceable in that Member State and which had been served. Such a course would constitute a circumvention of the mechanism established by Section 2 of Chapter III of BIIR and would render this mechanism devoid of purpose. Likewise, in circumstances such as those of the main proceedings, the bringing of an appeal against such a judgment given by the Member State of origin on the exercise of parental responsibility could not have any effect on the enforcement of that judgment (see paras [67], [68]).

(6) It had to be borne in mind that, in accordance with recital 21 in the preamble to BIIR, the Regulation was based on the conception that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and grounds for non-recognition should be kept to the minimum required:

Rinau v Rinau (Case C-195/08 PPU) (EU:C:2008:406) [2008] ECR I-5271, sub nom *Re Rinau* [2008] 2 FLR 1495 (see para [66]).

Statutory provisions considered

Child Abduction and Enforcement of Custody Orders Act 1991

European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (SI 2005/265)

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 1, 3, 12, 19

Rules of Procedure of the Court of Justice of the European Union (2012) OJ L 265/1, Art 107

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, Arts 2–20, 24, 28(1), Chs II, III

Treaty of Rome 1957 (EC Treaty), Art 61(c)

Treaty on the Functioning of the European Union (the Treaty of Lisbon) (2008) OJ C 115/47, Art 67

Cases referred to in judgment

A (Area of Freedom, Security and Justice) (Case C-523/07) (EU:C:2009:225) (2009) ECR I-2805, [2010] Fam 42, [2009] 2 FLR 1, CJEU

McB v E (Case C-400/10 PPU) (EU:C:2010:582) [2010] ECR I-8965, [2011] Fam 364, [2011] 3 WLR 699, [2011] All ER (EC) 379, sub nom *JMcB v LE* [2011] 1 FLR 518, ECJ

Mercredi v Chaffe (Case C-497/10 PPU) (EU:C:2010:829) [2010] ECR I-14309, [2012] Fam 22, [2011] 3 WLR 1229, [2011] 1 FLR 1293, CJEU

Purrucker v Vallés Pérez (No 2) (Case C-296/10) (EU:C:2010:665) [2010] ECR I-11163, [2011] Fam 312, [2011] 3 WLR 1040, [2012] 1 FLR 925, CJEU

Rinau v Rinau (Case C-195/08 PPU) (EU:C:2008:406) [2008] ECR I-5271, [2009] Fam 51, [2009] 2 WLR 972, sub nom *Re Rinau* [2008] 2 FLR 1495, CJEU

[1] This request for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1 (BIIR).

[2] The request has been made in the context of legal proceedings brought by C against M concerning the return to France of their child who is in Ireland with her mother.

Legal background

The 1980 Hague Convention

[3] Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (*United Nations Treaty Series*, vol 1343, No 22514) (the Hague Convention), states:

> 'The objects of the present Convention are—

(a) … to secure the prompt return of children wrongfully removed to or retained in any Contracting State; …'

[4] Article 3 of the Hague Convention states:

'The removal or the retention of a child is to be considered wrongful where—

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

The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

[5] Article 12 of the Hague Convention provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. …'

[6] Article 19 of the Hague Convention is worded as follows:

'A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.'

EU law

[7] Recital 12 in the preamble to BIIR states:

'The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. …'

[8] Article 2 of BIIR provides:

'For the purposes of this Regulation:

…

(7) the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a

natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
(8) the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;
(9) the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;
…
(11) the term "wrongful removal or retention" shall mean a child's removal or retention where—

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.'

[9] Chapter II of BIIR covers the rules relating to jurisdiction and contains, in section 1 thereof, comprising Arts 3–7, the rules on jurisdiction with respect to divorce, legal separation and marriage annulment, in section 2, comprising Arts 8–15, the rules with respect to parental responsibility, and in section 3, comprising Arts 16–20, common provisions.
[10] Article 8 of BIIR, headed 'General jurisdiction', provides:

'1 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.
2 Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.'

[11] Article 9(1) of BIIR, that Article being headed 'Continuing jurisdiction of the child's former habitual residence', provides:

'Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access

rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.'

