Trinity Term
[2016] UKSC 34
On appeal from: [2016] EWCA Civ 12

JUDGMENT

In the matter of D (A Child)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Hughes

JUDGMENT GIVEN ON

22 June 2016

Heard on 23 May 2016

Appellant
(Father)
Richard Harrison QC
Stephen Jarmain
Samantha Ridley
(Instructed by Wedlake Bell Solicitors LLP)

1st Respondent
(AA Mother)
James Turner QC
Edward Devereux

(Instructed by Osbornes Solicitors LLP)

2nd Respondent
(DD Child)
Nicholas Anderson
Katy Chokowry
(Instructed by CAFCASS Legal Services)

1st Intervener(Written submissions only)
(Reunite International Child Abduction Centre)
Henry Setright QC
Michael Gration
(Instructed by Dawson Cornwell)

2nd Intervener
(Ministry of Justice)

Hugh Mercer QC
Alistair Mackenzie
(Instructed by The Government Legal Department)

LADY HALE: (with whom Lord Neuberger, Lord Clarke, Lord Wilson and Lord Hughes agree)

1. On 21 March 2016, this court gave a father permission to appeal against the decision of the Court of Appeal that a custody order which he had obtained in Romania should not be enforced in this country under the Brussels II (Revised) Regulation ("BIIR"), because it had been given "without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure" in this country. In the view of the panel giving permission to appeal, the judgment of the Court of Appeal raised an arguable point of law of general public importance, as to the precise extent to which it is a fundamental principle of the procedure relating to all cases about children in the courts of England and Wales that the child should be given an opportunity to be heard. This is a question of importance in all children's cases, not just those where the court here is asked to enforce a judgment given in another member state of the European Union.

2. However, it has now become clear that under BIIR this court has no jurisdiction to entertain such an appeal. This point was not raised by the respondent mother in her notice of objection to the application for permission to appeal. No doubt, had she done so, the court would have listed it for oral argument before deciding whether or not to give permission. In the event, once it was raised, we were able to arrange a hearing at short notice, in advance of the date set for the substantive appeal. As a point of jurisdiction, it could not be ignored, however inconveniently late in the day it was raised. We are grateful to the parties for the speed with which they have prepared their written and oral arguments and, in particular, to the Ministry of Justice, whom we asked to intervene in order to give us an account of the relevant history.

The history of the case

3. The circumstances in which this question arises are deeply unfortunate, not least because of the delays there have been, not only in Romania but also in this country, but they are largely irrelevant to the question of law which we have to decide. The child in question, DD, was born in Romania on 8 November 2006 and so is now aged nine and a half. His parents are both Romanian but met while working in this country. They returned briefly to Romania, where they got married and the child was born, but by January 2007 both parents had returned to live in this country with the child. They separated in November 2007. DD has continued to live here with his mother, his main carer, ever since. The father returned to live in Romania in 2009, but has kept a second home here and for most of the intervening years (with

a long gap from November 2012 until March 2014) has shared the care of DD with the mother. He has a significant relationship with his son.

4. Although DD is undoubtedly habitually resident in this country, the parties chose to litigate about his future in Romania. The father issued divorce and custody proceedings there in November 2007. The couple were divorced in April 2008. The father was awarded custody of DD, but the mother successfully appealed. At the retrial, the father was again awarded custody, but first the mother and then the father successfully appealed. At a further retrial in a different court, in December 2011, the court awarded joint parental authority to both parents, while finding that DD's domicile and residence were at the mother's address in England. Both parties appealed, but their appeals were dismissed in March 2013, on the basis that joint custody is the norm and sole custody the exception. Nevertheless, the child should remain living with his mother in England, as it was not in his best interests to change his living arrangements. The father launched a further appeal, to the Bucharest Court of Appeal. Its final decision, in November 2013, was that the child should live with the father, on the basis that he could provide "the best moral and material conditions".

