

**E.S. and A.S. v. E.H. and M.H.**

**In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991**

**and in the matter of**

**E.S. (a minor): A.S. Plaintiff v. E.H. and M.H. Defendants**

[1996 No. 210 Sp.]

[1999] 4 IR 504

High Court

20th November 1997

*Family law - Child abduction - Wrongful removal - Wrongful retention - Whether father had custody rights at date of removal - Whether habitual residence of child could be affected by interim order - Whether guardian appointed by interim order entitled to determine habitual residence - Whether grave risk of exposure to serious psychological harm - Adoption Act, 1952 (No. 25), s. 40 - Child Abduction and Enforcement of Custody Orders Act, 1991 (No. 6) - Convention on the Civil Aspects of International Child Abduction, 1980, art. 13.*

Section 40 of the Adoption Act, 1952, provides, *inter alia*, that "[n]o person shall remove out of the State a child under seven years of age who is an Irish citizen or cause or permit such removal".

The Convention on the Civil Aspects of International Child Abduction signed at the Hague on the 25th October, 1980 ("the Hague Convention") was incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991.

Article 13 of the Hague Convention provides:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

E. was born in England on the 21st January, 1995, out of lawful wedlock. The child's parents stopped living together in 1995, but the plaintiff maintained regular contact with his child. The mother died unexpectedly on the 10th March, 1996, in London, although she had spent quite a long period living in Ireland between July, 1995 and the date of her death. On the 11th March, 1996, the defendants, the maternal aunt and maternal grandmother, took the child to Ireland without informing the plaintiff. A father of a non-marital child in England has no custody rights unless and until he obtains such rights from a court. On the 13th March, 1996, an order was made by the English High Court giving interim care and control of the child to the plaintiff. The second defendant, was ordered to return the child to the English jurisdiction. An application was also made in the Dublin Circuit Court on the same day and a temporary order was made making the first defendant, a guardian of the child, E., giving her custody of the child and granting an order prohibiting the plaintiff from removing the child from Ireland. The plaintiff sought,

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*inter alia*, the return of the child to England pursuant to the Hague Convention.

*Held* by the High Court (Geoghegan J.), in granting the relief sought, 1, that the expression "rights of custody" in the Hague Convention did not extend to inchoate rights which a father of a child born out of lawful wedlock could be said to have. The father of a non-marital child in England had no custody rights unless and until he obtained such rights from a court and, therefore the removal of the child to Ireland by the defendants was lawful.

2. That at the date of death of the mother, the child's habitual residence was in England. The removal of the child to Ireland did not terminate the child's English habitual residence. The guardian appointed in this jurisdiction on foot of the Circuit Court interim order was not entitled to determine the residence of the child. If the order of the Circuit Court had any effect on residence, it could only be temporary residence and not habitual residence.

*In re S. (A Minor) (Custody: Habitual Residence) [1998] A.C. 750 approved.*

*Semble*: There was no reason to doubt the correctness of the view taken by the English courts that a court order is deemed to be made at the very beginning of the day on which it was made.

3. That s. 40 of the Adoption Act, 1952, applied only to children who were habitually resident in Ireland and did not affect the operation of the Hague Convention in Ireland.

*Obiter dictum*: Even if the section did apply, there was nothing in s. 40(2) that would have prevented the first defendant as guardian from consenting to the child being sent back to England when she had knowledge of the English court order.

4. That art. 13(b) of the Hague Convention was intended to cover only serious psychological harm and as a matter of probability, long term serious psychological damage would not be caused to E. by merely taking him to England for the purpose of court proceedings to determine the custody issues. Any danger or even some damage could be largely removed by suitable undertakings. There was no grave risk that the return would expose E. to serious psychological harm and therefore the discretion under art. 13 did not arise.

Case mentioned in this report:-

*In re S. (A Minor) (Custody: Habitual Residence) [1998] A.C. 750; [1997] 4 All E.R. 251.*

**Special summons.**

The facts are summarised in the headnote and are fully set out in the judgment of Geoghegan J., *infra*.

Proceedings were instituted by special summons on the 26th March, 1996, seeking, *inter alia*, an order recognising the decisions of the English courts and an order directing the return of the child to the jurisdiction of habitual residence. By an order of the High Court (Budd J.) on the 8th May, 1996, the plaintiff was permitted to amend the special endorsement of claim so as to include a claim for the return of the child pursuant to the Hague Convention.

The matter was heard by the High Court (Geoghegan J.) on the 23rd, 24th and 28th October, 1997.

