



Neutral Citation Number: [2018] EWCA Civ 413

Case No: A2/2015/1438

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The High Court (Queen's Bench Division)
Mrs Justice Andrews DBE
QB20140511 & QB20140586

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2018

Before :

LORD JUSTICE GROSS
LORD JUSTICE DAVID RICHARDS
and
MR JUSTICE HILDYARD

Between :

Ionna Lambrou Christofi	<u>Appellant</u>
- and -	
National Bank of Greece (Cyprus) Limited	<u>Respondent</u>

Daniel Warents (instructed by Fletcher Day Limited) for the Appellant
David Elvin QC and Camilla Lamont (instructed by Charles Russell Speechlys LLP) for the Respondent

Hearing dates : 11 October 2017

Approved Judgment

Gross LJ :

INTRODUCTION

1. This is an appeal from the comprehensive judgment of Andrews J, dated 14th April, 2015: [2015] EWHC 986 (QB); [2015] 1 WLR 5405 (“the judgment”), on two preliminary issues relating to Art. 43(5) of *Council Regulation (EC) No 44/2001* (“the Regulation”).
2. The Regulation makes provision for judgments given in one Member State (as defined in Art. 1(3)) to be enforced in another Member State. The Regulation further provides for appeals against the decision on an application for a declaration of enforceability of such a judgment. Art. 43(5) imposes time limits for appeals against a declaration of enforceability.
3. The two preliminary issues, relating to Art. 43(5), determined by Andrews J in the judgment were as follows:
 - i) First, does the Court have the power to extend time for appealing? (“Issue I: Jurisdiction”).
 - ii) Secondly, if yes, should the Court extend time in this case? (“Issue II: Discretion”)
4. Andrews J answered Issue I, “no” – save in exceptional circumstances in which a refusal to do so would breach Art. 6 of the European Convention on Human Rights (“ECHR”) - but went on to hold, under Issue II, that if she did have jurisdiction to extend time, she would have declined to exercise her discretion to do so in favour of the then Defendant, now Appellant.
5. The Appellant submits that the Judge erred in her decisions on both Issue I and Issue II. The Respondent contends that she was right on both Issues.

BACKGROUND

6. There was no, certainly no serious, dispute as to the underlying facts. A brief summary therefore suffices, drawn, gratefully, from the judgment.
7. As long ago as 2006, the Respondent issued proceedings in Cyprus against the Appellant and her husband (“Mr Christofi”). The proceedings concerned a loan agreement and, additionally, a personal guarantee and mortgage over certain property in Cyprus given by the Appellant as security for the loan.
8. The proceedings were served personally on Mr Christofi in 2006 and the Respondent contends that this constituted valid service on both Mr Christofi and the Appellant under the law of Cyprus.
9. A firm of Cypriot advocates entered an appearance ostensibly on behalf of both Mr Christofi and the Appellant and the proceedings continued for a number of years, before being compromised in terms of a consent order made by the Cypriot Court, dated 25th October, 2010 (“the Settlement Order”). The Respondent’s case is that no payments

were made by the deadline of 30th April, 2011 provided in the Settlement Order. As recorded in the judgment:

“3. The Bank therefore started to take action to enforce the terms of the Settlement Order, first in Cyprus, and then in the United Kingdom. By the time that the Bank sought registration of the Settlement Order in the UK, the total amount due under it as calculated at €7,368,044.88. Credit was given for some relatively small amounts recovered in Cyprus.”

10. On the 14th May, 2014, following a without notice application made by the Respondent pursuant to the Civil Procedure Rules (“CPR”) Part 74.3, Deputy Master Eyre registered the Cypriot Settlement Order for enforcement pursuant to the Regulation (“the Registration Order”).
11. The Appellant is domiciled in Cyprus and was served with the Registration Order in Cyprus on 11th July, 2014.
12. The Appellant avers that this was the first time she became aware of the Cypriot proceedings:

“7.She alleges that her husband deliberately kept the proceedings from her, that Kallis & Kallis [the Cypriot advocates] had no authority to represent her in the Cypriot proceedings, and that the signature on a letter of retainer purporting to be her signature is a forgery (though she has adduced no expert evidence in support of that assertion).”
13. Based on these assertions and the provisions of Arts. 34(2) and 43 of the Regulation, together with CPR Part 74.8, the Appellant seeks to appeal the Registration Order.
14. It was not (or not seriously) in dispute that the applicable two months’ time limit for appealing (see further, below) expired on 11th September, 2014.
15. Unfortunately, the Appellant’s appeal was neither filed nor served within that time limit. The Appellant’s notice was filed on 30th September, 2014 and served (as we understood it) on 3rd October, 2014, 22 days out of time.
16. It is unnecessary here to set out the judgment in any length, especially with regard to Issue I. It is very clear and has been reported. I therefore turn directly to the Issues.

ISSUE I: JURISDICTION

17. (1) *Categories and terminology*: It is as well to have simple and common terminology. There are three categories of parties against whom enforcement is sought:
 - i) *Category A*: the party is domiciled in the jurisdiction of a Regulation Member State in which the declaration of enforceability is given.
 - ii) *Category B*: the party is domiciled in a Regulation Member State but one other than the Member State in which the declaration of enforceability is given. The Appellant here is a Category B party.

- iii) *Category C*: the party is domiciled in a State other than a Regulation Member State.
18. (2) *The legal framework*: I start with *the Regulation*. The Recitals address a number of policy themes. First, the objective of rapid and simple recognition and enforcement in one Member State of a judgment given in another Member State. Secondly, respect for the rights of a defendant, demonstrated by the provisions for appeals. Thirdly, principles of proportionality and subsidiarity, shown by the respective spheres of the Community and of Member States.
19. To these ends, so far as here relevant, the Recitals provide as follows:
- “(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.
- (4) In accordance with the principles of subsidiarity and proportionality.....the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.
- (9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seized.....
- (10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.
- (17) By virtue of the ...principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.
- (18) However, respect for the rights of the defence means that the defendant should 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.

Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.”

20. The Recitals further make provision for continuity between the *Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968* (“the Brussels Convention”) and the Regulation: see, especially, Recitals (5), (10) and (19).
21. As will be appreciated, the Regulation provides very limited grounds for resisting the recognition of judgments falling within its terms. In the present case, the Appellant wishes to invoke Art. 34(2), which provides that a judgment is not to be recognised if “given in default of appearance”.
22. Art. 43 is central to these proceedings. It is contained within Section 2 of the Regulation, under the heading “Enforcement”. Insofar as material, Art. 43 provides as follows:
 - “1. The decision on the application for a declaration of enforceability may be appealed against by either party.
 3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
 5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.”
23. Art. 44 provides that the judgment given on the appeal may be contested only by the appeal referred to in Annex IV. With regard to the United Kingdom, Annex IV provides for “a single further appeal on a point of law”.
24. The equivalent of Art. 43 of the Regulation was Art. 36 of the Brussels Convention, which was in these terms:
 - “ If enforcement is authorised, the party against whom enforcement is sought may appeal against the decision within one month of service thereof.
 - If that party is domiciled in a Contracting State other than that in which the decision authorising enforcement was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.”
25. The *Jenard Report* on the Brussels Convention (“Jenard”) said this as to Art. 36:

“As regards the period within which an appeal may be lodged and the moment from which it begins to run, Article 36 makes a distinction between the following situations:

(a) if the party is domiciled in the State in which the decision was given, the period is one month; the moment from which time begins to run is determined by the law of that State, from which there is no reason to derogate.

(b) if the party is domiciled in another Contracting State, the period is two months, and runs from the date when the decision was served, either on him in person or at his residence...

.....

The purpose of this rule, which derogates from some national laws, is to protect the respondent and to prevent his being deprived of a remedy because he had not been informed of the decision in sufficient time to contest it.

No extension of time may be granted on account of distance, as the time allowed is sufficient to enable the party concerned to contest the decision, if he is so minded;

(c) if the party is domiciled outside the Community, the period within which such an appeal may be lodged runs from the date when the decision is served or is deemed to have been served according to the law of the State in which the decision was given. In this case the period of one month may be extended on account of distance in accordance with the law of that State.

