Neutral Citation Number: [2016] EWCA Civ 12

Case No: B4/2014/2790 & B4/2014/2790(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY DIVISION OF THE HIGH COURT
Mr. Justice Peter Jackson
[2014] EWHC 2756

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2016

Before:

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal (Civil Division)
LORD JUSTICE RYDER
and
LORD JUSTICE BRIGGS

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In the Matter of D (A Child) (International Recognition)

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- -

Mr. David Williams QC and Ms. Jacqueline Renton (instructed by **Wedlake Bell LLP**) for the **Father**
Mr. James Turner QC and Mr. Edward Devereux (instructed by **Osbornes**) for the **Mother**
Mr. Nicholas Anderson (instructed by **Cafcass Legal**) for the **Child**
Mr. Henry Setright QC and Mr. Michael Gration (instructed by **Dawson Cornwell**) for **Reunite Child Abduction Centre**

Hearing date: 20 May 2015

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Judgment

Lord Justice Ryder:

Introduction:

1. I shall call the child who is at the centre of these proceedings, David. He is now 9 years of age. He has lived with his mother in England since shortly after his birth. His father lives in Romania. On 20 June 2014, Peter Jackson J, sitting in the Family Division of the High Court, allowed an appeal by David's mother against the recognition and enforcement of an order made by the Romanian Court of Appeal in Bucharest on 27 November 2013. The effect of enforcement of that order would have been to transfer custody of David from his mother to his father. The practical effect of Peter Jackson J's order is that the Romanian decision is not recognised by the courts of England and Wales and his parents are exercising a form of shared care in this jurisdiction pending further litigation. The judgment of Peter Jackson J is reported as *Re D (Recognition and Enforcement of Romanian Order)* [2014] EWHC 2756 (Fam), [2015] 1 FLR 1272.

2. This appeal engages fundamental principles concerning children's litigation and prior to the full hearing before this court, I permitted 'Reunite Child Abduction Centre' ["Reunite"] to intervene to assist the court on those principles. The other parties to the appeal are David's father who is the appellant, his mother who is the first respondent and David himself, by his children's guardian. David was joined to the proceedings in the High Court on 8 May 2014 and is represented by an experienced children's guardian from the Cafcass High Court team. David's representatives oppose this appeal.

3. In characteristically clear terms, the judge set out a summary of his decision and the background facts which by way of an introduction, it is helpful to set out in full:

> "[2] In summary:
>
> (1) These issues concerning parental responsibility are governed by articles 21-39 of BIIR - the *Council Regulation (EC) No. 2201/2003 (Brussels II Revised Regulation 2003)*.
>
> (2) Article 21(1) provides that a judgment given in a Member State shall be recognised in another Member State without any special procedure being required.
>
> (3) Article 21(2) allows any interested party to apply for a decision that the judgment be or not be recognised.
>
> (4) Article 23(a)-(g) sets out seven grounds on which a judgment shall not be recognised.
>
> (5) In this case, the mother relies on grounds (a) to (d), asserting that:

(a) Recognition would be contrary to public policy taking account of David's best interests.

(b) David was not given an opportunity to be heard, in violation of the fundamental principles of procedure in this jurisdiction.

(c) She herself was not served with the father's application that led to the November 2013 decision and was not enabled to defend those proceedings.

(d) She was not given the opportunity to be heard in those proceedings.

(6) The father contests each of these grounds. David's Children's Guardian submits that recognition should be refused on ground (b) and possibly also on ground (a). She makes no submissions on the other grounds.

[3] My conclusion is that the mother succeeds under article 23(b) because David was not given an opportunity to be heard in the Romanian proceedings, and also under article 23(c) and (d) in that she was not effectively served and was not given an opportunity to be heard. I dismiss her appeal under article 23(a), the public policy ground.

[4] I also uphold the mother's complaints in relation to certain aspects of the registration procedure in this jurisdiction, but her appeal does not ultimately succeed on those grounds.

[5] At the end of the hearing, I expressed concern at the damaging effect on David's welfare of the interminable litigation between his parents. The state of affairs described below is thoroughly contrary to the spirit of the BIIR regime, which aims to ensure that decisions are made in the country of a child's habitual residence and swiftly enforced elsewhere. I hope that even now the parents will take responsibility for David's future by reaching a mediated solution.

[6] In what follows, I set out the background, the history of the litigation, the legal framework, and my analysis and conclusions in relation to each ground of appeal.

Background

[7] David's parents are both Romanian. The father is aged 36 and the mother 31. They met in 2003 while they were both working in England, the father as a builder and the mother as a cleaner. They lived together in England from 2004 until November 2007, when they separated.

[8] In the meantime, David was born. In August 2006, during his mother's pregnancy, the parents had returned to Romania to get married.

The mother remained there for David's birth on 8 November 2006, with the father travelling backwards and forwards to England. The mother and David remained in Romania for a short time because of visa problems that were solved by Romania's accession to the European Union on 1 January 2007. On 10 January 2007, the mother rejoined the father in England with baby David.

[9] In November 2007, the parents separated. In 2009, the father returned to Romania, though he has maintained a second home in England, to which he returns for about 10 days each month for work and to see David.

[10] The parties' marriage was dissolved by the Romanian court in April 2008. The mother and David live alone. In January 2013, the father remarried and now has a 1-year-old daughter.

[11] Until November 2012, the father had regular contact with David in England, including overnight contact at weekends. The mother then withheld contact for reasons that have not been adjudicated upon, and David then saw almost nothing of his father until March 2014. At that point, following the mother's arrest for an alleged failure to comply with an order of this court, David was placed in the care of his father in England. At present, following a succession of temporary orders, he divides his time equally between his parents.

[12] The overall picture is that:

- The father lived in England between 2003 and November 2009. Since then he has lived in Romania, visiting England for substantial periods. Despite the acute difficulties in the parents' relationship, he has a significant relationship with David.
- The mother has lived continuously in England since 2003. She has been David's main carer since his birth. She states that she has not been back to Romania since coming here with David in January 2007.
- David has lived in England since he was under two months old, a period of 7 years 7 months in the life of a child aged 7 years 9 months. He has attended school here since September 2010. Reports from school and other sources, referred to below, are positive. He has never been back to Romania and speaks only a few words of Romanian. "

4. As the judge remarked, litigation about David has been continuing uninterrupted since November 2007. David is habitually resident in this jurisdiction but his parents have chosen to undertake that litigation in Romania and, with only one exception, the Romanian courts have accepted jurisdiction and have made orders about David in accordance with the prorogation provisions in article 12 BIIR (see below). There are eight relevant orders which, as the judge described, had the effect of providing over time for an almost equal division of lawful (and sole) custody in each parent.

David's actual care has, however, been provided by his mother in this jurisdiction although his father has visited England for substantial periods and David has a significant relationship with him.

5. The judge set out a detailed description of that litigation. I need not repeat it here. It is not in issue before this court and it can be read at [12] to [38] of his reported judgment. In summary, on 27 November 2013 the Romanian Court of Appeal in Bucharest allowed the father's appeal from the order of the Bucharest Law Court – Third Civil Section made on 7 March 2013. That was itself a first appeal by both parents from an earlier decision of the Bucharest District 1 County Court made on 12 December 2011.

6. The appeal before this court focussed on the two bases and three grounds upon which the mother succeeded before the High Court, namely, whether:

    a. David was not given an opportunity to be heard, in violation of the fundamental principles of procedure in this jurisdiction; and
    b. mother was neither served with the father's application that led to the November 2013 decision and was not enabled to defend those proceedings, nor was she given the opportunity to be heard in those proceedings.