*Máire R. Whelan* for the plaintiff.

*Gerard Durcan S.C.* (with him *Mary O'Toole*) for the defendants.

*Cur. adv. vult.*

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This case started life as a claim primarily for an order by the Irish High Court for the recognition and enforcement of an order made by the English High Court of Justice Family Division (Wall J.) granting to the plaintiff interim care and control of the minor named in the title and to compel the first defendant to return the child to the jurisdiction of the courts of England and Wales, the child having been taken from England to Ireland. An additional and alternative claim for return was also made pursuant to the provisions of the Luxembourg Convention. This case itself and other concurrent proceedings in the English High Court have had a very long history. At this stage it is sufficient to state that by an order of this Court (Budd J.) the plaintiff was permitted to amend the special endorsement of claim so as to include a claim for the return of the child pursuant to the Hague Convention. By agreement between the parties, it is this latter aspect of the claim which has been litigated first before me. If this court now makes an order for the return of the child, pursuant to the Hague Convention, that is the end of the matter. If on the other hand this Court refuses an order for the return under the Hague Convention, the case will have to be re-listed for argument as to the plaintiff's rights, if any, under the Luxembourg Convention.

I have already mentioned that there were concurrent proceedings in England. These proceedings were for custody and wardship as well as for declarations that the removal of the child to Ireland and/or retention of the child in Ireland was wrongful both under the Luxembourg and the Hague Conventions. Various judges dealt with the case in England at the stage of interim orders but ultimately the full case was heard by Mr. Lionel Swift, Q.C., sitting as a deputy judge of the English High Court of Justice Family Division. Appeals and cross appeals were brought from his decision to the English Court of Appeal and a further appeal was brought to the House of Lords. I have had the benefit of the very full judgments delivered by Mr. Swift, Butler-Sloss L.J. in the Court of Appeal and Lord Slynn of Hadley in the House of Lords (Reported as *In re S. (A Minor) (Custody: Habitual Residence)* [1998] A.C. 750). As I understand the position, I can only have regard to those judgments insofar as they assist me in relation to the questions of law involved. I cannot adopt the findings of fact, however convenient it might be to do so, particularly as very carefully reasoned findings of fact were made by Mr. Swift on foot of full oral evidence heard by him over many days. But counsel for the plaintiff is not necessarily prepared to accept any facts which were either found or conceded in the English courts. Nevertheless, it has been accepted that I should read all the affidavits and exhibits filed for whatever purpose and of course the English judgments are extremely helpful in considering the legal principles involved.

It has been established in a number of cases, particularly in England, that applications under the Hague Convention ought normally be heard on affidavit only because of the speedy remedy intended to be provided by the Convention. A judge reading the affidavits in an application under the Hague Convention should form a view of the facts as a matter of probability even where there may be conflict between the affidavits. In that sense it is different from almost all other types of proceedings brought on affidavit evidence. In this case I was asked to hear the oral evidence of the paediatric psychiatrist, Dr. B. This application was made to me by the defendants and was opposed by the plaintiff but I acceded to it in the circumstances. The purpose of the oral evidence was to set up a defence under art. 13 of the Convention to the effect that grave psychological harm would be caused by an order for the return of the child. The original involvement of Dr. B. in the case arose in a somewhat different context and I will be returning to that later on in this judgment. Apart, however, from the evidence of Dr. B., the evidence on which I must base my judgment is the evidence before me on affidavit.

The relevant background facts can be summarised as follows. The child, E., was born in England on the 21st January, 1995, out of lawful wedlock. The mother was Irish and the father was Moroccan. The father had previously been married to a Spanish girl and had two children by that marriage but that marriage had broken up. It seems clear, however, that he remained on reasonably good terms with her and was devoted to the two children. The father commenced a relationship with E.'s mother in 1990 and they lived together until July, 1995. The relationship then more or less broke up but not altogether. It would

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seem that it broke up to the extent that they were not living together after that under the same roof but there was constant contact and in particular the father, the plaintiff in these proceedings, had regular contact with his child, E. The mother died unexpectedly on the 10th March, 1996, in London. Between July, 1995 and the date of her death, the mother had spent quite a long period living in Ireland but it would seem that it was in the nature of a lengthy stay with her family rather than any permanent change of residence. In the months leading up to her death she was back in England and looking at the evidence as a whole, I am quite satisfied that at the date of the death of the mother, the child's habitual residence was in England. Indeed, this was conceded in the Appeal Courts in England.