Computation of time is governed by the internal law of the State in which the decision was given.”

26. For the avoidance of doubt, it is common ground that the revised Regulation, i.e., *Regulation (EU) No 1215/2012* (“Brussels Recast”) is neutral on the point/s at issue in these proceedings; quite simply, it does not contain any registration procedure. However, the present dispute remains of some importance insofar as cases are still coming through the pipeline.
27. We were additionally referred to the updated *Lugano Convention (2007)* (“the Lugano Convention”). Art. 43.5 is in the same terms as Art. 43(5) of the Regulation.
28. The Lugano Convention is accompanied by an *Explanatory Report*, written by Prof. Pocar (“Pocar”). Pocar, at para. 153, deals with Art. 43, beginning by noting that appeals can be against a *rejection* as well as a *grant* of a declaration of enforceability:

“ Article 43 provides that ‘either party’ may lodge an appeal, regardless therefore, of whether the decision allows or rejects the application [for a declaration of enforceability]. In practice, however, only the party against whom enforcement is sought will have an interest in challenging a declaration of

enforceability, and only the applicant will have an interest in challenging a rejection of the application.....

.....The Convention lays down no time-limit for an applicant's appeal against an application for a declaration of enforceability. This is an appeal in the applicant's interest against a decision that has not even been notified to the debtor, and it is therefore left to the applicant to choose the time of the appeal.....”

The position is, however, different in the case of appeals against a declaration of enforceability.

“there has to be a time-limit beyond which, if the party against whom enforcement is sought has not appealed, the judgment can be enforced. Article 43(5) therefore sets a time-limit of one month from the date of service of the declaration of enforceability. If the party against whom enforcement is sought is domiciled in a State bound by the Convention other than the one in which the declaration of enforceability is issued, the time-limit is increased to two months from the date of service on him, in person or at his residence. The time allowed is longer because of the difficulty the defendant may have in arranging for his defence in a State other than the one in which he is domiciled, where he may have to find a lawyer and will probably have to have documents translated. Article 43(5) states that no extension of the time indicated in the Convention may be granted on account of distance, and that rule takes the place of any national provisions there may be to the contrary. No time-limit is indicated in the Convention in the event that the party against whom enforcement is sought is domiciled in a State not bound by the Convention. In the absence of any such indication, the determination of the time allowed is left to the national law of the State addressed.”

29. In due course, it will be necessary to compare (briefly) the observations contained in *Pocar*, with those found in *Jenard*.
30. I turn next to the *CPR*. As is well understood, the Court has a general power to extend time for compliance with any rule, as provided by *CPR Part 3.1(2)(a)*. There is a similar general power to extend time for filing an appeal notice, furnished by *CPR Part 52.6(1)*. The question is whether these general powers are applicable in the present context.
31. *CPR Part 74.8* is squarely in point and provides as follows:

“(1) An appeal against the granting or the refusal of registration under the 1982 Act or the Lugano Convention or the Judgments Regulation must be made in accordance with Part 52, subject to the following provisions of this rule.

.....

(3) If –

(a) the judgment debtor is not domiciled within a Contracting State or a Regulation State, as the case may be, and

(b) an application to extend the time for appealing is made within two months of service of the registration order,

the court may extend the period for filing an appellant’s notice against the order granting registration, but not on grounds of distance.

(4) The appellant’s notice must be served –

(a) where the appeal is against the granting of registration, within –

(i) one month; or

(ii) where service is to be effected on a party not domiciled within the jurisdiction, two months, of service of the registration order;

(b) where the appeal is against the refusal of registration, within one month of the decision on the application for registration.”

32. It was not in dispute and, in any event, seems plain that CPR Part 74 must have been intended by the Rules Committee to reflect Art 43 of the Regulation. As will be seen, this is a consideration of some significance.

33. We were referred to a number of authorities, both European and domestic. While I did not understand it to be contended that any of the European authorities directly addressed Issue I, their reasoning is not without importance.

34. In *Deutsche Genossenschaftsbank v Brasserie Du Pecheur S.A. (Case 148/84)* [1986] 2 CMLR 496, the Court of Justice of the European Communities (“the CJEU”) drew a distinction between *enforcement* of a judgment given in another Member State and *execution* (in the narrow sense) of that judgment. At [16], the CJEU observed that the “principal objective” of the Brussels Convention was to simplify procedures in the State in which enforcement was sought. The Court went on to say this:

“17. In order to attain that objective the Convention established an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals. It follows that Article 36 of the Convention excludes procedures whereby interested third parties may challenge an enforcement order under domestic law.

18. The Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments and does not deal with execution itself, which continues to be governed by the domestic law of the court in which execution is

sought, so that interested third parties may contest execution by means of the procedures available to them under the law of the State in which execution is levied.”

35. *Hoffman v Krieg (Case 145/86)* [1990] IL Pr 4 concerned a matrimonial dispute between a German couple. Following their divorce, the husband settled in the Netherlands. The wife obtained a German maintenance order in 1979, which she sought to enforce in the Netherlands in 1981. The husband did not appeal against the enforcement order when it was served on him in 1982 but, when his earnings were attached in 1983, he contended that the maintenance order was unenforceable in the Netherlands. On a reference to the CJEU from the Netherlands Supreme Court, the question was posed (*inter alia*) whether Art. 36 of the Brussels Convention must be interpreted as meaning that a party who has not appealed against the enforcement order in accordance with that provision is precluded, at the stage of the execution of the judgment, from relying on a valid argument which he could have raised in an appeal against the enforcement order.
36. In coming to its decision, the CJEU drew on its conclusions in *Deutsche Genossenschaftsbank (supra)*. The passage which then followed in the CJEU’s judgment is instructive for present purposes:
- “28.a foreign judgment for which an enforcement order has been issued is executed in accordance with the procedural rules of the domestic law of the court in which execution is sought, including those on legal remedies.
29. However, the application, for the purposes of the execution of a judgment, of the procedural rules of the State in which enforcement is sought may not impair the effectiveness of the scheme of the Convention as regards enforcement matters.
30. It follows that the legal remedies available under national law must be precluded when an appeal against the execution of a foreign judgment for which an enforcement order has been issued is lodged by the same person who could have appealed against the enforcement order and is based on an argument which could have been raised in such an appeal. In those circumstances, to challenge the execution would be tantamount to again calling in question the enforcement order after the expiry of the strict time limit laid down by Article 36(2) of the Convention, and would thereby render that provision ineffective.
31. In view of the mandatory nature of the time limit laid down by Article 36 of the Convention, the national court must ensure that it is observed. It should therefore of its own motion dismiss as inadmissible an appeal lodged pursuant to national law when that appeal has the effect of circumventing that time limit.”
37. In *Verdoliva v Van der Hoeven (Case C-3/05)* [2006] IL Pr. 31, the judgment creditor obtained a judgment in The Netherlands which he sought to enforce in Italy, the place of the defendant’s domicile. The defendant was thus a Category A party. The decision

of the CJEU (at [38]) was that Art. 36 of the Brussels Convention required due service of the decision authorising enforcement, in accordance with the procedural rules of the contracting state in which enforcement was sought. In cases of failure of, or defective, service, the mere fact that the party against whom enforcement was sought had notice of the decision was not sufficient to cause time to run for the purposes of the time limit fixed by Art. 36.

38. As the CJEU observed (at [23]), Art. 36 neither defines service nor specifies the manner of service, save in cases where the party against whom enforcement is sought is domiciled in a Member State other than that in which the decision authorising enforcement was given (i.e., a Category B party). In category B cases, service was required to be effected on that party either in person or at his residence, before the time for appealing begins to run. Against this background, Art. 36 was to be interpreted in the light of the scheme and aims of the Brussels Convention (at [25]). As to those aims:

“26.it is clear from its preamble that it is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals. It is settled case-law that it is not, however, permissible to achieve that aim by undermining in any way the right to a fair hearing.....

27. More particularly, as far as enforcement is concerned, the principal aim of the Convention is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal....