5. In February 2014, the father applied for the recognition and enforcement of this order by the English court. The result was the re-establishment of contact between father and son and a High Court-ordered arrangement that the parents share his care in this country while the father's application proceeded. On 1 May 2014, Peter Jackson J ordered that DD be made a party to the enforcement proceedings: see the summary of the history in *In re D (Recognition and Enforcement of Romanian Order)* [2014] EWHC 2756 (Fam), [2015] 1 FLR 1272. He quotes, in para 33, the reasons given in his earlier judgment. This was not so as to make inquiries as to his welfare, which would be inappropriate in enforcement proceedings, but because "D's rights as an individual child are engaged in his father's application and … whatever has happened in this case he bears no responsibility for it" (para 15). His interest was not being represented (para 16) and the facts were "egregious" (para 10) - neither the judge, nor counsel, nor the Children's Guardian had experienced a "case in which enforcement is being sought with regard to a child who has attained the age of seven and has never lived in the country from which the relevant order emanates" (para 11).

6. The registration of an order under BIIR is "essentially administrative, although it requires a judicial act": see *In re S (Foreign Contact Order)* [2009] EWCA Civ 993, [2010] 1 FLR 982, para 12. Judicial consideration of any dispute occurs at the first "appeal" stage. This came before Peter Jackson J who determined it in July 2014 (reference above). Article 23 lays down seven grounds for non-recognition. The judge rejected the mother's case on article 23(a), that recognition was "manifestly contrary to the public policy of the member state in which recognition is sought taking into account the best interests of the child". This ground

is to be narrowly construed and the Bucharest decision was "not so extreme as to require recognition to be withheld on this ground" (para 74).

7. However, he did refuse recognition under article 23(b), which provides that a judgment shall not be recognised "if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the member state in which recognition is sought". The Bucharest Court of Appeal's conclusion about DD's wishes and feelings, namely that "he constantly craves for [the father's] permanent presence", had not arisen from any direct or indirect enquiry involving the child himself (para 83). It had a report from a Cafcass officer in earlier enforcement proceedings when DD was two years old. It had a report from a social worker when he was five and a half, in response to the father's concerns about the mother's care. At the first-tier appeal in February 2013, the father had asked the court to hear the child, but the mother had opposed this (interestingly, given her current stance), and the court had deemed it "not useful given the age of the minor". Peter Jackson J disagreed:

> "The child's entitlement to a voice is a fundamental procedural principle in our system. If he is old enough, it will be his voice and his words. An adult voice will convey the younger child's point of view. Younger children are less able to articulate their wishes, but their feelings may be more vivid than those of older children and of adults, whose views we canvass without a second thought." (para 96)

8. A report from a court social worker, containing the child's perspective, would be fundamental to the decision of any English court, "faced with a striking application of this kind (peremptory change of lifelong carer, country and language)" (para 103). He therefore allowed the mother's appeal on this ground. He also allowed her appeal on the grounds contained in article 23(c) (lack of service) and (d) (not giving the mother an opportunity of being heard).

9. The Court of Appeal dismissed the mother's cross-appeal on article 23(a), allowed the father's appeal on article 23(c) and (d), but dismissed the father's appeal on article 23(b): [2016] EWCA Civ 12, [2016] 1 WLR 2469. The question of whether and how the child's voice was to be heard in the proceedings was a separate question from the weight to be given to his wishes and feelings:

> "… 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 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) [of the Children Act 1989] like that in article 12(1) [of the United Nations Convention on the Rights of the Child 1989] relates to the weight to be put upon a child's wishes and feelings, not their participation." (para 44)

10. This court is not concerned with whether the decisions reached by the trial judge and Court of Appeal in this particular case were right or wrong. They may very well have been right. Nor is it concerned with the extent to which the child's right to be heard is a fundamental principle of the procedure in the courts of England and Wales in cases relating to the future of children. That is a very large question and views may differ as to precisely what the effect is of the Court of Appeal's judgment. This court is solely concerned with whether we have any jurisdiction to entertain an appeal against the decision of the Court of Appeal that the Romanian order should not be registered and enforced in this country.

The jurisdiction question

11. The jurisdiction of the Supreme Court of the United Kingdom is governed by section 40 of the Constitutional Reform Act 2005. So far as material, this provides:

> "(2) An appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings. …
>
> (6) An appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court; but this is subject to provision under any other enactment restricting such an appeal."

12. The question, therefore, is whether the provisions of BIIR constitute an "enactment restricting such an appeal" from the Court of Appeal or otherwise override the provisions of the 2005 Act. This encompasses two questions: first, what is the meaning and effect of the provisions of BIIR in European Union law; and second, what is their effect upon the provisions of an Act of the United Kingdom Parliament?