[12] Article 10 of BIIR, headed 'Jurisdiction in cases of child abduction' provides that, in a case of wrongful removal or retention of a child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention are to retain their jurisdiction, provided that certain conditions specified therein are satisfied.

[13] Article 11(1) of BIIR, that Article being headed 'Return of the child', provides:

'Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of [the 1980 Hague Convention], in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.'

[14] Article 12 of BIIR, headed 'Prorogation of jurisdiction' provides:

'1 The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where—

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2 The jurisdiction conferred in paragraph 1 shall cease as soon as—

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3 The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where—

(a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the

holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. …'

[15] Article 19 of BIIR, headed 'Lis pendens and dependent actions', provides:

'1 Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2 Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. …'

[16] Chapter III of BIIR contains the rules relating the recognition of judgments given in a Member State in the other Member States and the enforcement of those judgments. Within section 1 of that chapter, on recognition, Art 24 of BIIR, headed 'Prohibition of review of jurisdiction of the court of origin', provides:

'The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.'

[17] Article 28(1) of BIIR, within section 2 of Chapter III concerning applications for a declaration of enforceability, provides:

'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.'

Irish law

[18] It is stated in the order for reference that the Child Abduction and Enforcement of Custody Orders Act 1991, in the version applicable to the facts in the main proceedings, gives effect in Irish law to the Hague Convention. That act was amended by the European Communities (Judgments

in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005, in order to take account of BIIR in cases arising under the Hague Convention between Member States.

The main proceedings and the questions referred for a preliminary ruling

[19] C, who is French, and M, who is British, married in France on 24 May 2008. The child of that marriage was born in France on 14 July 2008. After a rapid deterioration in the parents' relationship, M brought proceedings for divorce on 17 November 2008. A series of proceedings concerning the child were then brought by the father and mother in France, both before and after the divorce judgment and the bringing before the High Court (Ireland) by the father of an application for the return of the child to France. Only the divorce judgment and the subsequent events and proceedings are of relevance to answering the questions raised by the referring court.

The divorce judgment, subsequent events and court proceedings

[20] The divorce for shared fault of the spouses was pronounced by the Tribunal de grande instance d'Angoulême (France) by judgment of 2 April 2012 (the judgment of 2 April 2012). That judgment, which declared that the divorce should be effective as from 7 April 2009, ordered that parental authority in respect of the child be exercised jointly by the two parents, determined the habitual residence of the child to be with the mother as from 7 July 2012 and organised access and accommodation rights for the father in the event of disagreement between the parties, by providing for different arrangements depending on whether the mother established residence in France or left France in order to live in Ireland. That judgment provides that the mother is permitted to 'set up residence in Ireland' and states, in its operative part, that the judgment is 'enforceable as of right on a provisional basis as regards the provisions concerning the child'.

[21] On 23 April 2012 C brought an appeal against that judgment, limiting his appeal to the measures relating to the child and to his being ordered to make an advance payment to M in respect of shared property. On 5 July 2012 the First President of the Cour d'appel de Bordeaux (France) dismissed C's request for a stay on the provisional enforceability of the judgment of 2 April 2012.

[22] On 12 July 2012 M travelled with the child to Ireland, where they both now live. According to the order for reference, the mother has not complied with the provisions in the judgment of 2 April 2012 relating to the father's access and accommodation rights.

[23] By judgment of 5 March 2013, the Cour d'appel de Bordeaux overturned the judgment of 2 April 2012 as regards the provisions relating to the residence of the child, the access and accommodation rights and the advance payment in respect of shared property. That court ordered that the child should reside with the father and provided for the mother to have access and accommodation rights.

[24] On 31 March 2013 C, invoking, inter alia, the fact that M was refusing to present the child, brought an action before the Family Court of the Tribunal de grande instance de Niort (France) seeking the transfer to him exclusively of parental authority, the return of the child to his home on pain of penalty and a

prohibition on the child leaving France without the permission of her father. On 10 July 2013 the Family Court of the Tribunal de grande instance de Niort granted the orders sought by C.