28. In relation to the scheme established by the Brussels Convention for recognition and enforcement, it is appropriate to point out that, in addition to Art 36, other provisions of that Convention provide for the service on the defendant of documents or decisions.

29. Accordingly, by virtue of Art. 27(2) and the second sentence of Art. 34 of that Convention, a judgment given in default of appearance is not to be recognised or enforced in another contracting state if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.... ”

39. Returning to Art. 36, the Court drew a distinction between the right of appeal in cases where the decision was to *authorise* enforcement as contrasted with a decision to *refuse* enforcement. Thus:

“32.according to Art. 36 of the Brussels Convention, the party against whom enforcement is sought may appeal against the decision, according to whether or not he is domiciled in the contracting state in which the decision authorising enforcement

was given, within a time-limit of one or two months from the date of service of the decision. That time-limit is of a strict and mandatory nature (*Hoffmann v Krieg...*). Conversely, it follows from both the wording of Art. 40(1) of that Convention and the Jenard Report on the Convention...., that an applicant's right of appeal against a decision refusing the application for enforcement is not subject to any time-limit."

40. The requirement of *service* of a decision authorising enforcement therefore fulfilled a dual function: namely, protection of the party against whom enforcement was sought and *evidentiary*, so as to enable "the strict and mandatory time-limit for appealing....to be calculated precisely": at [34]. Amongst other things, if the sole issue was whether the document authorising enforcement had come to the attention of the party against whom enforcement was sought:

"37. [that]...would make the exact calculation of the time-limit provided for in Art. 36 of the Convention more difficult, thus thwarting the uniform application of the provisions of the Convention".

41. Domestic authority is sparse and contains conflicting observations on the jurisdiction to extend time, albeit not in a case containing a Category B party.
42. The first authority, chronologically, was that of Jack J, in *TSN v Jurgens*, unreported (Case No. 315/00, 16th February, 2001). The case concerned an appeal under Art 36 of the Brussels Convention against the registration of a German judgment in this country by a Dutch national living in England – a Category A party.
43. The first question was whether the appeal was in time or not; the Judge's conclusion was that, as a matter of fact, it had been brought in time. Had that not been the case, the Judge observed that the defendant "would have been in some difficulty", as he explained as follows:

"17. In *Hoffman* the court was not directly concerned with the question whether time could be extended by a national court under its own procedures. But the statement is in clear terms. It appears consistent with the principle of exclusion of national law as a way of surmounting the provisions of Article 36: see *Deutsche Genossenschaftsbank* It is also supported by the Jenard Report....which states: 'No extension of time may be granted on account of distance, as the time allowed is sufficient to enable the party concerned to contest the decision if he is so minded.' The argument that, because the Article expressly precludes an extension of time on account of distance, it allows by implication extensions for other reasons in accordance with national law, would seem a bad one."

Necessarily, the Judge's observations were *obiter* and he referred to them as comprising his "tentative" view.

44. Next, there is *Citibank v Rafidian Bank and another* [2003] EWHC 1950; [2003] 2 All ER (Comm) 1054, a decision of Tugendhat J. Unfortunately, for whatever reason, it does not appear that the Judge was referred to either *TSN v Jurgens* (eminently understandable, as the decision was unreported) or to the CJEU authorities, *Deutsche Genossenschaftsbank* and *Hoffman v Krieg*. Nor, apparently, was the Judge referred to Jenard. The application before the Court was brought by the second defendant (“Rasheed”), an Iraqi state-owned bank, to vary the time limit for filing a notice of appeal from an order registering a judgment of a Court in The Netherlands. The application was brought more than two years after the order for the registration of the judgment, thus well outside the time period referred to in CPR Part 74.8(3). Rasheed was of course a Category C party.
45. The argument for Citibank was that the power to extend time under CPR Part 74.8 was conditional on an application being made within the time period stipulated. For the purposes of CPR Part 3.1, this was a case where the “Rules provide otherwise”. The rival case for Rasheed was that the wording of Part 74.8 was not sufficient to exclude the application of the power to extend time contained in Part 3.1, when regard was had both to the language of Part 74.8 and Art. 36 of the Brussels Convention.
46. The Judge preferred the Rasheed submissions and held that the Court did have jurisdiction to extend time, though he declined to exercise his discretion to do so. As to jurisdiction, the Judge’s reasoning was as follows:

“22. It is ...to be noted that there is a difference in the structure of art 36 compared with CPR Pt 74. Article 36 refers to only two classes of party against whom enforcement is sought. There are those domiciled within a contracting state other than that in which the decision authorising enforcement was given, for whom the time for appealing is two months. And there are all others, for whom the period of appealing is one month. But all the others will include those who are domiciled in a non-contracting state (which by definition will be a state other than that in which the decision authorising enforcement was given). It is not clear why they should have less than two months. It is for those parties that provision is made in Pt 74.8(3). Rasheed is such a party, that is, it is domiciled in a non-contracting state. If the convention were to be construed so strictly that the national rules governing procedure permitted no extension of time to be granted after the two-month period granted by Pt 74.8(3), it would also be for consideration whether Pt 74.8(3) were not itself outside what is authorised by art 36. Article 36 does not contemplate that such parties should have two months in the first place. The CPR give a general extension of one month to such parties.

23. In my judgment art 36 does permit an extension of time to be granted (otherwise than on account of distance), and there is nothing in art 36 or CPR Pt 74.8 which provides otherwise than CPR Pt 3.1(2)(a)..... ”

47. Finally, in this trawl of the authorities, there is the (unreported) decision of Slade J in *Taylor-Carr v Howkins & Harrison LLP* [2014] EWHC 3479 (QB). The appellant was seeking to set aside a Master’s order, registering a judgment given by a French Court. The appellant, who was unrepresented, was a Category A party. The appeal from the registration order was, in the event, lodged eight months out of the time specified by Art. 43(5) of the Regulation. As the Judge observed (at [20]), the appeal must be dismissed unless there was power to extend time for bringing an appeal under Art. 43 and the discretion should be exercised to do so in the circumstances of the case.
48. The Judge was referred to *Hoffman v Krieg* and *Verdoliva*. With regard to *Verdoliva*, Slade J said this (at [22]):
- “... By reason of the strict and mandatory nature of the time limit for bringing an appeal, the court in *Verdoliva* therefore held that there had to be certainty as to the date from which time is to run for bringing an appeal. Accordingly it was not sufficient that the putative appellant was aware of the registration but had to be served on an ascertainable date with the order registering the judgment.”
49. The Judge was also taken to both *TSN v Jurgens* and *Citibank*. The Judge preferred the tentative view of Jack J to the contrary view of Tugendhat J on the question of the jurisdiction to extend time. She said this:
- “ In my judgment the approach of *Hoffman*, *Verdoliva* and *TSN* to the question of whether there is a discretion to extend time for an appeal is to be preferred. Although it may be said that *Hoffman* and *Verdoliva* are not directly on point, they clearly emphasise the mandatory nature of the time limit provisions in the European instruments dealing with registration of foreign judgments. Where the point was considered by Jack J, albeit he did not reach a final conclusion on the point, I prefer and endorse the approach that he took and his view expressed tentatively that there is no power to grant an extension of time.”
50. (3) *The rival cases in outline*: We were most grateful to Mr Warents, for the Appellant and Mr Elvin QC, for the Respondent, for their excellent submissions.
51. The essence of Mr Warents’ argument for the *Appellant* on Issue I was that Art. 43(5) of the Regulation did not prohibit Member States from laying down procedural rules providing for an extension of the time limits there specified, provided that those procedural rules: (1) did not provide for any extension of time “on account of distance”; (2) were to be applied judicially and in accordance with settled principles; (3) did not (whether of themselves or in their application) undermine the policies and principles underlying the Regulation. CPR Part 3.1(2)(a) permitted the Court to grant both prospective and retrospective extensions to the time limits prescribed in Art. 43(5) of the Regulation and CPR Part 74.8(4). The discretion to extend time was to be exercised by the Court in accordance with domestic authority (dealt with under Issue II below), save that no extension of time may be granted on account of distance.