After the funeral of the mother, the maternal aunt and maternal grandmother spirited the child away to Ireland without informing the plaintiff and needless to say without his permission. I agree with the view taken by the English courts, and for the reasons given in the judgments, that the aunt and the grandmother in doing this were not doing anything unlawful or wrongful in the legal sense, however, morally reprehensible it may have been. Somewhat like the legal position in Ireland, a father of a non-marital child in England has no custody rights unless and until he obtains such rights from a court. Counsel for the plaintiff, despite the concessions made in the English courts, is not prepared herself to concede in this Court that the removal was not wrongful. She makes the point that the expression "rights of custody" in the Hague Convention may extend to inchoate rights which in a sense a father of a child born out of lawful wedlock could be said to have. While this is an interesting argument, I do not think that it is sound and I accept the view taken by the English courts. I am assuming therefore that the removal of the child to Ireland by the defendants was lawful.

The child, E., appears to have been returned to Ireland by the defendants on the 11th March, 1996 and has been with the first defendant ever since. On the 13th March, 1996, an order was made by the English High Court (Wall J.) giving interim care and control of the child to the father. The grandmother was ordered to return the child to the English jurisdiction and there was an undertaking given to bring wardship proceedings which were in fact issued on the 14th March, 1996. Subsequently, the aunt, the first defendant in these proceedings, was joined in the English proceedings. On the same day as the order was obtained from the English High Court in London an application was made in the Dublin Circuit Court to Judge McGuinness (as she then was) to have the aunt made a guardian of E. and giving the aunt custody and for an order prohibiting the father from removing the child from Ireland. These orders were made by the Circuit Court. In the English judgments there is a certain amount of esoteric discussion as to whether a court order is deemed to be made at the very beginning of the day in which it is made because the point was taken that apparently Judge McGuinness's order was made a short time before Wall J.'s order in England. I have no reason to doubt that the view taken by the English courts on this matter is correct but I do not think that it arises. I am satisfied that the operation of the Hague Convention is not and could not be affected by the order of the Circuit Court whether or not it was made before or after the English order. Counsel for the defendants however places a much more substantive reliance on Judge McGuinness's order in connection with his argument about habitual residence and I will be returning to that in due course. The important issue in this case is whether, as and from the time that the defendants had notification of the English order, the retention of the child in Ireland was thereafter wrongful and of course if so there is the further issue of whether, having regard to art. 13 of the Convention, this Court ought in fact to make an order for the return.

Counsel for the defendants resists an order for the return of the child on three grounds. These are:-

1. That as and from the time that the defendants took the child away from England and brought him back to Ireland or at the very least as and from the Circuit Court order, the child had an habitual residence in Ireland or at the very least no longer had an habitual residence in England.
2. That the first defendant, as appointed guardian under the Circuit Court order, could not be bound to return the child to England having regard to s. 40(2) of the Adoption Act, 1952.
3. That grave psychological harm would be caused by the return and that therefore the Court should exercise a discretion under art. 13 of the Convention and refuse an order for the return.

At all relevant times the child, E., had in my opinion a habitual residence in England. Mr. Lionel

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Swift, Q.C., sitting as a deputy judge of the High Court in England, in the course of his judgment stated the following:-

"I am not prepared to accept that a person with no juristic power over a person of this age can change his habitual residence within a day or two. It is not necessary to consider the position of a child kept by such a person over a significant period of time."

Lord Slynn of Hadley in his speech in the House of Lords had this to say on the same subject:-

"In the Court of Appeal Butler-Sloss L.J., with whom the other members of the Court agreed, took the same view as the trial judge. In considering the appellants' contention that S. lost his residence in England either when the appellants took over his *de facto* care on the 10th March or when they took him to Ireland on the 11 March she said:

'The death of the mother, the sole carer, would not immediately strip the child of his habitual residence acquired from her, at least, while he remained in the same jurisdiction. Once the child has been removed to another jurisdiction, the issue whether the child has obtained a new habitual residence whilst in the care of those who have not obtained an order or the agreement of others will depend upon the facts. But a clandestine removal of the child on the present facts would not immediately cloth the child with the habitual residence of those removing him to that jurisdiction, although the longer the actual residence of the child in the new jurisdiction without challenge, the more likely the child would acquire the habitual residence of those who have continued to care for the child without opposition. Since, in the present case, the English Court was seised of the case within two days of the removal of the child, it is premature to say that the child lost his habitual residence on leaving England or had acquired a new habitual residence from his *de facto* carers on arrival in Ireland.'"