The Brussels II Revised Regulation

13. By article 28 of BIIR, a judgment on parental responsibility which is enforceable in the member state where it was given shall be enforced in another member state when it has been declared enforceable there. (In the United Kingdom, this means the part of the United Kingdom where it has been registered.) By article 29, the application for such a declaration shall be submitted to the court appearing in the list notified by each member state to the Commission pursuant to article 68. The High Court of Justice - Principal Registry of the Family Division has been notified for this purpose. Rule 31.4 of the Family Procedure Rules 2010 provides that applications should be made to a district judge (as had previously been indicated should be the case by Thorpe LJ in *In re S*, above, at para 16). By article 31, the court applied to must give its decision without delay and neither the person against whom enforcement is sought nor the child is entitled to make any submissions about it. Although the application may be refused for one of the reasons set out in articles 22, 23 and 24, "under no circumstances may a judgment be reviewed as to its substance" (article 31.3). In essence, therefore, this is intended to be a speedy ex parte (and essentially administrative) process.

14. The first opportunity for inter partes debate comes with the first "appeal" under article 33. Under article 33.1, either party may appeal the decision on the application for a declaration. Once again it is to be lodged with the court notified under article 68 (article 33.2). The High Court of Justice - Principal Registry of the Family Division has again been notified for this purpose, but rule 31.15(1) of the Family Procedure Rules provides that the appeal must be made to a judge of the High Court (again as advised by Thorpe LJ in *In re S*). The appeal must be lodged within one month of service of the declaration, or two months if the person against whom enforcement is sought is habitually resident in a member state other than that where the declaration was given (article 33.5). Once again, the need for speed is emphasised.

15. Then comes article 34, the provision which is crucial to this case:

> "The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each member state to the Commission pursuant to article 68."

16. Article 68 provides that member states shall notify to the Commission the lists of courts and redress procedures referred to (relevantly) in articles 29, 33 and 34 and any amendments thereto. The Commission is to keep the information up to date and to make it publicly available. The reference to the United Kingdom in its consolidated list of notifications reads as follows:

> "The appeals provided for in article 34 may be brought only:
> …
>
> - in United Kingdom, by a single further appeal on a point of law:
>
> (a) in England and Wales, to the Court of Appeal."

17. On the face of it, therefore, the position under BIIR is quite clear. There is to be a largely formal first stage when (no doubt usually) the judgment is declared enforceable; there is to be a first "appeal" when the enforceability decision can be contested; and the decision on that appeal can *only* be contested by the notified proceedings. It follows that if there were no notification under articles 34 and 68, as is the case with Cyprus and Malta, there would be no appeal possible under article 34. The UK's notification expressly limits the "proceedings" to "a single further appeal on a point of law" which must be made, in England and Wales, to the Court of Appeal. No mention is made of a further appeal to the Supreme Court of the United Kingdom. This too accords with the understanding of Thorpe LJ in *In re S*.

18. The United Kingdom notification may be contrasted with the notification given by Ireland under articles 33 and 71 of Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("the Maintenance Regulation"). Article 33 provides that the decision given on appeal "may be contested only by the procedure notified by the member state concerned to the Commission in accordance with article 71". Article 71 requires member states to communicate to the Commission "the redress procedures referred to in article 33". Ireland's notification says this:

> "An appeal on a point of law to the Court of Appeal (it should be noted, however, that in accordance with the provisions of the Irish Constitution, the Supreme Court shall have appellate jurisdiction from a decision of the High Court if it is satisfied that there are exceptional circumstances warranting a direct appeal to it. The Supreme Court shall also have appellate jurisdiction from a decision of the Court of Appeal if it is satisfied that certain conditions laid down in the Constitution are satisfied."

19. It would appear, therefore, that at least one member state considers it possible to provide for two tiers of appeal from the first "appeal". It is not for this court to

say whether that is consistent with either article 34 of BIIR or article 33 of the Maintenance Regulation. Whether or not the United Kingdom could have provided for a further appeal to the Supreme Court, which some might think necessary if only to resolve inconsistent decisions in different parts of the United Kingdom concerning a Regulation which applies throughout, the fact remains that it did not do so.