52. Developing these submissions, Mr Warents submitted that the Regulation did not provide a complete procedural code for appeals under Art. 43(5); to the contrary, Art. 43 was significantly supplemented by local procedural rules. As Jenard suggested, in the case of Category C parties, the one month period for appealing may be extended on account of distance in accordance with national procedural law – which would not be uniform across all Member States. The Judge had fallen into error by treating Art. 43(5) as a complete procedural code. So too, the Judge had erred in concluding that a power to extend time would subvert the policy of the Regulation. There was no reason why there should be an absolute or inflexible prohibition on extensions of time. The exception postulated by the Judge, where a refusal to extend time would breach Art. 6, ECHR, was too narrow. Due regard was to be paid to the rights of the defence and the exercise of a judicial discretion to extend time - in appropriate circumstances - was compatible with the objectives of the Regulation in promoting the rapid and simple recognition and enforcement of judgments. Against this background, the final sentence of Art. 43(5) of the Regulation prohibited extensions of time on account of distance but *not* on other grounds.
53. If wrong thus far, Mr Warents went on to submit that the Judge’s interpretation of Art. 43(5) discriminated against Member State domiciliaries (Category A and B parties) in favour of non-Member State domiciliaries (Category C parties) and was therefore incompatible with the Appellant’s right not to be discriminated against on grounds of nationality in the enjoyment of her right to a fair trial, pursuant to Art. 6 ECHR. Accordingly, the Judge’s interpretation of the Regulation and the CPR was in breach of Art. 14 ECHR. If a matter fell within the ambit of an ECHR right (including Art. 6), then Art. 14 prohibited discrimination on grounds of nationality, unless that discrimination could be objectively justified as a proportionate means of achieving a legitimate aim. Given the broad correlation between domicile and nationality, there had been indirect discrimination against Member State domiciliaries (Category A and B parties) on grounds of nationality. The only objective distinction between Category A and B parties on the one hand and Category C parties on the other, was distance – but, under Art. 43(5), it was not permissible to take distance into account. The only non-discriminatory interpretation of Art. 43(5) was that it permitted national rules providing for extensions of time but that extensions of time beyond a 2 months period may not be granted on account of distance.
54. For the *Respondent*, Mr Elvin submitted that the Judge had reached the correct conclusion on the true construction of Art. 43(5) of the Regulation. With one exception, he supported the Judge’s reasoning. As to the exception, any “tension” in the judgment had been attributable to the Judge’s effort to accommodate the Jenard statements with regard to Category C parties, whereas, if need be, Mr Elvin submitted that Pocar’s views were to be preferred.
55. Mr Elvin underlined that the Judge had taken as her starting point the policy underpinning the regulation; it was common ground that she was correct to do so. Further:
- “The Judge had correctly identified “the policy from the Preamble to [the Regulation] as one of ‘simplicity and swiftness’ which recognised that differences between national rules governing the recognition of judgments hamper the sound operation of the internal market....The Judge also recognised

that respect for the rights of the defence meant that a balance had to be struck between the right of the defendant to challenge the recognition order by appeal on limited grounds, and the need for expedition.”

In Mr Elvin’s submission, the Judge had struck the correct balance.

56. The Judge had not erred as to the respective roles of the Regulation and local procedural rules; she had not held that the Regulation was procedurally exhaustive. As the Judge recognised, much had been left to the procedural rules of the *lex fori*. It would, however, be impermissible for local procedural rules to cut across the policy of the Regulation. That policy would be subverted by a power to extend time, exercisable by each Member State in accordance with their own individual rules or discretions, so departing from the uniform time limits specified in the Regulation. Having regard to the policy and language of the Regulation it made no sense to construe Art. 43(5) as precluding extensions of time on account of distance but permitting such extensions on other grounds. On the facts of the present case, such a construction would in any event be perverse as the Appellant had sufficient time to lodge her appeal within the applicable time limit but had failed to do so. The final sentence of Art. 43(5) was to be construed as a provision for the “avoidance of doubt”.
57. The Appellant’s argument based on Art. 14 ECHR went nowhere. It was to be borne in mind that the Appellant enjoyed a right of appeal; Art. 43(5) did no more than circumscribe the time limit for exercising it. It could not be suggested that the 2 months period was disproportionate or inadequate. Even if it could be said that Art. 43(5) impacted on the Appellant’s enjoyment of her Art. 6 rights, any distinction between Category A and B parties on the one hand and Category C parties on the other was objectively, reasonably, legitimately and proportionately justified. The two concessions in favour of Category B parties (actual service and the longer time limit) were deemed sufficient to equate their position with that of Category A parties. The obstacles faced by Category C parties could vary widely, depending on their country of domicile. On the Judge’s approach, namely that the discretion of national courts to extend time in Category C cases must be exercised consistently with the policy of the Regulation, there was no or very limited preferential treatment afforded to Category C parties as opposed to Category B parties.
58. (4) *Discussion: (A) Policy:* My starting point is that Art. 43(5) must be interpreted, as is common ground, in accordance with the policy underpinning the Regulation. This policy is readily to hand. Plainly, the Regulation has as its objective the “free movement of judgments” between Member States, so enhancing the sound operation of the internal market: Recitals, paras. (2) and (10). To that end, the Recitals speak variously of simplifying the formalities with a view to the rapid, simple, and efficient recognition and enforcement in one Member State of a judgment given in another: Recitals, paras. (2) and (17). As already seen, the CJEU decision in *Deutsche Genossenschaftsbank*, at [16], referred to simplifying procedures in the State in which enforcement was sought as the “principal objective” of the Brussels Convention, an observation which must now apply equally to the Regulation. (See too, *Verdoliva*, at [26].) Further, in *Deutsche Genossenschaftsbank*, at [17], the CJEU spoke of the Brussels Convention establishing “an enforcement procedure which constitutes an autonomous and complete system, including the matter of appeals”. Accordingly, when the Judge (at [23], [36] and [74] of the judgment) described the Regulation establishing

an autonomous, complete, uniform, self-contained and simple system for the recognition and enforcement of judgments throughout the European Union (“EU”), she was, in my view, correctly reflecting the policy, principles and principal objective of the Regulation.

59. The Regulation was not, however, one-sided. As set out in para. (18) of the Recitals, respect for the rights of the defence meant that the defendant should be able to appeal “in an adversarial procedure” against a declaration of enforceability. Any such right of appeal must of course be effective and would be rendered nugatory if defendants were not accorded an adequate opportunity to exercise this right. It follows that a balance must be struck between the objective of simplicity and expedition in the recognition and enforcement of judgments and permitting a defendant to exercise an effective right of appeal against a declaration of enforceability: *Verdoliva*, at [26] – [27]. As is plain from [25] and following in the judgment, Andrews J had the requirement of balance well in mind. Given the realities of geography, language and familiarity with the legal system, that balance might well differ between Category A, B and C parties. At least in the case of Category A and B parties, the time limits specified in Art. 43(5) represent the balance struck by the Member States in this regard.
60. There is a further dimension, namely, the principles of subsidiarity and proportionality, representing the respective spheres of the Community and the Member States: para. (4) of the Recitals. Thus, autonomous, complete and uniform though the Regulation system is intended to be for the recognition and enforcement of judgments, it is manifestly not exhaustive – in the sense of leaving no scope for local procedural law of individual Member States. Quite to the contrary, Art. 43(3) of the Regulation stipulates that the appeal shall be dealt with in accordance with the (national) *lex fori*. The Regulation system (or code) is thus supplemented by local procedural rules, for example as to determining whether an appeal was lodged in time and the computation of time: see, Andrews J, at [30] and [47] and Jenard, in the extract cited above. Plainly, therefore, the Judge did not overlook the role of national procedural law.
61. The challenge posed by reliance on national procedural laws is that they will, of course, not be uniform. A question of degree is involved; supplementing the Regulation system is one thing; undermining it is another. Wholesale recourse to national procedural laws would pose a threat to the uniformity, simplicity and effectiveness of the Regulation system for the recognition and enforcement of judgments. Accordingly, the room for the adoption of national procedural laws must necessarily be confined so as to ensure that they do not undermine or subvert the policy of the Regulation. As expressed in *Hoffman v Krieg (supra)*, at [29], national procedural law must “not impair the effectiveness of the scheme of the Convention as regards enforcement matters”.
62. In my judgment, the existence of a general judicial power to extend time for appealing beyond that allowed for in Art. 43(5) in the case of Category A or B parties, would undermine the policy of the Regulation and would not be compatible with it. The point is a short one, best made simply. Whatever the position might be if only one jurisdiction was involved, that would not be the case here. The general power would be exercised, differently, depending on the national procedural laws of each of the Member States. While caution is always advisable before ruling out the existence of any power to extend time (subject only to the Art. 6 exception) – there will inevitably be hard cases – this is not a straightforward matter of giving effect to a judicial discretion exercised, as Mr Warens submitted, in accordance with settled principles. The principles can and

would diverge between the Member States; certainly, the manner of their exercise would so diverge, very likely substantially. Such a general power would drive a coach and horses through the scheme for the recognition and enforcement of EU judgments. It would undoubtedly “impair its effectiveness”.