I totally agree with those views expressed by Mr. Lionel Swift and Butler-Sloss L.J. which in turn seem to have had the approval of the House of Lords. But counsel for the defendants adds a refinement to the argument. He says that even if the removal of the child by the aunt over to Ireland did not terminate the child's English habitual residence, such termination must necessarily have occurred once Judge McGuinness's order was made. Counsel argues that as and from the making of that order the appointed guardian in this jurisdiction was surely entitled to determine the residence of the child. I cannot agree. Quite apart from any consideration of comity of courts or as to what the position was to be if two conflicting orders were made in the two jurisdictions, I am satisfied that if Judge McGuinness's order as such had any effect on residence, it could only be temporary residence and not habitual residence. The Circuit Court order was a temporary order until a particular date. The matter then became adjourned on a few occasions until ultimately the Circuit Court proceedings were stayed by the High Court. There is some suggestion that the order of the High Court staying the Circuit Court proceedings was not valid but I do not think that I need consider that matter in this case nor indeed would it be appropriate for me to do so. Nothing really turns on whether the order staying the Circuit Court proceedings was valid or not. The essential point is that at all times Judge McGuinness's orders were temporary orders and those orders as such cannot have had the effect of altering the habitual residence. Of course if the first defendant for a certain period was looking after the child in her house and with the clear intention of keeping the child with her indefinitely and there was no apparent objection coming from the father, there would come a stage undoubtedly when the English habitual residence would be lost and either at the same time or perhaps at some stage later, an Irish habitual residence would be established. But that is clearly not the case here and in my view the child's habitual residence in England was never lost. The defendants' first ground of defence therefore fails.

I now turn to the ingenious point raised under the Adoption Act, 1952. It would be extraordinary and highly undesirable if an obscure section in the Adoption Act, 1952 (part of which had already been declared unconstitutional) could in any way affect the operation of the Hague Convention in Ireland which is part of Irish domestic law. Only if a court was compelled to take that view of the wording of the relevant statutory provision, should it do so. I have no doubt that the Adoption Act, 1952, cannot be relied

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on in this case. First of all, I entirely agree with counsel for the plaintiff's submission that the section is dealing only with children who are habitually resident in Ireland. It would never have been contemplated that s. 40 applied to a child merely because the child was in Ireland as distinct from being resident in Ireland. The purpose of the section was to prevent the scandal of children being sent out of the country for adoption without the approval of the relevant parent, guardian or relative. As I have taken the view that the habitual residence of the child remained at all material times England, I consider that s. 40 of the Adoption Act, 1952, has no application. But even if I am wrong about that, there is nothing in s. 40(2) which would have prevented the first defendant as guardian from consenting to the child being sent back to England when she had knowledge of the English court order. Counsel for the defendants' answer to this is that the Oireachtas intended such a guardian to have a discretion and that it cannot have been intended that the guardian would be forced to exercise the discretion only in one way. I cannot accept this argument. It seems to me that the Oireachtas would have assumed that the guardian would exercise the discretion in a proper way and if the guardian was bound under the Hague Convention to obey a call to return the child to another jurisdiction then he must exercise the discretion in favour of consenting to the removal. For both of these reasons therefore I hold that the second ground of defence fails also.

I now turn to the third defence, which is the defence under art. 13 of the Convention. Counsel argues that the oral evidence of Dr. B. establishes that there is a grave risk that the return of the child would expose the child to psychological harm of a serious nature. If he is right about that, then this Court has a discretion as to whether an order for the return should be made or not. In considering this defence it is very important to place Dr. B.'s evidence in context. At some stage during the course of the proceedings, which have taken, unfortunately, a long time to come to a hearing, a dispute about access came before the High Court (Budd J.). An independent assessment to be carried out by Dr. B. was ordered by Budd J. There was considerable delay in setting up the assessment and in finally obtaining a report from Dr. B. but as I understand it, in the preparation of his report, Dr. B. was at all material times addressing his mind to the problem of access and not to the issue involved in art. 13(b) of the Hague Convention. Dr. B.'s report is dated as recently as the 1st October, 1997. His assessment was in turn based on a very extensive schedule of interviews carried out in July, 1997. In para. 7 of his report under the heading "Psychiatric Opinion", Dr. B. sets out a number of questions which in his opinion must be addressed. The fourth of those questions is:-

"What would be the effect on (E.) of his removal from (M.H.) so as to live with his father?"