7. The three grounds of appeal are as follows:

    Ground 1: article 23(b) BIIR

    "Peter Jackson J was wrong to find that article 23(b) of BIIR had been established for the following reasons-
    a) Peter Jackson J was wrong in law in his approach to what in law could amount to a 'violation of fundamental principles of procedure of the Member State in which recognition is sought';
    b) Peter Jackson J was wrong to conclude that the child not being heard in this case was a violation of fundamental principles of procedure in England and Wales;
    c) Peter Jackson J placed insufficient weight on the overall picture in the Romanian proceedings as regards the child being heard;
    d) Peter Jackson J was wrong to place no weight on the fact that F had raised the issue of the child being heard in February 2013 and M had refused."

    Ground 2: article 23(c) BIIR

    "Peter Jackson J was wrong to find that article 23(c) of BIIR had been established for the following reasons-
    a) Peter Jackson J was wrong in concluding that the judgment had been given in default of appearance in light of the Annex II certificate issued by the Bucharest Court of Appeal;
    […]

c) Peter Jackson J was wrong in his interpretation of the meaning of the words *"in such a way as to enable that person to arrange for his or her defence"* in article 23(c);
d) Peter Jackson J was wrong to place the burden of proof on [the father] in respect of any matter in relation to article 23(c) in particular in that he was *"not satisfied"* that the Romanian judicial summons were not documents which instituted the proceedings;
e) Peter Jackson J was wrong to make a finding in relation to M's knowledge of the proceedings without hearing oral evidence from M;
f) Jackson J was wrong to make a finding that the Romanian judicial summons were not documents which instituted the proceedings."

Ground 3: article 23(d) BIIR

"Peter Jackson J was wrong to find that article 23(d) had been established given that (the mother) had been validly served according to Romanian law. He ought to have concluded as a matter of law and fact that valid service according to Romanian national law was an 'opportunity to be heard'."

8. A Respondent's Notice was filed on 2 October 2014, by which the mother seeks to uphold the decision of the judge on two additional grounds:

    a. by placing reliance on article 23(a) BIIR; and
    b. by identifying the defects in the registration procedure adopted by the district judge who made the second recognition and enforcement order at first instance.

9. It is not necessary to consider the second additional ground, given that Peter Jackson J set aside the original order of registration made by Her Honour Judge Hughes QC on 7 Feb 2014 "for cumulative defects of procedure" which are to all intents and purposes indistinguishable from the registration procedure subsequently adopted by the district judge. It can be taken that although his determination related to the first registration, the basis for setting it aside is equally applicable to the defects in procedure identified by the respondents in respect of the district judge's decision on registration.

10. There is a separate question raised by the respondent, that given the nature of the order made by the Romanian Court of Appeal on 27 November 2013, namely that it is on its face irrevocable and final, the prorogation jurisdiction under article 12(3) BIIR has ceased because a final judgment has been given in those proceedings (see the decision of the CJEU in Case C-436/13 *E v B* [2015] 1 FLR 64). Given the apparent habitual residence of David in this jurisdiction, it would then be for the courts of England and Wales to exercise jurisdiction on any subsequent application. Although it would be attractive to any decision maker to curtail the litigation that has surrounded David, this court has not determined this question, given that it is a mixed question of fact and law more appropriately addressed initially to a first instance court.

11. For the reasons I shall describe, I have come to the conclusion that I agree with the judge on the first and critically important basis for his decision ie the failure to consider how David was to be heard in the proceedings. I also agree that although article 23(b) is made out, article 23(a) may not be and in any event, on the facts of this case, the separate consideration of that ground adds little to the principles that are engaged. I have, however, come to the conclusion that the second basis for the judge's decision is incorrect but given that the article 23(b) basis is made out I would dismiss this appeal.

12. The essential conclusion to which the judge came on the article 23(b) question is a mixed question of fact and law which he expressed in conclusion in these terms:

> "[100] …David was never given the opportunity [to be heard]: how and why that happened is immaterial.
>
> [101] The fact that the mother opposed David being heard is neither here nor there. The obligation to hear the child falls on the court and not the parties.
>
> […]
>
> [103] …An English court, faced with a striking application of this kind (peremptory change of lifelong carer, country and language) would as a minimum seek a report from a court social worker that would, among other things, contain the child's perspective on such a momentous change of circumstances. Far from being unusual, such a report would be fundamental. Any decision reached without such information would immediately be vulnerable on procedural and substantive grounds."

General principles:

13. It may be helpful to consider some matters that are not contentious between the parties. The governing instrument in EU Member States concerning jurisdiction in matters about parental responsibility is *Brussels II Revised, Council Regulation (EC) No. 2201/2003* [BIIR or the "Regulation"]. The Regulation establishes a scheme by which jurisdiction is determined in accordance with unified rules that are directly applicable to the assumption and exercise of jurisdiction across all Member States. The rules relating to divorce, legal separation or marriage annulment set out at articles 3 to 7 BIIR are not the subject of this appeal. The articles concerning parental responsibility that are the articles relevant to this appeal are set out at articles 8 to 15.

14. The recitals in the preamble to the Regulation explain the rationale for the articles ie the rationale for the jurisdictional rules and the supporting scheme for recognition, registration and enforcement of the decisions made in one Member State by each other Member State. Recital 21 deals with recognition and enforcement:

> "The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required"

15. Recitals 12 and 13 deal with the underlying philosophy which is decision making based on the best interests of the child and recital 33 incorporates the fundamental rights of a child in the EU as set out in article 24 of the Charter of Fundamental Rights of the European Union 2000 which states:

> "(1) Children shall have the right to such protection and care as is necessary for their well-being. They may also express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
> (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
> (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

16. The court was taken to the history and development of BIIR by Mr. Turner QC and Mr. Devereux. The latter in particular provided a scholarly analysis of the principles and background that was not put in issue by the other parties. For the purposes of this judgment it is sufficient to extract the matters I describe below.

17. It is common ground that each State is expected to interpret the jurisdictional rules in the same way to achieve the object of 'mutual trust'. That is reflected in the concept of autonomous interpretation of the Regulation as distinct from interpretation in accordance with domestic legal concepts. Mr Setright QC who very helpfully appeared on behalf of Reunite submitted without contradiction that where a judge in one Member State is asked to consider the processes applicable in another Member State for the purposes of enforcement, then save where the Regulation refers to domestic rules and principles, s/he will interpret the Regulation's provisions autonomously and consistently with other European instruments in so far as they dictate a procedure or otherwise guide the approach to be used. That tends to avoid an erroneous focus on the domestic process of the Member State of origin when the focus should be on 'compliance with inter-continentally applicable procedural rules'.

18. The article 23 grounds on which a judgment shall not be recognised include at article 23(b) the fundamental principles of procedure in *this* jurisdiction. That is accordingly the focus of the first part of this appeal.

19. Furthermore, a purposive approach is to be taken to interpretation to advance the aims of the Regulation: Case C-195/08 PPU *Re Rinau,* [2008] 2 FLR 1495 at [83]:

> 83. "It should be added that that interpretation of the Regulation is consistent with its requirements and purpose and that it is the only interpretation which best ensures the effectiveness of Community law."

20. Two alternative procedures are prescribed in the Regulation for enforcement of an order made by the courts of a Member State. The first is the *exequatur* procedure at Chapter III sections 1 and 2 which is the procedure relevant to this appeal ie to any order regulating the exercise of parental responsibility. The other is a fast track or streamlined procedure provided for in articles 11(6) to (8) pursuant to Chapter III section 4 of BIIR which is relevant to certain prescribed cases concerning enforcement of a judgment on rights of access or an order for the return of a child.