[25] On 18 December 2013 C made an application to the High Court (Ireland) on the basis of Art 28 of BIIR, for the enforcement of the judgment of 5 March 2013 of the Cour d'appel de Bordeaux. That application was successful, but M, who on 7 January 2014 brought an appeal on a point of law against that judgment which is currently pending before the Cour de cassation (France), made an application on 9 May 2014 to the High Court for a stay on the enforcement proceedings.

The judgment of the High Court and the order for reference

[26] On 29 May 2013 C brought an action before the High Court seeking an order, under Art 12 of the Hague Convention, Arts 10 and 11 of BIIR and the Child Abduction and Enforcement of Custody Orders Act 1991 for the return of the child to France and a declaration that the mother had wrongfully retained the child in Ireland.

[27] By judgment of 13 August 2013, the High Court dismissed that action by holding, in essence, that the removal of the child to Ireland was lawful since it took place on the basis of a judgment of a French court authorising that removal, that the application for the stay on the provisional enforcement of the judgment of 2 April 2012 had been dismissed, that the judgment of 2 April 2012 was final, being neither an order for interim measures nor a decision which was temporary or provisional, and that it had not been amended or set aside on appeal within the period of 3 months specified in Art 9 of BIIR. The High Court concluded that the habitual residence of the child was not rendered conditional by the fact that C had brought an appeal against that judgment and that the decision on the action brought before it depended essentially on the determination of a question of fact, since there was nothing in the concept of 'habitual residence' to preclude it being changed and since BIIR moreover contemplated the situation of such a change occurring before a transfer of jurisdiction. Having regard to the matters of fact, the High Court considered that the child had in this case been habitually resident in Ireland from the time when her mother took her to Ireland with the intention of settling there.

[28] C brought an appeal against that judgment on 10 October 2013, claiming, inter alia, that the fact that the removal of the child to Ireland was lawful does not mean that the child's habitual residence has changed; that lawful removal does not rule out wrongful retention; that the judgment of 2 April 2012 was declared to be provisionally enforceable and therefore temporary while the appeal brought against that judgment was still pending; that the mother did not state before the French courts that she intended to maintain custody of the child in Ireland; that the mother has never contested the jurisdiction of the French courts or claimed that the habitual residence of the child had changed; that the clear intent of the French courts is that they retain their jurisdiction in relation to custody rights; that the Irish courts are bound by the decisions of the French courts which are the courts first seised and which retain jurisdiction as regards custody, and, lastly, that the High Court had erred in its interpretation of Art 9 of BIIR.

[29] In response, M claims, inter alia, that the habitual residence of the child must be examined having regard to the facts and that, in this case, habitual residence changed after the child's removal to Ireland, in accordance with the judgment of 2 April 2012 which enabled her alone to decide the child's place of residence, so that there has been no breach of rights of custody. Neither the nature of that judgment nor the appeal brought against it preclude, in her opinion, such a change of residence as a matter of fact. M refers, as regards the concept of habitual residence, to the judgments of the court in *A (Area of Freedom, Security and Justice)* (Case C-523/07) (EU:C:2009:225) (2009) ECR I-2805, [2010] Fam 42, [2009] 2 FLR 1 and *Mercredi v Chaffe* (Case C-497/10 PPU) (EU:C:2010:829) [2010] ECR I-14309, [2012] Fam 22, [2011] 3 WLR 1229, [2011] 1 FLR 1293.

[30] The referring court states that the dispute in the main proceedings raises questions of interpretation of Arts 2, 12, 19 and 24 of BIIR. It states that the French courts were those first seised within the meaning of BIIR, that their jurisdiction was accepted in an unequivocal manner by both parents at the time those courts were seised and that those courts assert that they continue to have jurisdiction with respect to parental responsibility notwithstanding the presence of the child in Ireland. If that is so, the mother, in the view of the referring court, wrongfully retained the child from the date of the first breach of the orders in respect of access and accommodation rights made by the judgment of 2 April 2012. The referring court seeks, accordingly, to ascertain whether or not that jurisdiction ceased in the light of the provisions of Art 12(2)(b) or Art 12(3)(a) and (b) of BIIR. In the view of the referring court, Art 19(2) of BIIR is applicable.