Dr. B. gives a lengthy answer to that question and I think that it is worth quoting in full but substituting initials for names where appropriate. It reads as follows:-

"At the time of G.H.'s death, E. lost his major attachment figure. He had also, by then, spent six months living with his father until Mr. S. separated from his mother. Subsequent to that separation Mr. S. had contact with E. although the frequency of that contact is unclear. During the six months they lived together it would seem that Mr. S. was very involved in E.'s life and so consequently, it is also likely that by the time Mr. S. separated from G.H., E. had formed an attachment to Mr. S. The majority of infants do form an attachment to their parent figures by the sixth or eighth month of life. Mr. S. had no physical contact with E. between September, 1995 and January, 1996. He would then seem to have had regular contact between January and March, 1996. This contact would have consolidated E.'s attachment and overall relationship to Mr. S. E.'s removal to Ireland was therefore a major loss for him in that he lost his mother and his father, his two main attachment figures. M.H. described his extreme anxiety when he first came to live with her and that anxiety lasted over five months. That degree of anxiety is to be expected given the trauma of his losses. He has now formed an attachment to M.H. Were he to be removed from her this would, once again, be a traumatic loss. Ms. H. stated that E. becomes distressed after access visits by his father to him overnight. Once again, I would expect that. There is little to be gained for E. in removing him from M.H. I consider that he would suffer psychological damage from such a removal.

A further question that arises is whether the psychological damage caused to E. by his removal from

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M.H. would be so severe as to prohibit this. It must be remembered that removal from M.H. to Mr. S. would be less traumatic than his removal from G.H. and Mr. S. to M.H. in March 1996. That is because E. has an attachment to Mr. S., whereas, he did not have an attachment to M.H. when he was removed into her care. It is my opinion that he would be less traumatised by the move from M.H. to Mr. S. than by the move from his mother and father to M.H. but it would still be a trauma. I do not consider it to be in his best interests, psychologically, to do this. The immediate effect of such a removal from M.H. to Mr. S. would be that E. would become anxious which he would, in all likelihood, show by wanting to be with his father all the time and be unable to allow his father out of sight. He would also probably become aggressive. However, the major effect would be to render him more vulnerable psychologically, long term, to losses in his life and that he would be more prone to depression and anxiety."

I am satisfied that Dr. B.'s oral evidence was not intended to be in conflict with what he had said in his report. His oral evidence must be interpreted in the context of his report. It is true that at one stage in his oral evidence Dr. B. did seem to suggest that damage would be caused by the removal of the child to the English jurisdiction even for the purpose of custody being determined and not for the purpose of sending the child back into the father's custody. It is perfectly clear, both from his report and from his evidence, that Dr. B. is understandably concerned about the severance aspect. But in a large number of Hague Convention cases an order for return could result in some psychological harm. It is a question of degree. It is well established by the authorities that art. 13(b) is intended to cover only serious psychological harm as has been pointed out in other cases this is quite obvious from the addition of the words "or otherwise place the child in an intolerable situation". In my view, the report and the oral evidence of Dr. B. fall far short of establishing that, as a matter of probability, long term serious psychological damage would be caused to E. by merely taking him to England for the purposes of court proceedings to determine the custody issues. Any danger of even some damage can be largely removed by suitable undertakings. This has consistently been the view of the Supreme Court. I will discuss with counsel the exact nature of the undertakings but subject to this Court being satisfied that the undertakings as to what is to happen when the child is brought to England, I am satisfied that there is no grave risk that the return would expose E. to serious psychological harm and therefore the discretion under art. 13 does not arise. Even if it did arise I would have to seriously consider whether, having regard to all the surrounding circumstances of this case, it might still be appropriate to exercise the discretion in favour of returning E. to England for the purposes of the custody issues being determined there but it is not necessary now for me to consider that point.

Accordingly, subject to considering the proposed undertakings, I am satisfied that I ought to make an order under the Convention for the return of E. to England.

Solicitors for the plaintiff: *Finglas Law Centre.*

Solicitors for the defendant: *McCann Fitzgerald.*

Caroline J. Cummings, Barrister

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**In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991,  
and in the matter of**

**H.I., a minor: H.I. Plaintiff v. M.G. Defendant**

[S.C No. 330 of 1998]

[2000] 1 IR 110

Supreme Court

19th February 1999

*Family law - Child abduction - Custody - Hague Convention - Wrongful removal - Preliminary issue - Whether non-marital parent could invoke provisions of Hague Convention in absence of rights of custody - Hague Convention on the Civil Aspects of International Child Abduction, 1980, art. 3 - Child Abduction and Enforcement of Custody Orders Act, 1991 (No. 6).*

The Hague Convention on the Civil Aspects of International Child Abduction, 1980, ("the Hague Convention") was incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991.