20. Furthermore, the approach adopted by the United Kingdom in all previous European instruments concerned with the free movement of judgments and judicial cooperation within the European Union has been to provide for only one tier of further appeal. The first of these was the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("the 1968 Convention"), concluded by the original six member states of the European Economic Community in 1968, later amended to include the United Kingdom. The courts and methods of appeal are specified in article 37 of the Convention itself, in England and Wales the first appeal going to the High Court (or in the case of a maintenance judgment, to the magistrates' court), and that decision being "contested only … by a single further appeal on a point of law". As the official Explanatory Report comments, the object of the Convention was to ensure that "the judgment given on the appeal may be contested only by an appeal in cassation and not by any other form of appeal or review" (OJ 1979 C 59, pp 1, 51-52). This was because "An excessive number of avenues of appeal might be used by the losing party purely as delaying tactics, and this would constitute an obstacle to the free movement of judgments which is the object of the Convention". Of course, this rationale only really applies to attempts by the person against whom enforcement is sought, such as the mother in this case, to resist enforcement, but what is sauce for the goose must also be sauce for the gander.

21. The 1968 Convention (along with its 1971 Protocol and the 1978 Convention on the accession of Denmark, Ireland and the United Kingdom to them both) was given effect in United Kingdom law by the Civil Jurisdiction and Judgments Act 1982. Interestingly, section 6(1) specifies that the single further appeal on a point of law lies in England and Wales either to the Court of Appeal or to the Supreme Court (formerly to the House of Lords) under the "leap-frog" procedure provided for in the Administration of Justice Act 1969.

22. Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation") was designed to replace the 1968 Convention with directly applicable Community legislation. The approach to avenues of challenge was the same, save that instead of containing each country's permitted avenues in the text of the relevant articles, these referred to lists contained in Annexes to the Regulation. Thus article 43.2 provided that the first appeal should be lodged with the court indicated in Annex III, which for England and Wales was the High Court of Justice (except for

maintenance judgments); and article 44 provided that the judgment given on appeal might be contested only by the appeal referred to in Annex IV, which was once again "a single further appeal on a point of law". The Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) specified, once again, that in England and Wales this would lie either to the Court of Appeal or on a "leap-frog" appeal to the House of Lords (article 4).

23. In 1998, the Council approved a Convention extending the scope of the Brussels regime to matrimonial matters. This took the same approach to the methods of challenging enforcement applications as had the 1968 Convention. The 1998 Convention never became applicable but was the source of the 2000 Council Regulation (EC) 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses ("the Brussels II Regulation"), which was the immediate predecessor to the BIIR Regulation. This adopted the same method as the Brussels I Regulation was to adopt some seven months later. Article 26.2 provided that the first appeal should be lodged with the court listed in Annex II, which for England and Wales was the High Court of Justice. Article 27 provided that the judgment given on appeal might be contested only by "the proceedings" listed in Annex III, which for the UK was "by a single further appeal on a point of law". However, the European Communities (Matrimonial Jurisdiction and Judgments) Regulations 2001 (SI 2001/310), unlike the 2001 Order relating to the Brussels I Regulation, did not specify what was meant by a "single further appeal on a point of law", nor did the new Chapter 5 of the Family Proceedings Rules 1991, introduced by article 29 of the Family Proceedings (Amendment) Rules 2001 (SI 2001/821) to cater for the Brussels II Regulation.

24. However, BIIR, which replaced the Brussels II Regulation, adopts a slightly different technique. Instead of describing the appeal processes in the text, or in Annexes, it provides for each member state to communicate the avenues of first appeal and further contestation to the Commission thus enabling member states to change the processes without the need to revise the Regulation. Unlike both the Brussels II and the Brussels I Regulations, BIIR does not contain either in its main text or in Annexes a reference to a "single further appeal on a point of law". There is no express limit in article 34 to the number of "proceedings" whereby the judgment on the first appeal may be contested (although article 35 refers to "the appeal" under article 34 rather than "an appeal"). This more flexible approach is also taken in the 2009 "Maintenance Regulation" (which removed maintenance obligations from the scope of the Brussels I Regulation). While article 33 provides that the decision given on first appeal may be contested only by "the procedure" notified in accordance with article 71, article 71 requires member states to communicate "the redress procedures referred to in article 33".