63. Furthermore, the provisions of Art. 43(5) themselves furnish the balance between expedition and protecting the rights of the defence. Policy does not require that they be supplemented. Having regard to Category B parties, there are specific provisions for service, “derogating from some national laws” (Jenard). A part of the “dual function” of those provisions is to protect the party against whom enforcement is sought: *Verdoliva*, at [34]. Moreover, Category B parties are furnished two months with which to lodge an appeal, rather than the one month available to Category A parties. The underlying policy of the provisions in respect of Category B parties is explained in Jenard: it is to protect a Category B party from being deprived of a remedy because he was not informed of the decision in sufficient time to contest it; no extension of time was to be granted on account of distance, because “the time allowed is sufficient to enable the party concerned to contest the decision” if so minded. Pocar’s views are to like effect: a longer time is available to a Category B party than a Category A party “because of the difficulty the defendant may have in arranging for his defence in a State other than the one in which he is domiciled...”; the rule precluding extensions of time on account of distance “takes the place of any national provisions there may be to the contrary”. There is not a hint in either Jenard or Pocar of any policy justification for the granting of extensions of time under national procedural laws, over and beyond the periods allowed by Art. 43(5). This is all the more so when it is recollected that the Judge’s interpretation of Art. 43(5) incorporates an in-built exception:

“...where the application of the time limit would impair the very essence of the right of appeal, and strict adherence to it would infringe article 6 of the [ECHR]”

Judgment, at [41] and see too [42].

64. Accordingly, considerations of policy tell strongly against the Appellant’s argument for a general power in the case of Category A or B parties to extend the time limits set out in Art. 43(5) of the Regulation, in accordance with national procedural laws. The time limits furnished by Art. 43(5) are intended to be adequate to enable the party concerned to contest the decision, if so minded; it cannot realistically be disputed that they are adequate for that purpose – at least provided there is an exception when required for compliance with Art. 6 ECHR.
65. *(B) Language:* Had the Regulation been a domestic statute, the Appellant’s argument would enjoy a certain attraction, as a matter of linguistic construction. Art. 43(5) precludes an extension of time “on account of distance”; it says nothing about extensions of time granted on any other grounds; by implication, it does not preclude extensions of time granted on grounds other than distance. The submission is concise and neat. With respect, however, I think it is wrong, when sought to be applied to the Regulation – which is emphatically not a domestic statute.
66. The language of the Regulation ought to be purposively construed and not divorced from its context. Approaching the task of construction in this way, I am readily persuaded that the final sentence of Art. 43(5) is included for the avoidance of doubt.

The obvious concern is that a Category B party may have difficulty in arranging his defence, extending to engaging lawyers and having documents translated (as explained by Pocar). Having regard to the mischief, the natural meaning of the language in the final sentence is to make it plain that the two month period allowed is sufficient for the purposes of protecting the rights of a Category B party – a view expressed in terms by Jenard. While neither Jenard nor Pocar comment on the possibility of permitting further extensions of time pursuant to national procedural laws, such a construction of Art. 43(5) would run contrary to the policy underlying the Regulation, as already discussed. I would not be minded to adopt such a construction, unless driven to it, which I am not. The Judge put the matter this way, at [31] of the judgment:

“ The argument that by excluding the possibility of an extension of time only on grounds of distance, the draftsman has envisaged an extension being granted for other reasons makes no sense in the light of those underlying policy considerations and the explanation given in the Jenard Report.....If ...[a Category B party] cannot obtain a further extension on grounds of distance, and time cannot run against him without his knowledge, then it would seem perverse to allow a further extension on other grounds. Such a person is already considered to be adequately protected against the potential unfairness of a tight mandatory deadline for appeal.”

I agree. It follows that both the policy of the Regulation and its language tell against the existence of a general power, vested in national courts, to extend the Art. 43(5) time limits, in respect of Category A and B parties, in accordance with national procedural laws.

67. As is apparent, the terms of Art. 43(5) make no reference to Category C parties. It is convenient to defer consideration of the position of Category C parties under the Regulation until later and I do so. I turn next to the provisions of the domestic CPR Part 74.8.
68. *(C) CPR Part 74.8*: My conclusions thus far are strongly fortified by the provisions of CPR Part 74.8.
69. It is perhaps an oddity, although nothing turns on it, that Part 74.8(3) – dealing with Category C parties – precedes rather than follows Part 74.8(4) – dealing with Category A and B parties.
70. Be that as it may, it is *only* Part 74.8(3) which contains any provision for a possible extension of the Art. 43(5) time limits. Any such extension would apply solely to Category C parties and not to Category A or B parties. To the extent necessary, I return later to the circumscribed provision for a Category C party obtaining an extension.
71. For immediate purposes, the striking feature of Part 74.8 is the contrast between rr. (3) and (4). As it seems to me, the overwhelming inference is that Part 74.8 only permits Category C parties, falling under r. (3), to apply for extension of the Art. 43(5) time limits, whereas the absence of any equivalent provision in r. (4) means that Category A and B parties are precluded from seeking any such extension. No other construction serves to explain the difference between the wording of rr. (3) and (4).

72. On this footing, my conclusion is that this is an instance where the “Rules provide otherwise” so that the general powers to seek extensions of time under CPR Parts 3.1(2)(a) and/or 52.(6)(1) are inapplicable to Category A and B parties. Any other construction would defeat the intention of the Rules Committee in its drafting of CPR Part 74.8.
73. This conclusion as to the domestic CPR provisions may itself be sufficient to decide the appeal against the Appellant. It is, however, of further significance: it expresses the Rules Committee’s understanding of Art. 43(5) – which CPR Part 74.8 was intended to reflect. Accordingly, it reinforces the conclusions to which I am already attracted as to the true construction of Art. 43(5).
74. *(D) Authority:* Very little needs to be added as to the CJEU authorities. First, none are squarely in point. Secondly, references to the “mandatory nature of the time limit” (such as *Hoffman v Krieg*, at [31]) do not of themselves determine the matter. By their nature any references to time limits are necessarily “mandatory”, in at least one sense; were they otherwise, they would not constitute time limits. The question here is instead whether the time limits under Art. 43(5) are such as to rule out the general power to extend time for which the Appellant contends. Thirdly, the tenor of each of the judgments to which I have referred, contains no encouragement whatever for the Appellant’s case. To the contrary, the language and emphasis of each of the decisions, point against there being any such general power to extend time.
75. *Verdoliva* may be taken as an example. It will be recollected that the requirement of *service* of a decision authorising enforcement fulfilled a dual function; one part of that function was evidentiary, so that (at [34]) the precise calculation of the “strict and mandatory time-limit” for appealing could be “calculated precisely”. If (at [37]) the “exact calculation” of the time-limit provided by Art. 36 of the Brussels Convention was made more difficult, this would thwart the uniform application of the provisions of the Convention. As already seen, I would not conclude that any of the cited CJEU authorities are decisive; I would, however, have great difficulty reconciling the observations to which I have drawn attention with the Appellant’s case. Were there to be a general power to extend the time limits in respect of Category A and B parties in accordance with the individual Member States’ procedural laws, the emphasis on the precise calculation of those time limits would seem (at the least) overblown. The risk of diverse extensions of time under national procedural laws would dwarf any threat to the uniform application of the provisions of the Regulation emanating from a very limited degree of imprecision in calculating the Art. 43(5) time limits against which the requirement of service was intended to guard.
76. Returning to the domestic authorities, it may be seen that Jack J’s tentative view, in *TSN v Jurgens*, on the construction of what is now the final sentence of Art. 43(5) of the Regulation, accords with the conclusion to which I have come. The observations of Slade J (set out above) in *Taylor-Carr v Howkins & Harrison LLP* are to like effect, as is her assessment of the CJEU authorities to which she and I have referred. It is fair to acknowledge that both *TSN* and *Taylor-Carr* concerned Category A rather than Category B parties, though, for present purposes, my inclination is that the distinction is immaterial. The observations in *TSN* and *Taylor-Carr* thus provide some limited reinforcement for the construction of Art. 43(5) which I favour – though it is necessary to keep in mind that Jack J’s view was tentative and Slade J’s judgment *ex tempore*,