Article 1 of the Hague Convention provides, *inter alia*, that its objects are to secure the prompt return of children wrongfully removed to and retained in any contracting state and to ensure that rights of custody and access in one contracting state are respected in the other contracting states.

Article 3 of the Hague Convention provides, *inter alia*, that the removal or retention of a child is to be considered wrongful where it is in breach of "rights of custody".

Article 5 of the Hague Convention provides, *inter alia*, that "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

The plaintiff and the defendant went through a ceremony of marriage under Islamic law in the State of New York in 1991. That marriage was not valid under the civil law of the United States of America. The defendant gave birth to a son, H., who spent the first five and a half years living in the State of New York with his parents and was habitually resident there.

In 1996, the defendant and H. took up residence apart from the plaintiff and on the 3rd February, 1997, the defendant and H. returned to Ireland. The plaintiff sought an order under the Hague Convention directing the return of H. to the jurisdiction of the courts of the State of New York.

In the High Court, the plaintiff argued that H.'s removal to Ireland by the defendant was in breach of rights of custody attributed to a person, an institution or any other body.

The plaintiff argued that the expression; "rights of custody", should be given the widest sense possible. The plaintiff submitted that even if he did not have "rights of custody" in the narrow sense under the law of the State of New York, he did have "rights of custody" under the Hague Convention.

The defendant argued that the plaintiff did not have a cause of action under the Hague Convention on the basis that H. was not removed in breach of custody rights. The defendant argued that under the law of the State of New York, a natural father of a non-marital child has no legal status and no rights of custody in respect of the child until such rights of custody can be conferred by a court in the State of New York. The plaintiff had not established paternity, had not been conferred rights of custody and had no say in the place of residence of the child.

The High Court (Laffoy J.) decided the preliminary issue in favour of the plaintiff finding that the removal was in breach of rights of custody within the meaning of art. 3 and that the plaintiff was entitled to invoke the Hague Convention and pursue his claim pursuant to Article 12.

The defendant appealed to the Supreme Court.

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*Held* by the Supreme Court (Hamilton C.J., Denham, Barrington and Keane JJ.; Barron J. dissenting), in allowing the appeal, 1, that the removal of H. was not at that time in breach of any right of custody to which the plaintiff was entitled under the law of the State of New York, whether arising by operation of law, judicial or administrative decision or an agreement having legal effect under that law.

2. That, in giving the Hague Convention a purposive and flexible construction, circumstances can arise where a removal can be "wrongful" within the meaning of art. 3 because it is in breach of rights of custody not vested in either of the parents but in the court itself, however, the Hague Convention did not provide protection for "inchoate" rights of custody.

*Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249 not approved.

3. That the removal of H. was not at that time in breach of any right of custody vested in the family court in New York, in proceedings then in being or of any order prohibiting the defendant from removing the child to another jurisdiction, nor was it in breach of any such order which might have been implicit in an order actually granting the plaintiff visitation rights.

*Per* Barron J., dissenting: That the purpose of the Hague Convention was to protect the interests of children from the harmful effects of an improper removal or retention and the right to invoke the Hague Convention should not be limited to those with established legal rights. Legal rights cannot be ignored but where a party entitled to those rights entered into an agreement, whether by words or conduct, whereby *de facto* exercise of those rights passed to another, whether solely or jointly with the possessor of the rights, such rights so passed arise within the meaning of art. 3 of the Hague Convention. The plaintiff, the defendant and H. lived together in circumstances akin to that of a legal family and, *de facto*, the care of H.'s person was exercised jointly by the parties. The right to do so by the plaintiff arose through acquiescence or implied agreement between the parties. The plaintiff came within the Hague Convention.

Cases mentioned in this report:-

*Re B (Abduction)* [1997] 2 F.L.R. 594.

*Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249.

*B. v. B. (Abduction)* [1992] 3 W.L.R. 865; [1993] 2 All E.R. 144; [1993] 1 F.L.R. 238.

*Bourke v. Attorney General* [1972] I.R. 36; 107 I.L.T.R. 33.

*Re C (A Minor) (Abduction)* [1989] 1 F.L.R. 403.

*C. v. C. (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 W.L.R. 654; [1989] 2 All E.R. 465.

*C. v. C. (Minors) (Child Abduction)* [1992] 1 F.L.R. 163.

*Re F (A Minor) (Abduction: Custody Rights Abroad)* [1995] 3 W.L.R. 339; [1995] 3 All E.R. 641.