21. In the first procedure, the grounds upon which a court can refuse to recognise and/or enforce an order made by the courts of another Member State in the exercise of a jurisdiction conferred by BIIR concerning parental responsibility are limited and are set out in article 23. The grounds are substantially procedural. A wider ranging enquiry is permitted into the grounds than would be the case in the second procedure but it is also common ground that the article 23 grounds must be interpreted restrictively. The judge reminded himself of this and directed himself to this court's decision on the approach which is to be followed to the article 23 grounds. In *Re L (Brussels II Revised: Appeal)* [2013] 1 FLR 430, Munby LJ, as he then was, said:

> "[46] Article 23(a), in my judgment, contains a very narrow exception and, consistently with the entire scheme of BIIR and with the underlying philosophy is spelt out in Recital (21), sets the bar very high."

22. There is undoubtedly a distinction to be drawn between the grounds described in article 23(a) and (b), to which I shall return, but I accept the submission that the exceptions in article 23 are intended to be very narrow. The judge emphasised one of the elements of the analysis conducted in *Re L* which is the decision of the CJEU in Case C-7/98 *Bamberski v Krombach* [2001] QB 709 where the Luxembourg court held that:

> "[37] Recourse to the public policy clause in article 27(1) of the convention [then Brussels 1] can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle."

23. In England and Wales a party who seeks to register for enforcement a judgment on the exercise of parental responsibility made by a court of another Member State does so in accordance with part 31 of the Family Procedure Rules 2010. Unless subsequently dispensed with, the party seeking enforcement is required to produce a copy of the judgment which satisfies the conditions to establish its authenticity and a certificate which is known as the Annex II certificate.

24. Mr Setright evidences the difference in certification protections which surround the two procedures in this way: the first and relevant procedure involves an 'Annex II' certificate being completed by 'the competent court or authority of the Member State of origin'. That involves no 'checklist' of matters to be considered on its completion and no necessary involvement in the certification process of a judge as distinct from an administrative authority. The second and more streamlined procedure involves a checklist of matters to be considered before an Annex III or IV certificate is granted by a judge. The difference in approach, he submits, follows through to the greater level of scrutiny that is permitted in the first procedure by the court of enforcement than is afforded in the second procedure. I agree with him.

25. It is nevertheless the case that the scrutiny that is permitted must not go any further than is strictly necessary to facilitate the enquiry. There are additional rules in articles 24 to 26 BIIR which prohibit a review of the jurisdiction that was exercised, non-recognition on the basis of a difference in applicable law or a review of the substance of the judgment of the court of origin.

The article 23 (b) question:

26. There is no direct authority in this jurisdiction that assists in construing what is a fundamental principle of procedure for the purposes of article 23(b) BIIR. The failure to hear the child was the fundamental principle which Peter Jackson J held had been violated. David's children's guardian submitted then as now that David was not provided with any opportunity either directly or indirectly to be heard in the proceedings before what is Romania's final court of appeal. There is no evidence that the question of the child's opportunity to be heard was considered by that court so that the exception created by article 41(2)(c) BIIR, namely that it would be 'inappropriate having regard to his age or degree of maturity', was not engaged before the Romanian Court of Appeal. This court's scrutiny of the materials that are available does not suggest that David's guardian is wrong and in any event there is no appeal on this issue of fact. Accordingly, that is the basis upon which we have proceeded.

27. It is to be noted from the terms of article 23(b) that if the judge is satisfied that there has been a violation of a fundamental principle of procedure, then there is no discretion in the consequence: the order shall not be recognised and accordingly cannot be enforced under the Regulation. In my judgment nothing turns on any distinction that there may be between a violation and a breach. If the question is fundamental and it was not asked by the court, then that would be a sufficient failure to comply.

28. It is submitted by the appellant father that a fundamental principle of procedure is intended to be a reference to the child's article 6 ECHR rights, the procedural component of his article 8 rights and/or the principles of due process ie whether there has been a fair hearing. Interestingly, the appellant acknowledges and submits

that article 12 of the United Nations Convention on the Rights of the Child 1989 is at least a pillar of his fundamental rights argument. Article 12 UNCRC 1989 states:

(1) "States Parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely in all matters affecting the child, the views of he child being given due weight in accordance with the age and maturity of the child.
(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law."

29. So far, so good, but the appellant goes further and submits that a fundamental principle is one that *every* court in the jurisdiction of the court of enforcement would have to act in compliance with. The test for fundamentality is surely not *ex post facto* empirical compliance but rather what is it that is being provided for?

30. The parties' submissions have ranged far and wide with great eloquence and not inconsiderable general interest. It suffices at this stage to summarise them so that I can put to rest various issues that do not in my judgment help to identify either the problem or the solution to this aspect of the appeal.

31. The appellant submits that:

i. given that David was aged five when the first instance court made its determination that ultimately led to the final appeal, six during the first appeal and seven by the time of the judgment that was to be recognised and enforced, a court in England and Wales, in particular a final appeals court, would not necessarily have given him an opportunity to be heard ie there was neither a fundamental principle that was engaged nor was there a violation.
ii. in the context that there was some evidence at first instance at least sufficient for the Romanian court to dispense with any further opportunity being given for David to be heard, the overall position was that even if a fundamental principle was engaged it was not violated.
iii. An age appropriate enquiry into a child's wishes and feelings is not the same as giving the child an opportunity to be heard.
iv. The concept derived from section 1(3)(a) CA 1989 is the former not the latter.
v. Ascertaining a child's wishes and feelings in accordance with section 1(3)(a) CA 1989 is part of the court's welfare evaluation in coming to a conclusion about the child's best interests, it is neither a component nor reflective of any obligation in the court to give the child an opportunity to be heard.
vi. Likewise, a welfare report (whether general or issue specific including a report about a child's wishes and feelings) directed by a court under

section 7 CA 1989 is intended provide evidence relevant to the welfare evaluation rather than being a vehicle that provides an opportunity for a child to be heard.

vii. It is unlikely that a five year old would be the subject of a Cafcass welfare report in contested section 8 CA 1989 proceedings which had as their object the determination of with whom the child should live even if that might involve (as the judge described it) a "*peremptory change of lifelong carer, country and language"* .

viii. Many courts in England and Wales would consider it inappropriate to canvass the views of a child so young let alone afford him an opportunity to be heard because of the adverse welfare implications of such a step.

ix. A court in England and Wales hearing private law family proceedings concerning a child aged between five and seven years, would hear about a child's wishes and feelings through his or her parents.

32. In reply the respondents fundamentally disagree with each of those propositions. Given that I have come to the firm conclusion that the appellants are wrong and that the judge and the respondents are right, I shall summarise those conclusions and give my reasons in the context of an analysis of what are the relevant fundamental procedural principles.

33. Considerable weight is placed upon the decision made by the Romanian court of first appeal (the Third Civil Section of the Bucharest Court) in February 2013 that it had appropriate information as to welfare and that hearing the voice of the child was inappropriate. Those are of course different questions. The basis of the latter conclusion appears to be that the appellant father wanted his son's voice to be heard and the mother did not. I have no difficulty with parents expressing strong views about the welfare implications of a child being involved in litigation and it may well be that in some cases those welfare implications may be such that some or all of the steps that a court might take to hear a child (whether directly or indirectly) may be excluded on welfare grounds. But the decision is one for the court not the parents (something that is conceded by the appellant before us) and time will of necessity change the answer to the question. First of all, it presupposes that the question 'whether and if so how a child is to be heard' is asked by a court and then that the court answers the question by reference to the child's age and understanding (i.e. his autonomy). For reasons that I shall describe, whether a child is to be heard is both a welfare question and a fundamental principle.

34. If and in so far as it is submitted that the judge did not give sufficient respect to the fact that the court of origin was the highest court in Romania and that the issue of the child's participation had been ruled upon by the first appellate court in February 2013 (only 9 months before) though not on the merits by the first instance court in 2011, then that is answered by the judge's ruling at para 75 of his judgment where he accepted that the court must:

> "look at the process as a whole, bearing in mind that this was an appeal decision, and not focus exclusively on the final leg of the legal journey."