with the appellant before her unrepresented. I shall return to the decision in *Citibank v Rafidian Bank*, dealing with a Category C party, presently.

77. *(E) Category C parties:* In the view of Andrews J (at [32] of the judgment) the “real problem” was that Art. 43(5) of the Regulation did not deal expressly with Category C parties. On the basis of the observations in Jenard (set out above) – as to extending the one month limit pursuant to national procedural law for Category C parties - she went on (at [33]) to accept Mr Warents’ submission that parties domiciled in a State other than a Regulation Member State were “not in a completely independent category” but were in a sub-category of Category A – in the Judge’s terminology, Category A2. Andrews J did not, however, accede to Mr Warents’ further submission, namely, that once it was possible to extend time under national procedural law for some parties in Category A (those in A2), there must also be a power to extend time for those in Category B, albeit not on account of distance; that submission entailed “false logic” (as explained at [35]).
78. With respect to Andrews J, I neither share her view that the position of Category C parties – *whatever it might be* – presents a “real problem” for the purposes of these proceedings, nor that it is appropriate or helpful to treat Category C parties as a subset of Category A, on account of the observations in Jenard. Not least as the Judge herself observed (at [35]), Jenard’s views on extensions of time for Category A parties were very different from his views in respect of those in (the Judge’s) category A2. It is unnecessary to say more as to categorisation, save that I shall continue to treat non-Regulation Member State domiciliaries as Category C parties.
79. My reasons follow for not seeing Category C parties as presenting a “real problem” for the purposes of these proceedings.
80. *First*, insofar as the Judge’s concern related to Jenard’s view, it is not at all easy to ascertain why he was of the opinion that the relevant time limit for Category C parties was one month, albeit that in this regard the procedural rules of the state of enforcement could be used to extend time “on account of distance”. I share the puzzlement of the Judge (expressed at [34]) and can only speculate that Jenard may have based that view on para. (9) of the Recitals (set out above). Granted that, as the Judge rightly said (at [35]), “...the commentary in Jenard...authoritatively informs the interpretation...” of the Regulation, this may be a very rare instance where, with the greatest respect, the view of Jenard is unsustainable. If para. (9) of the Recitals formed the basis for Jenard’s observation, it is not at all apparent that it provides a foundation for his view on the time limit for Category C parties. For my own part and if it matters, the simpler view of Pocar (set out above) is to be preferred: Art. 43(5) does not indicate a time limit for Category C parties and, in the absence of any such indication, the time limit must be furnished by national procedural law. On this footing, it is unnecessary to take further time analysing the Jenard view.
81. *Secondly*, regardless of whether Jenard or Pocar is to be preferred, the Appellant’s case is not assisted. As already observed, neither Jenard nor Pocar begins to suggest that recourse to national procedural law is available to extend time in the case of Category A or B parties. In any event, whether by way of Jenard’s or Pocar’s reasoning and in agreement with the Judge (at [36]), “...it cannot be inferred that each state of enforcement has a free rein in granting extensions of time to ...[Category C] defendants because that would completely undermine the policy...” underlying the

Brussels Convention and the Regulation. As the Judge, in my view, rightly concluded (*ibid*), the power to extend time in a Category C case must be exercised consistently with the policy in the Brussels Convention and the Regulation. In this jurisdiction, that policy is implemented by way of the provisions of CPR Part 74.8, with which I have already dealt – whatever the true construction of the power to extend under Part 74.8(3), a matter for another day.

82. *Thirdly* and accordingly, the short answer is that whatever the position as to Category C parties, it has no bearing on the clarity of the provisions, both in Art. 43.5 of the Regulation and in CPR Part 74.8(4), as to Category B parties, with whom alone we are concerned. In this connection, I entirely agree with the Judge, when she observed (at [40] of the judgment):

“ ...The power to extend time must be confined to ...[Category C] defendants, because fairness to the other categories of defendant is already sufficiently catered for.”

Andrews J added the *caveat* (at [41]) in respect of Art. 6 ECHR, with which I have already expressed agreement.

83. *Fourthly*, if this is right then it is unnecessary to express any view on the decision in *Citibank v Rafidian Bank* (*supra*), dealing as it did with Category C parties. However, if necessary to go further, CPR Part 74.8(3), as it seems to me, gives Category C parties a circumscribed right, *prospective only*, to apply to extend the time for appealing: that right can only be exercised within two months of the registration order; the structure of r.3 is such that retrospective applications are not permitted. For my part, I cannot see any warrant to go behind those clear terms, which I am content to conclude suffice to exclude the application of the general powers to extend time under CPR Parts 3.1(2)(a) and/or 52.6(1). If need be, therefore, I respectfully disagree with the approach to CPR Part 74.8(3) of Tugendhat J in *Citibank v Rafidian Bank* (*supra*) and prefer those of Jack J in *TSN v Jurgens* and Slade J in *Taylor-Carr v Howkins & Harrison LLP*, discussed above. In fairness to Tugendhat J and as already noted, the relevant CJEU authorities and Jenard were apparently not cited to him. In any event, I agree with Andrews J’s overall conclusion on *Citibank v Rafidian* (at [64]):

“ Whatever the scope of the residual power to extend time in a ...[Category C] case, *Citibank* is not authority for the proposition that the time limits imposed by the Brussels Convention and the ...Regulation in ...[Category A] and ...[Category B] cases are not mandatory. It was not necessary for Tugendhat J to make such a finding in order to decide the narrow issue in the case. However, if and to the extent that Tugendhat J’s finding, at para. 23, that article 36 of the Brussels Convention does permit an extension of time to be granted otherwise than on account of distance is to be read as extending to cases outside ...[Category C], he was clearly wrong.”

84. There remain Mr Warents’ submissions on Art. 14 ECHR, to which I next turn.

85. (F) *Discrimination*: The thrust of the Appellant’s complaint is that, on the Judge’s construction of Art. 43(5), Category B parties are treated less favourably than Category C parties, without objective justification.

86. Art. 14 ECHR provides as follows:

“ The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such asnational...origin....”

As explained by Mance LJ (as he then was) in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 WLR 1868, at [48 a], Art. 14, with reference to a proposition accepted by the Court:

“ Article 14 applies to the ‘enjoyment’ of Convention rights. This means that even if there is no actual *breach* of a Convention right there can still be an article 14 claim if the conduct complained of comes within the *ambit* or the right, i.e., its subject matter is linked to the exercise of the right concerned...”

It is plain therefore that the foundation for the Appellant’s Art. 14 claim must be found in the impugned construction of Art. 43(5) coming within the ambit of another ECHR right. The argument here is that the construction of Art. 43(5) favoured by the Judge comes within the ambit of the Appellant’s Art. 6 rights to a fair trial.