*Re F (Child Abduction: Risk if Returned)* [1995] 2 F.L.R. 31.

*Re H (Minors) (Abduction: Acquiescence)* [1998] A.C. 72; [1997] 2 W.L.R. 563; [1997] 2 All E.R. 225.

*Hewer v. Bryant* [1970] 1 Q.B. 357; [1969] 3 W.L.R. 425; 1969 3 All E.R. 578.

*Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562; [1990] 3 W.L.R. 492; [1990] 2 All E.R. 961.

*K. v. K.* (Unreported, Australian Family Court, 22nd May, 1996).

*K. v. K.* (Unreported, Supreme Court, 6th May, 1998).

*Re O (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702.

*S. v. H. (Abduction: Access Rights)* [1997] 3 W.L.R. 1086; [1997] 1 F.L.R. 971.

*Thomson v. Thomson* [1994] 3 Can. S.C.R. 551.

*Re W; Re B (Child Abduction: Unmarried Father)* [1998] 3 W.L.R. 1372; [1998] 2 F.L.R. 146.

**H.I. v. M.G.**

**Appeal from the High Court.**

The facts have been summarised in the headnote and are set out in the judgments of Keane and Barron JJ., *infra*.

The proceedings were commenced by special summons which was issued on the 20th March, 1997. The trial of a preliminary issue, whether the removal of H. from the State of New York was "wrongful" within the meaning of art. 3 of the Hague Convention, was heard by the High Court (Laffoy J.) on the 28th and 29th October, 1998. On the 5th November, 1998, the High Court (Laffoy J.) decided the preliminary issue in favour of the plaintiff.

By notice of appeal dated the 25th November, 1998, the defendant appealed against the judgment and order of the High Court.

The appeal was heard by the Supreme Court (Hamilton C.J., Denham, Barrington, Keane and Barron JJ.) on the 14th and 21st January, 1999.

*Inge Clissman S.C.* and *Carmel Stewart* for the defendant.

*Gerard Durcan S.C.* and *Máire R. Whelan* for the plaintiff.

*Cur. adv. vult.*

**Hamilton C.J.**

19th February, 1999

I have read the judgment about to be delivered by Keane J. and I agree with it.

**Denham J.**

I also agree with the judgment of Keane J.

**Barrington J.**

I also agree with the judgment of Keane J.

**Keane J.**

*Introduction*

The factual background to this difficult and unfortunate case, brought under the Hague Convention on the Civil Aspects of International Child Abduction, 1980, is as follows. The plaintiff and the defendant are Egyptian and British citizens respectively. They met in the United States in July, 1989, and lived together in New York from February, 1990, until December, 1996, when the defendant left the plaintiff.

At the time they met, the plaintiff was carrying on a restaurant business. The defendant was in the United States on a visitor's visa: her home was in Ireland. The plaintiff and the defendant entered into a Moslem wedding ceremony on the 5th March, 1991, but it is accepted that, under the law of the State of New York, this was not recognised as a valid marriage. They had one child, H., the minor named in the title, who was born on the 13th July, 1991. The plaintiff is named in H.'s birth certificate as the father and the defendant has acknowledged him to be such. The defendant, from the 19th January, 1991, to the 3rd February, 1997, when she left the United States, had the status of an illegal alien.

When the relationship between the plaintiff and the defendant broke down in December, 1996, and the defendant left the plaintiff, she applied to the Family court in the County of Nassau, New York on the 31st December, 1996, for, and was granted, a "temporary order of protection" in respect of the plaintiff, which is the equivalent of a barring order in our jurisdiction, and was also granted *interim* custody of H.

On the 3rd January, 1997, the plaintiff filed a petition in the Family court. Paragraph 14 stated:-

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"That it would be in the best interest of the child to have (visitation) awarded to the petitioner for the following reasons: petitioner/father loves his child and has always maintained a close relationship."

Paragraph 10 of the petition in the court form read as follows:-

"(An order of filiation) (A paternity acknowledgement) was filed by the Court of Nassau County, docket No. 1997-00000, concerning the defendant and the child(ren) who is/are the subject of this proceeding. A true copy is annexed hereto."

Under this paragraph are the initial "N/A".

The petition ends as follows:-

"Wherefore, petitioner(s) pray(s) for an order awarding visitation of the child(ren) named herein to the petitioner(s) and for such further and other relief as the court may determine."