35. In any event, even when viewed as a whole, time passes quickly for a child and what might be clear at the age of 5 or 6 is not necessarily so at the age of 7 or 8. In my judgment, each court should be astute to consider participation in context. That was the focus of Peter Jackson J's enquiry and I agree with him.

36. In the family jurisdiction of the courts of England and Wales and for all purposes relevant to the type of application that the parents were making ie cross custody or residence applications, the search for the fundamental principles that are to be applied begins with the Children Act 1989 [CA 1989]. Section 1(3)(a) of that Act provides the starting point for the consideration of a welfare issue by any family court exercising a children's jurisdiction under the Act. It provides that:

> "(3) in the circumstances mentioned in subsection (4), a court shall have regard in particular to –
> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
> (g) the range of powers available to the court under this Act in the proceedings in question."

37. This is the non-exclusive checklist of relevant factors that the court in England and Wales is required to consider on an application of the kind brought by the parents before the Romanian courts in relation to David. Does it evidence a fundamental principle at section 1(3)(a)?

38. It is certainly right that the provision is mandatory and permits of no discretion in the court ie the parents cannot seek to avoid it. The discretion is in the weight to be given by the court to the child's wishes and feelings alongside any other relevant considerations in reaching a decision about the best interests of the child. On behalf of the appellant, Mr Williams QC submits that the focus of section 1(3)(a) is to ensure that the court evaluates all relevant factors in reaching a decision on paramountcy ie welfare. He submits that it is not a statement of fundamental principle that can be carried across into the exercise required of this court.

39. I cannot accept that submission. The question was authoritatively answered by their Lordship's House in *In re D (A Child)* [2006] UKHL 51, [2007] 1 AC 619. Baroness Hale of Richmond gave the leading opinion as follows:

"[57] But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

[58] Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11(2) provides:

> "When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a "defence" under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child – in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.

[59] It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

[60] There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the

limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

[61] Hitherto, our courts have only allowed separate representation in exceptional circumstances. As recently as in *In re H (Abduction)* [2007] 1 FLR 242, the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now; European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a "last ditch stand" on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.

[62] That is not, of course, this case. When the proceedings began, it might well have been considered inappropriate to hear A's views. When the proceedings should have been completed, in August 2005, this may still have been the case. But once the proceedings were prolonged beyond then, A had reached an age where it could no longer be taken for granted that it was inappropriate for him to be given the opportunity of being heard. Consideration should then have been given to whether and how this might be done. It could scarcely by then have been said that seeking his views, or allowing his legal participation, would add to the already inordinate delay. It goes without saying that if, having heard from the child, an issue arises under the Convention which has not been raised by either of the parties, the court will be bound to consider it irrespective of the pleadings."

40. Far from section 1(3)(a) CA 1989 being merely a checklist factor that is designed to ensure comprehensive evaluation of a welfare question, it is plainly an example of domestic legislation giving force to a fundamental principle of procedure. The same principle is to be found in article 11.2 BIIR (using the European language for the same concept: "it shall be ensured that the child is given the opportunity to be heard

during the proceedings"). That provision expressly takes priority over 1980 Hague Convention principles. It was most recently applied by this court to inherent jurisdiction proceedings concerning an application for summary return of a child allegedly unlawfully removed from another jurisdiction: *In the matter of S (A Child) (Abduction: Hearing the Child)* [2014] EWCA Civ 1557, [2015] 2 FLR 588 in which we said:

> "[24] […] The question of what if anything of that which a child wants to say is relevant to welfare and the weight to be given to it is an entirely separate question from the principle that a child is to be heard. The adverse welfare effect of delay may influence or even determine whether and how a child is to be heard on the facts of a particular case, but that again is a question relating to the welfare balance on a case management issue, not the question of principle.
>
> […]
>
> [28] On the question of principle, therefore, I agree with the appellant's submissions i.e. for the reasons set out above, there is an obligation in principle on the High Court sitting its inherent jurisdiction in relation to an abduction application to consider whether and how to hear the child concerned."

41. A principle that is of "universal application" consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child is on its face a fundamental principle. I regard this court as bound by their Lordship's decision *In re D* and in any event, it is high time that this court laid to rest the canard that summary and/or autonomously interpreted processes, whether Hague or BIIR, can in some way avoid the application of a fundamental procedural protection. In every case, the court is required to ensure that the child is given the opportunity to be heard. That means asking the questions, 'whether and if so how is the child to be heard'. There are a range of answers, many of which were foreshadowed in *In re D*. It is not the answer that is key to the question before this court but the fact that the question must be asked. The asking of the question does not in any way detract from other principles that are in play, for example, the convention policy under the Hague Convention for the return of the child to the jurisdiction of habitual residence or the no delay principle in domestic children legislation. Furthermore, the provisions of article 24 of the Charter of Fundamental Rights and Freedoms are directly applicable (see above) with the consequence that the court is required to ask the question I have identified.

42. I accept that for reasons of comity or mutual respect, there is a high threshold to the identification of a fundamental principle. There should be no tendency in the enforcement process under BIIR to fail to recognise and hence enforce orders made by Member States. To the extent that there are different approaches to how a child is to be heard both domestically and among Member States this court and indeed any court of enforcement should be astute to identify the principle and not just one

of the procedural options that may or may not be available in any particular Member State.

43. In that regard it is the appellant who provides the answer to his own complaint. While making the submission that the concept of wishes and feelings in section 1(3)(a) CA 1989 is different from the concept of providing an opportunity for a child to be heard (the two limbs of article 12 UNCRC 1989), the appellant submits that "the child being heard is to do with recognition of the developing autonomy of the child and that children of an age are able to formulate and express their own point of view. The formulation and expressing of a point of view is what relates to the concept giving the child 'an opportunity to be heard'. It is primarily a child centred issue which ensures that the child is engaged in the process and is accorded due respect in that process".

44. That is rightly an acceptance that the rule of law in England and Wales includes the right of the child to participate in the process that is about him or her. That is the fundamental principle that is reflected in our legislation, our rules and practice directions and our jurisprudence. At its most basic level it involves asking at an early stage in family proceedings whether and how that child is going to be given the opportunity to be heard. The qualification in section 1(3)(a) CA 1989 like that in article 12(1) UNCRC 1989 relates to the weight to be put upon a child's wishes and feelings, not their participation.

45. For young children who have not developed any sufficient communication skills it may not be possible or necessary to ascertain their wishes and feelings. Furthermore, there may on the facts of a particular case be very good welfare reasons to make a decision not to do so. That is quite separate from the question whether and how they are going to participate. Again, for some children in the private law context participation may be through their parents but it must not be assumed that that will be good enough. The question must be asked.

46. It was submitted to us that no assistance can be gained from the jurisprudence of the domestic court in relation to Hague Convention 1980 proceedings on the basis that it evidences a more liberal approach developed by the court to deal with the summary nature of that jurisdiction and the issues in play. Given the House of Lords decision in *In Re D* (supra) and the strong judgment of this court in *Re F (Abduction: Child's Wishes* [2007] EWCA Civ 468, [2007] 2 FLR 697 at [17] to [25] the submission is frankly unsustainable. In support of my conclusion I need only extract the principle from the analysis of Thorpe LJ in *Re F* which emphasises the court's obligation to hear the child as being distinct from any Hague Convention defence that might be pleaded.

47. The participation of the child in our domestic proceedings has been the subject of a growing body of jurisprudence over the last decade or more. The theme of the case law is an emphasis on the 'right' of participation of those 'affected' by proceedings. This found prescient acknowledgement in 2005 when Thorpe LJ in *Mabon v Mabon*

[2005] EWCA Civ 634, [2005] 2 FLR 1011 at [28] commented on the right to participation of articulate teenagers in the following terms:

> […] "Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare."