25. For what it is worth, the recast version of the Brussels I Regulation, Regulation (EU) 1215/2012 of the European Parliament and of the Council, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also adopts this more flexible technique. Article 50 provides that the judgment given on the first appeal can "only" be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated to the Commission under article 75(c), which also refers to "courts". The United Kingdom has retained the previous reference (for England and Wales) to an appeal either to the Court of Appeal or under the "leap-frog" procedure to the Supreme Court.

26. The purpose of all these instruments is that, save in very narrowly defined circumstances, member states should recognise and enforce one another's judgments. The recitals to BIIR are typical: "The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured" (Recital 1). "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" (Recital 21). From the very outset, in 1968, member states were anxious that there should not be too many avenues and methods of challenging enforcement decisions, hence the restriction to "cassation" type further appeals. It may well be, as Mr Richard Harrison QC has argued very ably on behalf of the father, that the strict approach taken in the earlier instruments has had to give way to the more flexible approach taken more recently. It may well be that it would be open to the United Kingdom to do as Ireland has done and notify the possibility, not only of "leap-frog" appeals from the High Court to the Supreme Court, but also of appeals from the Courts of Appeal in each part of the United Kingdom to the Supreme Court. The fact remains that it has not done so.

27. It is also true to say that the policy of the United Kingdom has not been entirely consistent. In relation to civil and commercial judgments, the 1968 Convention, the Brussels I Regulation and the recast Brussels I Regulation provide for the possibility of either an appeal to the Court of Appeal or a "leap-frog" appeal to the House of Lords or Supreme Court (thus, it would appear, giving the Supreme Court jurisdiction where the Court of Appeal has gone wrong in law in an earlier case, but not if it does so in the current case). It has not been possible to discover why a different approach, excluding the House of Lords or Supreme Court altogether, was taken in relation to family matters in the Brussels II Regulation and BIIR. It is known that the President of the Family Division, the Solicitors Family Law Association, The Law Society, the Family Law Bar Association, Reunite, Pact, and the Child Abduction Unit in the Office of the Official Solicitor were consulted on the Commission's revised draft text of BIIR and that the Lord Chancellor's Department continued to consult the President of the Family Division, Thorpe LJ (Chairman of the President's International Committee), senior practitioners and

Reunite during the negotiations. But it is not known precisely how and why the decision was taken to adopt the new approach in article 34 or how and why the United Kingdom government chose to make the notification which it did. The Minutes of the International Family Law Committee of the Family Justice Council held on 8 November 2004, at which the proposed BIIR was discussed, do not record any discussion of these matters. But it is not surprising that the notification was to the same effect as Annex III to the Brussels II Regulation, nor is it unlikely that limiting the scope for multiple appeals was seen as an important consideration.

28. The fact remains that the United Kingdom did make the notification in question. The question, therefore, is whether BIIR, combined with that notification, is effective to restrict what would otherwise be the jurisdiction of the Supreme Court under section 40 of the 2005 Act.

The effect of BIIR in United Kingdom law

29. Mr Harrison faces the serious difficulty that article 34 clearly states that the decision on appeal may "only" be contested by the notified proceedings. On the face of it, therefore, as Mr Hugh Mercer QC submits on behalf of the Ministry of Justice, if there were no relevant notification, there would be no possibility of further challenge (as is apparently the case with Cyprus and Malta). Mr Harrison seeks to avoid this problem in two ways.

30. First, he argues that the notification, being an act of the executive without any Parliamentary scrutiny or approval, cannot be an "enactment" for the purpose of section 40(6). He is of course quite correct that the executive has no power to amend or qualify primary or delegated legislation unless Parliament has given it the power to do so. An example is the power given by the United Nations Act 1946 to make Orders in Council without Parliamentary scrutiny where necessary to comply with the United Kingdom's obligations under the United Nations Charter. Express language would be required for such a power to permit the executive to abrogate fundamental rights such as the right of access to a court: see *A v HM Treasury (JUSTICE intervening)* [2010] UKSC 2; [2010] 2 AC 534. In fact, such delegated legislative powers are far more frequently exercised by statutory instrument which has to be laid before, and in some cases positively approved by, Parliament. It is also correct that the power to amend primary legislation and otherwise to legislate for the purpose of complying with the United Kingdom's obligations in European Union law, conferred by section 2(2) of the European Communities Act 1972, has to be exercised by Order in Council or by orders, rules, regulations or schemes. The notification was none of these things. By itself, therefore, it could not be effective to amend or qualify section 40(2) of the Constitutional Reform Act 2005.