87. I confess to considerable misgiving that the construction favoured by the Judge does come within the ambit of the Appellant’s Art. 6 rights at all, not least given the exception in respect of Art. 6, provided by the Judge; if such misgiving is well-founded, then the Art. 14 claim fails *in limine*. Nonetheless, I am prepared to assume in the Appellant’s favour (without deciding) that the absence of a general power to extend the time limits in Art. 43(5) for Category A and B parties – time limits which are adequate in my view – comes within the ambit of the Appellant’s Art. 6 rights, in that it is linked to access to the Court for the purpose of exercising her right of appeal conferred by Art. 43(1). Further, given the broad correlation between domicile and nationality, I am prepared to assume in the Appellant’s favour (again without deciding) that a difference in treatment between Category A and B parties on the one hand and Category C parties on the other is capable of giving rise to indirect discrimination on the ground of nationality.

88. Further than that, however, I am not prepared to go. First, for present purposes, there are material differences between the different Categories of parties. Thus, a Category A party is domiciled in the self-same jurisdiction in which the declaration of enforceability is given. That party must be taken to be familiar with the law and language of the Court in that jurisdiction, together with the practicalities of obtaining legal assistance. A one month time limit ought to be adequate for launching an appeal, if the party in question is so minded. Additional allowances (in the form of requirements of service and a two months’ time limit) serve to protect the Category B party from the risk of time expiring without becoming aware of the judgment in question or being in a position to take effective steps to appeal: see, *Jenard*. Indeed, the present case is very much in point; the Appellant’s predicament arose from a “muddle” on the part of her solicitors (judgment, at [82]) not because of any “distance” considerations. Category B

parties are of course all domiciled in Member States. Those Member States enjoy the benefits and accept the burdens of the Regulation and the same must apply to their domiciliaries. Category C parties are in a very different position, domiciled as they are in States other than Member States. The Regulation must contemplate a worldwide variety of legal systems, together with widely varying familiarity with the law, language and practicalities of obtaining legal assistance in respect of the jurisdiction in which the judgment is given.

89. Secondly, on the Judge's construction of Art. 43(5), with which I agree, it is difficult to discern any difference between Category B and Category C parties in terms of the time limits for appealing. Thus, a Category B party has a two months' time limit, capable of extension (exceptionally) when required in order to comply with Art. 6 ECHR. In respect of Category C parties, the Judge, as seen (at [36] of the judgment) held that the power to extend time must be exercised consistently with the policy of the Regulation and later (at [56]) rejected "...an unfettered power to extend time ...especially one exercisable after the time limit had expired...". Still further, the Judge (at [62]) observed that it seemed unlikely that the power to extend time in the case of Category C parties "...could be legitimately exercised in a manner which went beyond the concessions expressly made in the ... Regulation itself to ...[Category B] parties". The Judge's reasoning would thus, at least generally, equate the position of Category B and Category C parties; any difference in treatment could be marginal only.
90. Thirdly, as I understood it, the Appellant's Art. 14 complaint does not extend to CPR Part 74.8(3). That is understandable. The Appellant's case overall is not assisted by the view I take as to the true construction of Part 74.8(3) – assuming it is necessary for me to take any view at all. But, on the view I take, Part 74.8(3) permits prospective applications for extensions of time only. If that is right, then the most that could be said is that Part 74.8(3) permits some marginally more favourable treatment for Category C parties - in that a prospective application for an extension of time made within the two months period is capable of producing an extension to a date outside that period. Of itself that does not yield a foundation for an Art. 14 claim. Moreover, in this jurisdiction, absent a discrimination challenge to CPR Part 74.8(3), I struggle to see that any complaint on Art. 14 grounds concerning the provisions of Art. 43(5), as construed above, can be anything other than academic – and therefore goes nowhere.
91. Fourthly, against this background, any marginal or modest difference in treatment between Category B and Category C parties (if any there be) cannot be regarded as "unduly discriminatory" (*Nasser v United Bank of Kuwait, supra*, at [57]) and would in any event be "reasonable and objectively justifiable" (*ibid*). The variety of "unknowns" relating to Category C parties justify the difference in the provisions, such as there are, in Art. 43(5) of the Regulation and CPR Part 74.8(3), as between Category C and B parties. In any event, a challenge to Art. 43(5) alone – without a like challenge to CPR Part 78.4 – may well be academic. I would reject the complaint of discrimination under Art. 14 ECHR.
92. (G) *Conclusion on Issue I*: At [76] of the judgment, the Judge said this:
- “ ...there is no general power to extend the mandatory two-month time limit for appealing in this case. The court is obliged to enforce that time limit strictly, subject only to the residual power to extend a mandatory time limit in the rare case where its

application would impair the very essence of the right of appeal, and strict adherence to it would infringe article 6 of the Human Rights Convention.”

93. I agree. This conclusion in respect of Category B (and Category A) parties is supported by both the policy and language of the Regulation. It is consistent with the reasoning of the CJEU authorities to which reference has been made. It receives some support from two of the three first instance domestic decisions. It is strongly reinforced in this jurisdiction by the language and structure of CPR Part 74.8. It is unaffected by any conclusion which might be reached as to Category C parties, or the reasoning upon which any such conclusion might be based. It protects Art. 6 rights and furnishes no scope for a discrimination claim under Art. 14 ECHR, even on the most favourable assumptions for the Appellant. If this conclusion on Issue I is right, then the appeal must fail. However, on the hypothesis that I am wrong and that there is a general power to extend time for appeals by Category B parties pursuant to national procedural law, I go on to consider and determine Issue II.

ISSUE II: DISCRETION

94. (1) *The judgment*: Here, it is convenient to begin with brief reference to the judgment. Andrews J dealt with Issue II at [77] – [86]. She had regard to the domestic case law on relief against sanctions, in particular *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3926. She was, however, not persuaded:

“77. ...that the guidance given in cases concerning non-compliance with a court order or procedural direction or with the rules of court pertaining to domestic litigation including appeals, is wholly apposite in this context though of course it is of some relevance. The underlying policy considerations in a case such as this.....go well beyond those affecting decisions on matters of pure case management.”

95. The Judge concluded (at [78]) that the failure to meet the time limit was serious; the delay of about three weeks had to be seen in the context of a two months’ time limit. The delay may have had some impact on the progress of the litigation, in that (at [80]) the appeal may have been listed earlier and, in any event, there would have been no need to deal with the preliminary issues. At all events, the delay was serious (at [81]), whether or not it was significant with regard to hearing dates. The Judge was next satisfied (at [82]) that there was no good reason for the delay.
96. Finally, therefore, the Judge turned to consider whether notwithstanding the seriousness of the delay and the absence of any excuse for it, the justice of the case required an extension of time (at [83] and following). The Judge was not persuaded that the decision of this Court in *R (Hysaj) v Home Secretary* [2014] EWCA Civ 1633; [2015] 1 WLR 2472 advanced the Appellant’s case and she in any event distinguished it. The Judge’s overall conclusion was encapsulated (at [85]), as follows:

“There was no background [in *Hysaj*] of a complex and supposedly self-contained international Treaty or directly effective EU Regulation with the policy of simple, expeditious recognition and enforcement of judgments of other contracting

states at its heart, a deliberately tight timetable set for appeals on very restricted grounds, and a regime that was designed to strike a fair balance between the rights of the judgment creditor and protection of the legitimate interests of the defendant. Viewed in that context, there is no obvious justification for condoning a three week delay by someone who knows of the existence of the enforcement order in ample time to appeal. Indeed, given that the balance between the competing interests is already fairly struck by the terms of the ...Regulation itself, in my judgment any interference by the court with that balance in circumstances such as this would be unwarranted and unprincipled. It is not good enough to say ‘there was no harm done’ because, even if that were true (which it is not) it loses sight of the bigger picture.”

Accordingly, even if the Judge had a discretion to extend time for appealing, she declined to exercise it in favour of the Appellant (at [86]).