48. The involvement in proceedings of children whose interests are affected was specifically highlighted by Baroness Hale in *In Re D* (supra) and in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 1 FLR 2170. These dicta were brought together by Sir James Munby P in *Cambra v Jones* [2014] EWHC 913 (Fam), [2015] 1 FLR 263. At [18] he said, and I respectfully agree,:

> […] "*If* and to the extent that [the child's] Article 8 rights are engaged, then that will carry with it the important procedural right to be "involved in the decision-making process, seen as a whole, to a degree sufficient to provide [her] with the requisite protection of [her] interests" see *W v United Kingdom* (1988) 10 EHRR 29, para 64. However, although that may, it does not necessarily, carry with it the right to be represented or the right to party status: see *ZH (Tanzania),* paras 34-37. In *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, proper representation was held to be necessary; because it was lacking, the decision was quashed. But there are many contexts where effective participation requires neither party status nor even representation."

49. The appellants argue that the principle I have identified is not one that is complied with in all domestic proceedings. There is no evidential basis for that assertion which would, if correct, represent significant non-compliance with domestic practice directions. It suffices for me to re-iterate to anyone who doubts the procedural practice that is to be followed that it can be found at para 4.2 of the Child Arrangements Programme (PD 12B to Part 12 of the Family Procedure Rules 2010) which reiterates that children and young people should be at the centre of all decision making and para 14.13 which states in terms that the court should ask 'is the child aware of the proceedings' and 'how is the child to be involved in the proceedings'.

The article 23(a) question:

50. By her Respondent's Notice, the mother seeks to uphold the decision of Peter Jackson J by reliance upon article 23(a). It is accepted that public policy as a ground for non recognition should be an exceptional remedy. Each of the particulars of breach relied upon are identical to those examined by reference to article 23(b). I accept that although there is an obvious overlap between public policy and breach of a fundamental principle, the former requires something more. Although I am persuaded that the order in question breached a fundamental principle of procedure, I am of the view that that is distinct from breach of a substantive

principle such as welfare itself, ie something which is at variance to an unacceptable degree with the legal order of the state.

The question of service and the opportunity to be heard: the article 23(c) and (d) questions:

51. For present purposes, it is sufficient to note that the mother was not personally served, no documents were sent to England where she resides, nor were any documents sent to her lawyer who had been acting for her in previous proceedings. Attempts were made to deliver two summonses to the address of the mother's mother (David's maternal grandmother), which the mother had chosen to use in the previous proceedings.

52. The father did not attempt to notify the mother directly, nor were attempts made to notify the maternal grandmother of the three subsequent adjournments. The mother says that she obtained knowledge of the appeal by a text message from the father two days after the proceedings had ended (see judgment, at [115]).

53. The key issue as respects this ground of appeal is whether the judge was entitled to find that the respondent mother had not been served with a document instituting proceedings in sufficient time to be able to arrange for her defence.

54. Peter Jackson J held that:
    a. the court summonses were delivered to the mother's mother's address and that such service satisfied the requirements under Romanian law (judgment, at [113]-[114]);
    b. on the balance of probabilities, it was more likely than not that the mother had had no knowledge of the proceedings until after they had been concluded (judgment, at [117]);
    c. the Romanian Court of Appeal judgment was given in default of appearance (judgment, at [122]);
    d. the proceedings in question are the father's appeal, launched in June 2013 and not the previous proceedings (judgment, at [122]);
    e. the judicial summons to attend court that was served at the mother's mother's address was not a document which instituted proceedings or an equivalent document (judgment, at [122]); and
    f. service did not take place in such a way as to enable the mother to arrange for her defence (judgment, at [122]).

55. As regards the judge's finding that article 23(c) BIIR applied, thereby entailing the non-recognition of the Romanian judgment, the appellant father maintains that the judge erred in:
    a. concluding that the Romanian judgment had been given in default of appearance in light of the Annex II certificate issued by the Bucharest Court of Appeal;
    b. interpreting article 23(c) so as to require the phrase "was not served with the document which instituted the proceedings" to be read together with

"in sufficient time and in such a way as to enable that person to arrange for his or her defence" rather than on its own;

c. his interpretation of the meaning of the words "in such a way as to enable that person to arrange for his or her defence" in article 23(c);
d. placing the burden of proof on the appellant (father) in respect of any matter in relation to article 23(c), in particular in that he was "not satisfied" that the Romanian judicial summons were not documents which instituted proceedings;
e. making a finding in relation to the mother's knowledge of the proceedings without hearing oral evidence from her; and
f. finding that the Romanian judicial summons were not documents which instituted the proceedings.

57. The appellant chose not to pursue ground (b) above. Before dealing with the other grounds of appeal under this head, it is important to set out the purpose of article 23(c) BIIR and to note that Peter Jackson J did not have the benefit of all of the jurisprudence to which I now refer.

58. It is clear from a reading of article 23(c) that the underlying purpose of the provision is the safeguarding of a defendant's right to a fair hearing and his/her rights of defence. As such, the provision guarantees procedural fairness (see A Briggs, Civil Jurisdiction and Judgments, 6th ed., Routledge, 2015, at 7.17).

59. This has been emphasised repeatedly by the Court of Justice of the European Union (CJEU), first in Case 166/80 *Klomps v Michel* [1981] ECR I-1593, where it held at paragraph 9 that article 27(2) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters

> "[...] is intended to ensure that a judgment is not recognized or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised."

60. This passage was cited a decade later in Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] ECR I-5661 at paragraph 18 and was again referred to in *Case C*-39/02 *Maersk Olie & Gas A/S v Firma M. de Haan en W. de Boer* [2004] ECR I-9687, where the CJEU stated at paragraph 55 that

> "55 According to settled case-law, the purpose of Article 27(2) of the Convention is to ensure that a judgment will not be recognised or enforced under the Convention if the defendant has not had an opportunity to put his defence before the court which gave the judgment (Case 166/80 *Klomps v Michel* [1981] ECR 1593, paragraph 9; Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963, paragraph 38; and *Case* C-474/93 *Hengst Import BV v Anna Maria Campese* [1995] ECR I-2123 paragraph 17)."

61. Similarly, it was also held in Case 49/84 *Debaecker v Bouwman* [1985] ECR I-1779, at paragraph 10 that

> "Although the Convention is, as is clear from the preamble, intended to "secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals," that aim cannot, according to

> a series of decisions of the Court, be attained by undermining in any way the right to a fair hearing."

62. Although these decisions concerned article 27(2) of the Brussels Convention, there is no difference in the underlying purpose of this provision (or article 34(2) of the Brussels I Regulation) and that of article 23(c) BIIR. They find their origins in the Brussels Convention and as far as each of these instruments concern the recognition and enforcement of judgments within the European Union, they aim to achieve identical goals by identical means. It should also be noted that the wording of the provisions is almost identical.

63. Article 23(c) BIIR intends to achieve a balance between the competing interests of the mutual recognition of judgments by the courts of the EU Member States, based on the principle of judicial comity, and the rights of defence. This was expressly held to be the case in relation to the Brussels I Regulation in Case C-420/07 *Apostolides v Orams* [2009] ECR I-3571 at paragraph 73:

> "In that connection, it is apparent from recitals 16 to 18 in the preamble to Regulation No 44/2001 that the system of appeals for which it provides against the recognition or enforcement of a judgment aims to establish a fair balance between, on the one hand, mutual trust in the administration of justice in the Union, which justifies judgments given in a Member State being, as a rule, recognised and declared enforceable automatically in another Member State and, on the other hand, respect for the rights of the defence, which means that the defendant should, where necessary, be able to appeal in an adversarial procedure against the declaration of enforceability if he considers one of the grounds for non-enforcement to be present."