[31] The Supreme Court also sets out the argument, referring to the judgments in *A (Area of Freedom, Security and Justice)* (EU:C:2009:225) and *Mercredi* (EU:C:2010:829), that the concept of 'habitual residence', which is not defined by BIIR, is always a question of fact and that account must be taken of, inter alia, the circumstances of and reasons for the stay in the territory of the Member State concerned. The question to be resolved is therefore whether the French courts continue to be seised or whether the mother and the child were entitled, under EU law, to establish their habitual residence in Ireland.

[32] In those circumstances, the Supreme Court decided to stay the proceedings and to refer to the court the following questions for a preliminary ruling:

> '(1) Does the existence of the French proceedings relating to the custody of the child preclude, in the circumstances of this case, the establishment of habitual residence of the child in Ireland?
>
> (2) Does either the father or the French courts continue to maintain custody rights in relation to the child so as to render wrongful the retention of the child in Ireland?
>
> (3) Are the Irish courts entitled to consider the question of habitual residence of the child in the circumstances where she has resided in Ireland since July 2012, at which time her removal to Ireland was not in breach of French law?'

The urgent procedure

[33] The Supreme Court requested that the reference for a preliminary ruling should be dealt with under the urgent preliminary ruling procedure provided for in Art 107 of the Rules of Procedure of the Court of Justice of the European Union (2012) OJ L 265/1 (Rules of Procedure) on the ground that recital 17 in the preamble to BIIR states that, in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay.

[34] In that regard, it is clear, first, that the reference for a preliminary ruling concerns the interpretation of BIIR, which was adopted in particular on the basis of Art 61(c) of the EC Treaty (Treaty of Rome 1957), now Art 67 of the Treaty on the Functioning of the European Union (the Treaty of Lisbon) (2008) OJ C 115/47, which is in Title V of Part Three of the FEU Treaty, relating to the area of freedom, security and justice, and consequently that reference falls within the scope of the urgent preliminary ruling procedure defined in Art 107 of the Rules of Procedure.

[35] Secondly, it is stated in the order for reference that, although parental authority in respect of the child was granted to both parents by the judgment of 2 April 2012, access and accommodation rights were granted to the father by that judgment, and the judgment of the Cour d'appel de Bordeaux of 5 March 2013, which partially set aside the judgment of 2 April 2012, ordered that the child should reside with her father, the father has been deprived of regular contact with his daughter, who is now 6 years old, since the removal of the child to Ireland on 12 July 2012. Since the reference for a preliminary ruling has been made in proceedings relating to an application by the father for the return of the child to France and since the answers to the questions referred are decisive for the outcome of those proceedings, any delay in those proceedings could damage the restoration of the relationship of the child with her father and, if she were to return to France, the child's integration in her new family and social environment.

[36] In those circumstances, the Third Chamber of the Court decided, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, to grant the request by the referring court that the request for a preliminary ruling should be dealt with under the urgent procedure.

Consideration of the questions referred for a preliminary ruling

The relevant provisions of BIIR

[37] It must be observed, in the first place, that there is no conflict or risk of conflict of jurisdiction between the French and Irish courts in the main proceedings, and consequently the provisions of Arts 12 and 19 of BIIR which are mentioned by the referring court are not relevant to the disposal of this case.

[38] It is accepted, first, that the child was habitually resident in France at the time when the Tribunal de grande instance d'Angoulême and the Cour d'appel de Bordeaux were seised, and consequently, in accordance with Art 8 of BIIR, those courts had jurisdiction to rule on the provisions relating to parental responsibility.

[39] Secondly, it must be pointed out that the High Court was seised, on 29 May 2013, of an application for the return of the child to France, on the

basis of Art 12 of the Hague Convention, Arts 10 and 11 of BIIR and the Child Abduction and Enforcement of Custody Orders Act 1991.

[40] Such an action, whose object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility (see judgment in *Purrucker v Vallés Pérez (No 2)* (Case C-296/10) (EU:C:2010:665) [2010] ECR I-11163, [2011] Fam 312, [2011] 3 WLR 1040, [2012] 1 FLR 925, para 68). Further, according to Art 19 of the Hague Convention, a decision under that Convention concerning return is not to be taken to be a determination on the merits of any custody issue. There can therefore be no lis pendens between such actions.