31. However, we are concerned, not with the notification alone, but with the combined effect of article 34 of BIIR and the notification. It is trite law that European Regulations are directly applicable in all member states without the need for further legislative implementation there: Treaty on the Functioning of the European Union, article 288. It was, of course, necessary for the United Kingdom to legislate to make this treaty provision the law in the United Kingdom. This it did by section 2(1) of the European Communities Act 1972:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; …"

32. Furthermore, by section 2(4):

> "(4) … any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions of this section …"

33. Thus, Parliament has decreed that its own legislation is to have effect subject to the requirements of directly applicable European Union law. This includes section 40(2) of the 2005 Act.

34. Mr Harrison is therefore driven to argue that articles 34 and 68 of BIIR are not, in fact, directly applicable. This is because they require "measures of application" to be adopted by member states in order to be implemented. He relies, in particular, on the cases of *Azienda Agricola Monte Arcosu Srl v Regione Autonoma Della Sardegna and Others* (Case C-403/98) [2001] ECR I-103; [2002] 2 CMLR 14 and *OBB-Personenverkehr AG v Schienen-Control Kommission* (Case C-509/11) [2014] 1 CMLR 51.

35. His best example is the *OBB* case, which concerned a Regulation (1371/2007) providing for rail passengers to be compensated for delay. Under article 30, each member state was to designate a body responsible for enforcing the Regulation. But the Regulation did not define the specific measures which that body had to be able to adopt to secure compliance. The relevant body in Austria, the Kommission, required the railway company, OBB, to alter the terms and conditions

of its tickets so as to comply with the compensation requirements of article 17 of the Regulation. But under Austrian law the Kommission did not have the power to do so. The Court held that article 30 by itself did not give it the power to impose terms on the railway company. (I note that it would be a completely separate question whether the passenger could rely on the direct effect of the Regulation in order to claim the compensation which it prescribed.)

36. The *Azienda* case concerned Regulation No 797/85, which provided for certain payments to farmers "practising farming as [their] main occupation". Member states were required to define what that meant, both for natural and non-natural persons. The relevant Italian law defined it for individuals and certain other entities, such as farming co-operatives, but did not provide for limited companies at all. The Court held that, as the Regulation required a definition before it could be operated, a limited company conducting farming operations could not make claims under the Regulation. The principle was stated thus:

> "26. In this respect, although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may nonetheless necessitate, for their implementation, the adoption of measures of application by the member states."

Thus, says Mr Harrison, as articles 34 and 68 of BIIR required further measures of implementation in the form of notifications by the member states, they cannot be directly applicable.

37. The simple answer to this argument is that articles 34 and 68 are not comparable with the articles under consideration in these two cases. Article 34 does not depend for its implementation upon the member state's choice of avenue of appeal. If the member state fails to notify any such avenue of appeal, then none will exist. But in any event, the member state in question did make a relevant notification. There is nothing in these cases to suggest that, if the required measures of implementation are adopted in a member state, the Regulation is not directly applicable there (and indeed effective to create individual rights). The farmers who were covered by the Italian definition would no doubt have been able to claim their rights under the Regulation.

38. Mr Harrison's final argument is that the notification cannot be effective if it does not give an accurate picture of the appellate rights under United Kingdom law.

Article 68 requires member states to supply information as to the position in their country; it does not permit them to change the position as it would otherwise be. However, so to interpret article 68 would run counter to the purpose of the provisions relating to routes of challenge which date back to the 1968 Convention and continue through all the European instruments discussed earlier. This is to limit the avenues and methods of appeal so as to avoid delays and manoeuvrings which will defeat the object of effective enforcement of one another's orders. This object may have become slightly diluted in the more recent instruments, but the Regulation clearly contemplates the possibility that Member States will make notifications which cut down the routes of appeal which would otherwise be available.

Conclusion

39. I am therefore satisfied that the Supreme Court of the United Kingdom has no jurisdiction to entertain an appeal in this case. The appeal which has been lodged should therefore be struck out.