64. Consequently, the main question in the present case is whether the procedure followed by the Romanian court was sufficient to protect the rights of 'the defendant' so as to allow for the recognition of the judgment.

65. The first ground of appeal under this head concerns the meaning of the term "in default of appearance." In order for article 23(c) to come into play, it has first to be established that the defendant (the mother) was in default of appearance. The expression 'in default of appearance' has an autonomous meaning, rather than being defined by strict reference to the law of the adjudicating court.

66. I accept the submission that 'in default of appearance' does not refer to a defendant's mere physical presence at trial, but that it refers to his/her absence from the proceedings in their entirety. In *Tavoulareas v Tsavliris and Others (No 2)* [2006] EWCA Civ 1772, Longmore LJ held that

> 12. "Appearance" may have two separate meanings. Usually, once court proceedings have begun, a defendant will have to decide whether to ignore the proceedings or defend them or challenge the jurisdiction of the court. If he decides to defend he will at some stage have to lodge with the court a formal document of some kind; so will he if he challenges the jurisdiction of the court. Once that formal document has been lodged, he would in most legal systems, be said to have "appeared". If, however, he decides to ignore the proceedings he will not lodge any formal document with the court; in that sense he will not

> have "appeared" but, if he has been served with the proceedings, he will be at risk of having an enforceable judgment being entered against him.
>
> 13. Once proceedings come before a court for a hearing a defendant will again have to choose whether to be present in court or not. If he does choose to be present he will, on any view, have "appeared"; if he chooses not to be present he will not, in one sense, have "appeared". But if he has already chosen to take part in the proceedings by defending them or even by challenging the jurisdiction, he may (in some legal systems) be said to have already "appeared" and thus not be in default of appearance.
>
> 14. Mr Tavoulareas did not "appear" in either of the meanings of the word; he neither lodged any formal document with the court in Greece nor was he present when the proceedings came to trial. On any view, therefore, the judgment against him was given in default of appearance."

67. This is also the circumstance here: the mother neither lodged any formal document with the court in Romania, nor was she present when the proceedings came to be heard. The father submits that since the Romanian court had issued an Annex II BIIR certificate stating that the judgment had not been given in default, Peter Jackson J was bound by such a finding. According to his position, it is for the originating court and not the enforcing court to determine issues of service and default of appearance. The existence of an Annex II certificate alone, he submits, would prevent a recognising court from concluding that article 23(c) applies. I reject this submission for the reasons which follow.

68. First, the father's position is contrary to the purpose of article 23(c), as described above. In my judgment, the rights of the defendant have priority so as to displace any findings of the originating court if such is necessary to uphold his/her rights of defence.

69. Second, it would be counterproductive if the mechanism laid down by article 23(c) required the enforcing judge to blindly follow the originating judge's findings as regards the question whether or not a defendant was in default of appearance, but allowed the enforcing judge to question the originating judge's findings when dealing with the two subsequent questions of whether there had been valid service (see *Kruk*' at [27(b)] and [35], where it was held that the decision of the originating court on the validity of service is not binding on the enforcing judge) and whether such service was effected in sufficient time for the defendant to prepare his case (see *Minalmet,* at [21]-[22]; and Case C-39/02 *Maersk Olie & Gas A/S Firma M. de Haan en W. de Boer* [2004] ECR 1-9687, at [61]). That is especially the case if one recollects that article 23(c) only comes into play if it has been established that the judgment had been given in default of appearance.

70. Such an approach would completely undermine the purpose of article 23(c) and would have the potential of rendering the safeguards it provides meaningless by the simple issue of an Annex II certificate, thereby reducing the enforcing judge's obligations under article 23(c) to a mere rubber stamp exercise. This is what article

23 prevents and hence, the appellant father's approach does not sit well with the mechanisms article 23(c) implements to guarantee a defendant's right to a fair hearing.

71. Third, that the father's submission is to be rejected also follows from the CJEU's decision in Case C-78/95 *Hendrikman v Magenta Druck & Verlag GmbH* [1996] ECR I-4943, where it was held that although as a matter of German law the judgment was not entered in default of appearance, the Court accepted that the judgment was to be seen as one in default of appearance, as the defendant had been "quite powerless to defend himself" and was on that account to be regarded as a defendant in default of appearance.

72. Consequently, I would hold that a recognising judge is not bound by the originating court's decision on whether or not a judgment was made in default of appearance and is entitled to make his own assessment in that regard.

73. The Appellant father relies in his submission on the judgment in Case C-195/08 PPU *Rinau v Rinau* [2008] 2 FLR 1495. However, that case involved an Annex IV certificate, not an Annex II certificate, and was concerned with the abduction of children and the decision as to their return. Consequently, that case concerned a different subject matter which is governed by a different legal regime and thus the decision in *Rinau* relating to the recognition of the foreign judgment is of no assistance in the present case.

74. The reason why a different regime applies to child abduction cases was explained in *Rinau* at paragraphs 63-74. In essence, an Annex IV certificate can only be issued if both parties were given an opportunity to be heard. This is not the case for Annex II certificates.

75. The second ground of appeal under this head was not pursued before us but likewise does not withstand scrutiny for reasons which may be regarded as important to the coherence of the overall interpretation of the article. Article 23(c) functions in two stages. First, it must be assessed whether a defendant had been validly served with a document instituting proceedings and secondly, it must be determined whether s/he had sufficient time to arrange for his/her defence.

76. This two-stage approach was set out in *Klomps*, where the CJEU held that:

> "15 For the purposes of the reply to the first part of the question it should first of all be pointed out that Article 27, point 2, lays down two conditions, the first of which, that service should be duly effected, entails a decision based on the legislation of the State in which judgment was given and on the conventions binding on that State in regard to service whilst the second, concerning the time necessary to enable the defendant to arrange for his defence, implies appraisals of a factual nature. A decision concerning the first of those conditions made in the State in which the judgment was given accordingly does not release the court in the State in which enforcement is sought from its duty to examine the second condition, even if that decision was made in the context of separate adversary proceedings.

> 16 The reply to this part of the question must accordingly be that, even if the court in which the judgment was given has held, in separate adversary proceedings, that service was duly effected, Article 27, point 2, still requires the court in which enforcement is sought to examine whether service was effected in sufficient time to enable the defendant to arrange for his defence."

77. Similarly, it was held in *Minalmet* at paragaph 13 that:

> "It must next be noted that, in its judgment in Case C-305/88 *Lancray* [1990] ECR 1-2725, paragraph 18, the Court held that due service and service in sufficient time constituted two separate and concurrent safeguards for a defendant who fails to appear. The absence of one of those safeguards is therefore a sufficient ground for refusing to recognize a foreign judgment."

78. The same two-stage approach applies with regard to article 34(2), as is summarised in Dicey at 14-232:

> "The court in which enforcement of a default judgment is sought must consider the manner in which service was effected and whether, following service, the defendant had sufficient time to arrange for his defence. (Case 166/80 *Klomps v Michel* [1981] ECR 1593; Case 228/81 *Pendy Plastic Products v Pluspunkt* [1982] ECR 2733. Both conditions must be fulfilled: Case C-305/8 *Isabelle Lancray SA v Peters und Sickert KG* [1990] ECR I-2725; Case C-123/91 *Minalmet GmbH v Brandeis Ltd* [1992] I-5661. See also *Artic Fish Sales Co Ltd v Adam (No 2),* 1996 SLT 970; *Selco Ltd v Merier*, 1996 SLT 1247.)"

79. Finally, it was held in *Debaecker* at paragraph 12 that:

> "Article 27(2) must be interpreted as being intended to protect the right of a defendant to defend himself when recognition of judgment given in default in another Contracting State is sought, even if the rules on service laid down in that Contracting State were complied with."