[41] It must be added that Art 10 of BIIR, likewise, is not applicable in the main proceedings, since those proceedings do not concern the substance of parental responsibility.

[42] It is clear, in the second place, that for the purposes of the decision to be made in the main proceedings, neither the provisions in Art 9 of BIIR, to which the High Court referred in its judgment of 13 August 2013, relating to the continuation for a certain period of the jurisdiction with respect to access rights of the courts of the Member State of the child's former habitual residence, nor those of Art 24 of BIIR, as mentioned by the referring court, which Article is part of section I of Chapter III of BIIR, relating to the recognition of judgments given in a Member State, are of any relevance. As is apparent from what has been said above, the dispute in the main proceedings does not raise any question of jurisdiction to rule on access rights or any question of recognition in Ireland of a judgment of a French court.

[43] In the third place, it must be stated that provisions which are relevant, however, are those of Art 2(11) of BIIR, which defines the concept of 'wrongful removal or retention' of a child, and of Art 11 of BIIR, which complements the provisions of the Hague Convention and is applicable where, as in the main proceedings, a court within the European Union is seised, on the basis of that Convention, of an application for the return to a Member State of a child who has been wrongfully removed to or retained in another Member State.

The first and third questions

[44] First, it must be emphasised that, in the main proceedings, the child was removed from France to Ireland lawfully, following the judgment of 2 April 2012 which fixed the habitual residence of the child at the home of the mother and which authorised the mother to 'set up residence in Ireland'. That judgment, as stated by the French Government in reply to a request for clarification made in writing by the court and at the hearing, was not final, because it was subject to appeal, but its provisions concerning the child were enforceable on a provisional basis. That judgment, against which an appeal was brought before the child was removed, was set aside, almost 8 months after the removal of the child to Ireland, by the judgment of the Cour d'appel de Bordeaux of 5 March 2013, which fixed the residence of the child at the home of her father, living in France. The latter judgment, against which M has brought an appeal on a point of law, is, as the court is informed by the French

Government, enforceable and final, since an appeal on a point of law does not stay the effects of that judgment under French law.

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

[46] In that regard, it must be observed that, according to the definition of removal or retention given in Art 2(11) of BIIR, in wording very similar to that of Art 3 of the Hague Convention, a removal or retention, before being considered wrongful within the meaning of BIIR, must have taken place in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect, under the law of the Member State where the child was habitually resident immediately before the removal or retention.

[47] It follows from that definition that the identification of a wrongful removal or retention within the meaning of Art 2(11) of BIIR presupposes that the child was habitually resident in the Member State of origin immediately before the removal or retention and that there is a breach of rights of custody attributed under the law of that Member State.

[48] Article 11(1) of BIIR, for its part, provides that paras 2–8 of that Article are to apply where the holder of rights of custody applies to the competent authorities of a Member State to deliver a judgment on the basis of the Hague Convention in order to obtain the return of a child that has been wrongfully removed to or retained in 'a member state other than the member state where the child was habitually resident immediately before the wrongful removal or retention'. It follows that this is not the case if the child was not habitually resident in the Member State of origin immediately before the removal or retention.

[49] It is evident, therefore, from both Art 2(11) and Art 11(1) of BIIR, that the latter Article can be applied for the purposes of granting an application for return only if the child was, immediately before the alleged wrongful retention, habitually resident in the Member State of origin.

[50] As regards the concept of 'habitual residence', the court has previously stated, in interpreting Art 8 of BIIR in the judgment in *A (Area of Freedom, Security and Justice)* (Case C-523/07) (EU:C:2009:225) (2009) ECR I-2805, [2010] Fam 42, [2009] 2 FLR 1 and Arts 8 and 10 of BIIR in the judgment in *Mercredi v Chaffe* (Case C-497/10 PPU) (EU:C:2010:829) [2010] ECR I-14309, [2012] Fam 22, [2011] 3 WLR 1229, [2011] 1 FLR 1293, that BIIR contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble BIIR, which states that the grounds of jurisdiction established in BIIR are shaped in the light of

the best interests of the child, in particular on the criterion of proximity (judgments in *A (Area of Freedom, Security and Justice)*, paras 31 and 35, and *Mercredi v Chaffe*, paras 44 and 46).