97. (2) *The rival cases*: For the Appellant, Mr Warents submitted that the Judge had applied the wrong test, taken into account irrelevant factors and failed to give any or appropriate weight to relevant factors in the exercise of her discretion. She would otherwise have exercised her discretion in favour of granting an extension of time. The appropriate test was to be found in *Denton* and *Hysaj*, save that extensions of time beyond two months could not be granted on account of distance. The Judge had erred in law by not applying the guidance contained in these authorities and, in her overall conclusion, had done no more than pay lip service to *Denton*. Developing his argument, Mr Warents made detailed reference to the chronology, which he submitted was not affected by the Appellant’s delay in lodging her appeal or was irrelevant in that “the Appellant should not be penalised because the preliminary issues raised matters that are legally complex”. The Judge ought to have found that the Appellant’s delay had no significant impact on the course of the litigation or on other court users”. Further, the Judge had failed to take into account, appropriately or at all, relevant factors including that the Respondent was not prejudiced by the delay, that permission was not required to appeal under CPR Part 74.8, so that the facts were very similar to those of *Hysaj* – which the Judge had been wrong to distinguish. Mr Warents submitted that, as the Judge’s exercise of her discretion was flawed, we should exercise it afresh – and grant the extension of time.
98. For the Respondent, Mr Elvin submitted that the Judge’s determination of Issue II involved a case management decision, with which this Court should be slow to interfere. The Judge could not be said to have exercised her discretion – which was closely linked to her reasoning in respect of Issue I - in a flawed manner. In Mr Elvin’s submission:

“ ...to the extent that the Court has power to grant relief from sanctions from a failure to comply with the two month time limit it should exercise that discretion in accordance with:

- (1) the domestic law on relief from sanctions;

- (2) consistently with the policies and principles underlying the Regulation.”

It was therefore incumbent on the Judge to apply the domestic law on relief from sanctions in a manner which gave effect to the policies and principles underlying the Regulation. That was what the Judge had done. It would be contrary to the policy of the Regulation for the discretion to extend time to be exercised in a case such as this “...where the putative appellant was actually served with the registration order in sufficient time to make an appeal but did not do [so] because of a serious mistake on the part of her legal representatives”. The decision in *Hysaj* did not require the Judge to reach any different conclusion. The criticisms of the Judge’s exercise of her discretion were not made out. In any event, if we exercised the discretion afresh, we should uphold the Judge’s decision.

99. (3) *Discussion: (A) The premise:* The premise for considering Issue II is that the conclusion to which I have come on Issue I is wrong, so that there is a discretion vested in the national Court to extend time in accordance with national procedural law. That said, Issue II cannot be and is not divorced from the context in which it arises: namely, the Regulation, with its policy, principles and principal objective.
100. (B) *The test:* Two aspects arise for consideration. First, the test to be applied by the Judge. Secondly, the test for this Court interfering with the decision of the Judge. I take them in turn.
101. As to the test to be applied by the Judge, CPR Part 3.9 provides, *inter alia*, as follows:

“ Relief from sanctions

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need -

(a) for litigation to be conducted efficiently and at proportionate cost;

and

(b) to enforce compliance with rules, practice directions and orders.”

102. In this jurisdiction, *Denton (supra)* furnishes a three-stage test for considering an application for relief from sanctions under CPR Part 3.9(1):

“24. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the ‘failure to comply with any rule, practice direction or court order’ which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred.

The third stage is to evaluate ‘all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]’....”

103. As held in *Hysaj (supra)*, an application for an extension of the time prescribed pursuant to Part 52.4(2) for filing a notice of appeal should be approached in the same way and with the same rigour as an application for relief from sanctions under Part 3.9.
104. In my view the test to be applied by the Judge was the domestic test for relief from sanctions (as laid down by *Denton* and *Hysaj*), with the third stage informed by the policy and principles of the Regulation. This is indistinguishable from Mr Elvin’s formulation, namely, that the discretion to grant relief from sanctions is to be exercised in accordance with the domestic law and consistently with the policies and principles underlying the Regulation. In this way, while the exercise of discretion under Issue II faithfully reflects the premise upon which it is addressed and is thus kept properly separate from the jurisdiction issue arising under Issue I, it is not divorced from the context in which it arises. This approach is preferable to that advocated by Mr Warents (see above) which, to my mind, does not adequately address the question of context, save for the length and basis of any extension which might be granted.
105. Turning to the test to be applied by this Court, it is the well-known test covering appeals from discretionary decisions by the Court below. We should not interfere simply because we might ourselves have exercised the discretion differently. We should only interfere if the Judge failed to consider relevant factors, or took into account irrelevant factors, or was plainly wrong.
106. (C) *The exercise of the discretion:* There can be no doubt that the Judge had regard to the first stage of the *Denton* test. For my part, I cannot fault her conclusion that the delay was serious, for the reasons she gave. That being so, I am not minded to take time over a more detailed consideration of whether or not the delay impacted on the date for the hearing of the appeal. Whatever the answer, it can only matter but little, if at all. It is, however, plain that the Appellant’s failure to comply with the time limit has generated the preliminary issues with which this Court is now concerned; but for these preliminary issues, it must be likely that the litigation would long since have come to an end. Though the Appellant cannot be “blamed” for the interest to which Issue I gives rise, there would have been no preliminary issues had the Appellant lodged her appeal within time. On any view – given the Judge’s conclusion as to the seriousness of the delay – stages two and three of the *Denton* test require careful consideration.
107. As to the second stage of the *Denton* test, no proper criticism can be made of the Judge’s conclusion that there was no good reason for the delay. Without belabouring the point, this was a case where there was ample time for the Appellant to lodge her appeal. That it was not lodged in time was attributable to the “serious mistake” made by her solicitors, as the Judge understandably characterised it (at [18] of the judgment).
108. Turning to stage three of the *Denton* test, as it seems to me, the Judge did have regard to “all the circumstances of the case”. She had already held that the delay was serious and that there was no good reason for it. Contrary, with respect, to Mr Warents’ submission, the Judge did take into account the Appellant’s contention that there had been no prejudice – “there was no harm done”, as expressed by the Judge (at [85]). She was, however, entitled to go on to conclude that any such considerations as to the

absence of prejudice were outweighed by the “bigger picture” of the Regulation, including its deliberately tight timetable for appeals against the background of the balance already struck between the rights of the judgment creditor and the legitimate interests of the defendant. In the circumstances, the Judge’s conclusion that condoning the Appellant’s delay would be “unwarranted and unprincipled” cannot be said to fall outside the scope of her discretion.

109. I am not at all persuaded that the decision in *Hysaj* told in favour of, still less required the Judge to reach, a different conclusion. The point of principle in *Hysaj* was that already summarised: namely, an application for an extension of time for filing a notice of appeal should be approached in the same way and with the same rigour as an application for relief from sanctions under CPR r. 3.9. The decisions in *Hysaj* on the facts of the individual cases before this Court do not advance the argument. I am also not persuaded that the fact that CPR Part 74.8 does not require permission to appeal, somehow equates the position of the Appellant to that of the applicant in *Hysaj*, who had already obtained a judicial decision granting permission to appeal.
110. It follows that despite the Judge’s initial observation (at [77], set out above) as to the *Denton* test not being “wholly apposite”, she effectively worked through and applied that test, *in context*, against the background of the Regulation and its underlying policy and principles. The precise language in which the Judge expressed herself does not affect the essence of this conclusion. If there is any distinction between the approach adopted by the Judge and the test to be adopted as set out above, it is a distinction without any real difference. For my part, I cannot see any proper basis for impugning the Judge’s exercise of her discretion, so that no question of exercising the discretion afresh arises.
111. If, however, I am wrong about that, so that it is appropriate to exercise the discretion afresh, then I would have no hesitation in coming to the same conclusion as that reached by the Judge. In all the circumstances of this case, informed by the context and even *assuming* (without deciding, in the Appellant’s favour) “no harm done”, there is no warrant for granting a substantial extension of time, so cutting across the policy and principles of the Regulation.
112. *(D) Overall conclusion:* For the reasons given, I would uphold the decision of the Judge on Issue II and would dismiss the appeal.

Richards LJ :

113. I agree.

Hildyard J :

114. I also agree.