80. According to article 27(2), a judgment is to be denied recognition if the judgment is in default of appearance, and either the defendant was not duly served with the document instituting the proceedings (or an equivalent document), or was duly served, but not in sufficient time to arrange for his defence. In light of the similarities between article 27(2) of the Brussels Convention, article 34(2) of the Brussels I Regulation and article 23(c) BIIR as regards their purpose and their wording, I have come to the conclusion that these decisions are equally applicable to article 23(c) BIIR.

81. As a result, in order to guard the rights of the defence, it is open to the court called upon to recognise the judgment to conclude, even if this is contrary to the view of the court of origin, that the method of service used was insufficient to start the clock running against a defendant as from the moment of that service and to draw the conclusion that s/he was not served in time or in such a way as to arrange for his defence. Accordingly, it is clear that valid service alone does not satisfy article 23(c), and this ground of appeal would have failed if it had been pursued.

82. Peter Jackson J accepted that the mother had been validly served under Romanian law (judgment, at [114]) and thus he was only concerned with the second limb of article 23(c). The father submits as respects the third ground of appeal under this head that the judge erred in adopting a too expansive approach in applying the second limb of the test under article 23(c) instead of restricting its operation to cases having "exceptional circumstances," and that no actual service on a defendant is required, as long as it was possible for her, had she taken reasonable steps, to arrange for her defence. I agree with the father's submissions on the third ground.

83. Having said this, I have come to the conclusion that a defendant's state of knowledge is a relevant factor. Regarding a defendant's state of knowledge, the following explanation in *Klomps* is instructive:

> 19." In this connection it must be stated first of all that Article 27, point 2, does not require proof that the document which instituted the proceedings was actually brought to the knowledge of the defendant. Having regard to the exceptional nature of the grounds for refusing enforcement and to the fact that the laws of the Contracting states on the service of court documents, like the international conventions on this subject, have as their objective the safeguarding of the interests of defendants, the court in which enforcement is sought is ordinarily justified in considering that, following due service, the defendant is able to take steps to defend his interests as soon as the document has been served on him at his habitual residence or elsewhere. As a general rule the court in which enforcement is sought may accordingly confine its examination to ascertaining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time to arrange for his defence. Nevertheless the court must consider whether, in a particular case, there are exceptional circumstances which warrant the conclusion that, although service was duly effected, it was, however, inadequate for the purposes of enabling the defendant to take steps to arrange for his defence, and accordingly, could not cause the time stipulated by Article 27, point 2, to begin to run.
>
> 20. In considering whether it is confronted with such a case the court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgment being given in default. If, for example, the dispute concerns business relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgment in default may be taken informally and even by a representative.
>
> 21 The reply to that part of the fourth question should therefore be that the court in which enforcement is sought may as a general rule confine itself to examining whether the period reckoned from the date on which service was duly effected allowed the defendant sufficient time for his defence. However the court is also required to consider whether, in a particular case, there are exceptional circumstances such as the fact that, although service was duly

> effected, it was nevertheless inadequate for the purpose of causing that time to begin to run." [Emphasis added]

84. In *Debaecker*, the CJEU held at paragraph 11 that:

> "It follows from the wording of Article 27 that the courts of a contracting state may refuse to recognize a judgment only on one of the grounds expressly mentioned in that provision. One of those grounds is that laid down in paragraph (2), in order to ensure the adequate protection of the rights of a defendant against whom judgment is given in default of appearance abroad. Article 27(2) provides that a judgment shall not be recognized '... if the defendant was not duly served with the document which instituted the proceedings in sufficient time to enable him to arrange for his defence'. That provision takes account of the fact that certain Contracting States make provision for the fictitious service of process where the defendant has no known place of residence. The effects that are deemed to follow from such fictitious service vary and the probability of the defendant's actually being informed of service, so as to give him sufficient time to prepare his defence, may vary considerably, depending on the type of fictitious service provided for in each legal system."

85. That knowledge is a factor is also apparent from *Kruk*, where Coulson J stated that:

> "29. As I have indicated, that document enclosed a certificated English translation of the court order – the payment order - that instituted these proceedings. BSL therefore knew, if they had read the documents that they were sent by the respondents, that they could challenge the payment order if they so chose, but only had limited time in which to do so."

86. It appears from these passages that the state of knowledge of the defendant is a factor which a judge may take into account when considering whether a defendant had sufficient time to arrange for his/her defence. What matters is "not form but function" (see *Kruk* at [27]) and the recognising court needs to look at the reality of the situation.

87. Additionally, the father's interpretation of the judge's findings in this case is incorrect. Peter Jackson J at [119(iii)] only stated that Mostyn J in *MD v CT (Parental Responsibility Order: Recognition and Enforcement)* [2014] EWHC 871 (Fam), [2015] 1 FLR 213 had held that

> "the court is entitled to examine whether on the ground and in the real world there was actual service or an acceptable substitute sufficiently ahead of the hearing to enable the defendant to arrange for his defence" [Emphasis added].

88. He did not require, as the father submits, that additional proof is necessary to show that a defendant actually received the documents. Peter Jackson J considered whether the mother in this case had actual knowledge (judgment, at [117]-[118]) and in light of the above, he was entitled to do so.

89. Additionally, it should be noted that as appears from paragraph 121 of the judgment of Peter Jackson J, the case was argued differently before the court below. Counsel for the father apparently submitted that technical service would in all cases be

sufficient for article 23(c) purposes. The judge rightly rejected this position and held that "[t]he true test is whether the respondent has been served at the outset in a way that actually enables him or her to defend the case" [Emphasis added]. Being actually able to arrange for one's defence is not the same as having been actually served.

90. Whether in the present case the service of the two summonses at the maternal grandmother's address enabled the mother to arrange for her defence depended on a factual assessment by the recognising judge and a judgment on those facts. Although the factual conclusions of the judge must stand, that does not mean, however, that his judgment follows. In my judgment, it is simply unsustainable to say that service did not take place in such a way as to enable the mother to arrange for her defence when she had nearly four months to take steps to make such arrangements i.e. from 5 July to 11 September 2013.

91. As regards the mother's behaviour, it was held in *Debaecker* that her conduct was not determinative as to whether service was made in sufficient time for her to arrange her defence, although it is a factor that should be taken into account when making the overall decision. In that case the CJEU held that:

> "31 In view of the fact that Article 27 (2), as has already been stated, seeks to enable a defendant to defend himself effectively, the defendant's behaviour may not be used as a basis for considering that service was effected in sufficient time even though the plaintiff subsequently became aware that the defendant could be reached at a new address. To admit such a proposition would be tantamount to acknowledging the existence of a presumption that service was effected in sufficient time. Although it may rightly be presumed that service was effected in sufficient time where the plaintiff did not know where to reach the defendant, such a presumption would clearly be contrary to the principle that the defendant's rights should be protected if, after service, the plaintiff learned where the defendant could be reached.
>
> 32 Thus the defendant's behaviour cannot automatically rule out the possibility of taking into account exceptional circumstances which warrant the conclusion that service was not effected in sufficient time. Instead, such behaviour may be assessed by the court in which enforcement is sought as one of the matters in the light of which it determines whether service was effected in sufficient time. It will therefore be for that court to assess, in a case such as the present, to what extent the defendant's behaviour is capable of outweighing the fact that the plaintiff was apprised after service of the defendant's new address."

92. Hence, the mother's failure to take steps which may have led her to discover that proceedings had been issued is a factor that should have been taken into account by the judge. Accordingly, in my judgment, Peter Jackson J was not entitled to find that in light of all the circumstances of the case it was not possible for the mother to commence proceedings to challenge the judgment.