[51] In those judgments the court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in *A (Area of Freedom, Security and Justice)*, paras 37 and 44, and *Mercredi v Chaffe*, paras 47 and 56). The court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in *A (Area of Freedom, Security and Justice)*, paras 38 and 44, and *Mercredi v Chaffe*, paras 47, 49 and 56).

[52] The court explained that, to that end, account must be taken of, inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state (judgments in *A (Area of Freedom, Security and Justice)*, paras 39 and 44, and *Mercredi v Chaffe*, paras 48, 49 and 56). The court also held that the intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in *A (Area of Freedom, Security and Justice)*, paras 40 and 44, and *Mercredi v Chaffe*, para 50).

[53] Further, in paras 51 to 56 of the judgment in *Mercredi v Chaffe* (Case C-497/10 PPU) (EU:C:2010:829) [2010] ECR I-14309, [2012] Fam 22, [2011] 3 WLR 1229, [2011] 1 FLR 1293, the court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

[54] The concept of the child's 'habitual residence' in Art 2(11) and in Art 11 of BIIR cannot differ in content from that elucidated in the abovementioned judgments with regard to Arts 8 and 10 of BIIR. Accordingly, it follows from the considerations set out in paras [46]–[53] of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the Hague Convention and Art 11 of BIIR, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

[55] When examining in particular the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that

the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

[56] Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in para [52] of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.

[57] In the light of all the foregoing, the answer to the first and third questions is that Arts 2(11) and 11 of BIIR must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.

The second question

[58] While the French Government and the Commission consider that the admissibility of the second question is open to doubt since it concerns the interpretation of the Hague Convention, it must be observed that, as stated by the Advocate General in points 54–57 of his View, since BIIR reproduces in some of its provisions the wording of that Convention or refers to it, the interpretation requested is necessary to achieve a uniform application of BIIR and that Convention within the European Union and does not appear to be without relevance to the decision to be made in the main proceedings (see, to that effect, judgment in *McB v E* (Case C-400/10PPU) (EU:C:2010:582) [2010] ECR I-8965, [2011] Fam 364, [2011] 3 WLR 699, sub nom *JMcB v LE* [2011] 1 FLR 518, paras 32–37).

[59] As a preliminary point, on the substance, it must be observed, first, that the French Government stated, at the hearing, that a court could not, under French law, be the holder of rights of custody.

[60] Secondly, insofar as the referring court seems to link the question of the jurisdiction of the French courts to determine the rights of custody over the child and the question of whether the retention is wrongful, it must be observed that, as stated in para [38] of this judgment, the Cour d'appel de Bordeaux had jurisdiction under Art 8 of BIIR when, by its judgment of 5 March 2013, it fixed the residence of the child at the home of the father. However, that has no bearing on the question of whether retention of the child

was wrongful, within the meaning of BIIR, since that depends not on the jurisdiction, per se, of the courts of the Member State of origin, but, as stated in para [47] of this judgment, on a breach of rights of custody attributed under the law of the Member State of origin.

[61] Thirdly, it must be emphasised that Art 2(11) of BIIR does not include in the definition of 'wrongful removal or retention' the breach of access and accommodation rights.

[62] That being the case, it must be considered that, by its second question, the referring court seeks, in essence, to ascertain whether BIIR must be interpreted as meaning that, where the removal of a child took place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment which fixed the residence of the child at the home of the parent living in the Member State of origin, the failure to return the child to that Member State, following the latter judgment, is wrongful, with the result that Art 11 of BIIR is applicable.

[63] In that regard, suffice it to state that the failure to return a child to the Member State of origin following a court judgment in that Member State fixing the residence of the child at the home of the parent living in that Member State constitutes a breach of rights of custody, within the meaning of BIIR, since rights of custody include, under Art 2(9) of BIIR, the right to determine the child's place of residence. Consequently, the retention of the child in breach of such a judgment is wrongful within the meaning of BIIR. Article 11 thereof is then applicable if the child was, immediately before that retention, habitually resident in the Member State of origin.