93. The dicta of Mostyn J in *MD v CT (supra)* at [16] that for article 23(c) purposes a defendant's inaction is irrelevant to the merits of an appeal against registration and enforcement of a parental responsibility order is in my view questionable. The

absence of these words does not necessarily indicate that the opposite situation applies. In light of the decision in *Debaecker*, I consider that under article 23(c) a defendant's behaviour is a factor that should be taken into account, but that his/her inaction does not necessarily and automatically disentitle him/her to rely on article 23(c). Such a finding can only be made after an assessment of all the facts of the case.

94. By his fourth ground of appeal under this head, the father claims that the judge erred in placing the burden of proof on him when determining whether article 23(c) was established. He argues that this puts him in the impossible situation of proving actual service. There is no requirement to prove actual service and in any event I am unable to discern from paragraph 122 of the judgment that the judge placed the burden of proof on the Appellant father in this respect.

95. The judge did place the burden of proof on the father as regards the nature of the summonses that were delivered to the mother's mother's address. Since it is the appellant who alleges that the defendant was served with documents instituting proceedings, it clearly falls upon him to provide the necessary evidence of both the nature of such documents as well as the fact that they were so delivered. If it were otherwise, the defendant would have to prove a negative. That was right in principle.

96. The appellant father's fifth ground of appeal under this head relates to hearing oral evidence.

97. First, it seems that it was not suggested to the judge that he should hear oral evidence. There is no reference in the judgment as to any such suggestion and the judge instead stated at paragraph 112 that "It was rightly not suggested that oral evidence should be heard about this." Although this concerned the question of service, there seems to have been no suggestion that there should be oral evidence in relation to the question as to whether the mother had actual knowledge of the proceedings.

98. Second, and even if I am wrong about the first proposition, there is no obligation on the judge to hear oral evidence from the parties. Recognition proceedings are summary proceedings and extensive factual investigations should be avoided. The father acknowledged this in written submissions: "[article 23(c)] does not envisage a detailed factual inquiry into 'state of knowledge.'"

99. Third, the decision whether or not to hear oral evidence falls within the broad discretion a judge enjoys under his case management powers and there is a high threshold for the father to overcome before he can establish that the judge erred in not hearing such evidence.

100. In his sixth and final ground of appeal under this head the father maintains that the judge erred in finding that the Romanian judicial summonses were not documents which instituted proceedings for the purposes of article 23(c). "Documents

instituting proceedings" is an expression which has an autonomous meaning and which refers to the documents which enable a defendant to understand the subject matter of, and the ground for, the claimant's application and of his right to assert a defence in a pending action or of his right to challenge an order made without notice where this was made by the originating court (see Case C-14/07 *Ingenieurburo Michael Weiss & Partner GbR v Industrie-und Handelskammer Berlin* [2008] ECR-I-2113 at [19] and Briggs at 7.18).

101. The national law of the originating state is of importance, as was held in *Klomps* at paragraph 11:

> 11 [...] "the document which instituted the proceedings" cover any document, such as the order for payment [Zahlungsbefehl] in German law, service of which enables the plaintiff, under the law of the State of the court in which the judgment was given, to obtain, in default of appropriate action taken by the defendant, a decision capable of being recognized and enforced under the provisions of the Convention; [...][Emphasis added].

102. Nevertheless, it is for the court called upon to recognise the judgment to identify which was the document, or which were the documents, which instituted the proceedings before the foreign court. This is a question of fact and a recognising judge is not bound by the findings of an originating court that the defendant was validly served. (See for example Case C-474/93 *Firma Hengst Import BV v Campese* [1995] ECR I-2113 and A Briggs at 7.18).

103. It was for the father to prove the nature of the documents and whether they could be said to be documents instituting proceedings. The judge held in paragraph [122(iii)] of his judgment that he had failed to provide the document that was served. In light of this, although the judge accepted that service of the summonses satisfied the requirements of Romanian law (judgment, at [114]), it was still open to him to decide whether the summons was a document instituting proceedings. On the facts, I would be inclined to disagree with the judge on this question on the footing that there is no satisfactory basis to say otherwise than that the summons was a regular and proper document instituting proceedings.

104. For all these reasons, I have come to the conclusion that Peter Jackson J was not entitled to reject the father's application for registration and recognition of the Romanian judgment pursuant to article 23(c) BIIR.

105. Given my conclusion in respect of article 23(b) BIIR I would dismiss this appeal.

Lord Justice Briggs:

106. I agree that this appeal should be dismissed. Like my Lord I do so for the first of the two reasons given by the Judge, namely that in failing to give any consideration to the question whether and if so how David should be given the opportunity to be heard, the Romanian Court of Appeal violated a fundamental principle of procedure of the courts of the United Kingdom, within the meaning of Article 23 (b) of BIIR.

107. To my mind the violation did not lie simply in not giving him that opportunity. For example, if the Romanian court had duly considered the question but decided, like the court below, that it was inappropriate to do so, then, even if a court in this jurisdiction would probably have done otherwise, such a decision might not, on the facts of this case, necessarily have been a violation of a fundamental principle of our procedure. That would probably depend on the Romanian court's reasons for not doing so. Here, the violation lay in failing to give that basic question any consideration at all.

108. Article 23 contains exceptions to the core principle of mutual recognition which lies at the heart of BIIR. It must therefore be narrowly construed. But I do regard the failure even to consider whether to give David an opportunity to be heard as fully deserving being described as a violation of a fundamental principle of the procedure of our courts. Although some might regard the age of seven as lying near the borderline above which the giving of such an opportunity might be regarded as routine, the very large implications for him of the decision sought by his father, namely a complete change in his main carer and a move to a country in which he had not lived since very soon after his birth, cried out for consideration of the question whether he should be heard, all the more so since the mother, who might have been supposed to be likely to put the case for preserving the status quo, appeared to be taking no part in the appeal.

109. I need say nothing about the question whether the need to consider whether to give a child in such a case the opportunity to be heard is a fundamental principle of our procedure, since I fully agree with my Lord's reasoning for his conclusion that it is.

110. It follows that it is not necessary to decide whether the Judge was correct in his conclusion that Article 23 (c) and (d) also applied. Nonetheless I agree with my Lord that the Judge's conclusion on these points was wrong. Since the question as to the availability of these exceptions to recognition is an important one, I will give my reasons very briefly. They involve no disagreement with my Lord's analysis.

111. Article 23 (c) and (d) derogate just as much from the core principle of mutual recognition in BIIR as does Article 23 (b), so that they should also be regarded as setting a very high bar. It is well settled that the question whether service has occurred is to be resolved by reference to the procedure of the State in which the judgment was given. As the Judge said, there is no basis for going behind the Romanian certificate of service.

112. The question then, ordinarily, is whether there was sufficient time after the date of service for the mother to arrange for her defence to the appeal. On the face of it, the period from 5th July to 11th September was ample time for her to have done so, in the absence of what are described in the *Klomps* case as "exceptional circumstances". In my view the fact that the mother did not, apparently, have in place measures which ensured that process served at her Romanian address for

service would be brought to her attention ought not to be recognised as exceptional for this purpose.

113. Nor in my view does Article 23 (d) take the matter any further. The mother was on any view a party to the appeal, and given an opportunity to be heard by being duly served with the summons for the purposes of Romanian procedural law, in sufficient time before the hearing. I recognise of course that, on the judge's findings of fact, she was unaware of the appeal until after the judgment had been given. But if that were on its own sufficient to engage Article 23 (c) or (d) it would greatly diminish the effectiveness of BIIR in achieving the mutual recognition of member States' judgments which is its primary objective.

Lord Justice Moore-Bick:

114. I agree that the appeal should be dismissed for the reasons given by Ryder LJ.