[64] If it is held that that condition of residence was not satisfied, the decision to dismiss the application for return based on Art 11 of BIIR, which does not affect the substance of rights of custody which the court of the Member State of origin has previously determined, is without prejudice to the application of the rules relating to the recognition and enforcement of judgments given in a Member State set out in Chapter III of BIIR.

[65] Accordingly, in the main proceedings, the failure to return the child to France constitutes a breach of rights of custody, within the meaning of BIIR, which derive from the judgment of 5 March 2013 of the Cour d'appel de Bordeaux. It follows therefrom that the retention is wrongful, within the meaning of BIIR, and that Art 11 thereof can be applied so as to accede to the application for return if it is held, by the competent Irish court, that the child was habitually resident in France immediately before that judgment. If that court considers on the contrary that the child was at that time habitually resident in Ireland, its decision to dismiss the application is made without prejudice to the application of the rules of Chapter III of BIIR designed to secure the enforcement of that judgment.

[66] On the latter hypothesis, it must be borne in mind that, in accordance with recital 21 in the preamble to BIIR, BIIR is based on the conception that the recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and grounds for non-recognition should be kept to the minimum required (judgment in *Rinau v Rinau* (Case C-195/08 PPU) (EU:C:2008:406) [2008] ECR I-5271, [2009] Fam 51, [2009] 2 WLR 972, sub nom *Re Rinau* [2008] 2 FLR 1495, para 50).

[67] The possibility that a child's habitual residence might have changed following a judgment at first instance, in the course of appeal proceedings, and that such a change might, in a particular case, be determined by the court seised of an application for return based on the Hague Convention and Art 11 of BIIR, cannot constitute a factor on which a parent who retains a child in breach of rights of custody can rely in order to prolong the factual situation created by his or her wrongful conduct and in order to oppose the enforcement of the judgment given in the Member State of origin on the exercise of parental responsibility which is enforceable in that Member State and which has been served. The reason is that if it were considered that a finding of a change of the child's habitual residence by the court seised of such an application would permit the prolongation of that factual situation and the obstruction of the enforcement of such a judgment, that would constitute a circumvention of the mechanism established by section 2 of Chapter III of BIIR and would render this mechanism devoid of purpose.

[68] Likewise, in circumstances such as those of the main proceedings, the bringing of an appeal against such a judgment given by the Member State of origin on the exercise of parental responsibility cannot have any effect on the enforcement of that judgment.

[69] In the light of all the foregoing, the answer to the second question is that BIIR must be interpreted as meaning that, in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following that latter judgment is wrongful and Art 11 of BIIR is applicable if it is held that the child was still habitually resident in that Member State immediately before the retention. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on that provision is without prejudice to the application of the rules established in Chapter III of BIIR relating to the recognition and enforcement of judgments given in a Member State.

Costs

[70] Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the court, other than the costs of those parties, are not recoverable.

On these grounds, the court (Third Chamber) hereby rules:

(1) Articles 2(11) and 11 of Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1, must be interpreted as meaning that where the removal of a child has taken place in accordance with a judgment which was provisionally enforceable and which was thereafter overturned by a judgment which fixed the residence of the child

at the home of the parent living in the Member State of origin, the court of the Member State to which the child was removed, seised of an application for the return of the child, must determine, by undertaking an assessment of all the circumstances of fact specific to the individual case, whether the child was still habitually resident in the member state of origin immediately before the alleged wrongful retention. As part of that assessment, it is important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it.

(2) BIIR must be interpreted as meaning that, in circumstances where the removal of a child has taken place in accordance with a court judgment which was provisionally enforceable and which was thereafter overturned by a court judgment fixing the child's residence at the home of the parent living in the Member State of origin, the failure to return the child to that Member State following the latter judgment is wrongful and Art 11 BIIR is applicable if it is held that the child was still habitually resident in that Member State immediately before the retention. If it is held, conversely, that the child was at that time no longer habitually resident in the Member State of origin, a decision dismissing the application for return based on that provision is without prejudice to the application of the rules established in Chapter III of BIIR relating to the recognition and enforcement of judgments given in a Member State.

Order accordingly.

SAMANTHA BANGHAM
Law Reporter