On the 7th January, a petition was filed on behalf of the defendant in the Family court. Paragraph 10 reads:-

"(A paternity acknowledgement) is being filed by the family court of Nassau County on Nassau County, docket No. 1997-00000 concerning the petitioner and respondent and the child who is the subject of this proceeding. A true copy is annexed hereto."

Paragraph 14 states that:-

"it would be in the best interest of the child(ren) to have (custody) (visitation) awarded to the petitioner(s) for the following reasons:-

I, M.G., mother of child prior to separation, has provided the majority of nurturing and physical care since the child needs daily medical attention which I have solely taken care of. My son will continue to have a good life and undisrupted by staying with me."

The petition ends:-

"Wherefore petitioner(s) pray(s) for an order awarding custody/visitation of the child named herein to the petitioner(s) and for such further and other relief as the court may determine."

The defendant left the United States with H. on the 3rd February, 1997, and came to Ireland, without informing the plaintiff. Since her arrival in this jurisdiction, she and H. have been living with her parents and two sisters in Dublin. In the meantime, the proceedings in the New York court had been adjourned. On the 26th February, 1997, at a hearing where both parties were represented by their lawyers, it was ordered by consent of all the parties that H. should be produced before the court on the 26th March, 1997, and that any foreign police or other applicable authority should be asked to assist in implementing that order.

The circumstances in which the defendant left for this jurisdiction are set out by her as follows in an affidavit sworn by her in these proceedings:-

"I say that I made an initial application to the court on the 30th December, 1996. I say that, as I was unrepresented, the presiding judge advised me to engage a lawyer. The matter was adjourned to the 9th January, 1997. The plaintiff attended. I was represented by a Mr. Mosser through the legal aid system. Prior to that date I had applied for custody and the plaintiff had applied for visitation rights. The judge said that there was no proof of paternity and the matter was adjourned to the 7th February. Paternity papers needed to be filed by the plaintiff.

I say that I firstly consulted a private lawyer in relation to family proceedings who referred me to two specialist immigration lawyers with regard to my position. I say that prior to the next scheduled court date of the 7th February, as a result of advice received from the said immigration lawyers and my own private lawyer, I left the jurisdiction of the United States on the 3rd February, 1997. I say I did so in circumstances where I was under considerable emotional stress. The relationship with the plaintiff having broken down, my fear(*sic*) that he would remove the child to Egypt and therefore my fear(*sic*) that substantial psychological damage at the least could be caused to my child by reason of

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being separated from me, his mother and of physical harm in that he would be exposed to a less comfortable standard of living and in particular that his medical needs, which are considerable, would not be met by the plaintiff. I say that I regret any discourtesy to the American court but I acted in the interest of protecting the infant from the dangers I have referred to. I say at the time I departed the jurisdiction there were no proceedings in being to my knowledge taken on behalf of the plaintiff apart from his visitation application. I further say that I was never served with such proceedings. I say that I have no knowledge of any application to court on the 26th February, 1997. In particular I say that I was not contacted by the lawyers who indicated to the court on that day that they appeared on my behalf nor did I instruct them to consent to any orders on my behalf on that date. I say that I am a stranger as to what occurred in court on that date."

The advice from an immigration lawyer referred to in that affidavit states:-

"The only way that [the defendant] could legalise her status in the United States would be if her United States citizen child were to petition for her. However, the United States citizen child must be at least 21 years old before the child can file such a petition on behalf of his mother.

Unlike the immigration laws enacted prior to September, 1996, the Immigration Act, 1996, mandates a very harsh penalty for overstaying [being out of status].

As an illegal alien, one who is out of status, [the defendant] has no right to remain in the United States as the mother of a minor [under 21] United States citizen child.

It is also my understanding that there was never a legal marriage between [the defendant] and the father of [H]. She also has no education or employment background which would enable her to be granted lawful permanent residence status or non-immigrant status.

Therefore, it is my opinion that until such time as [the defendant's] son reaches the age of 21 years and can petition for his mother, there is no way that she would be able to obtain lawful permanent resident status in the United States."

In her affidavit, the defendant also makes various allegations of misconduct against the plaintiff and similar allegations were made by her father and her sister's partner in affidavits sworn by them in the proceedings. These allegations were vehemently denied by the plaintiff in an affidavit sworn by him in the proceedings. Clearly, however, any conflicts of evidence arising could not be, and were not, resolved by the High Court on affidavit only. In any event, they would be relevant only to an issue arising under art. 13 of the Hague Convention or to a determination by either the court in New York or the courts in this jurisdiction as to the future custody of H. It does not, however, appear to be disputed that H. suffers from partial epilepsy, most probably as a result of a developmental brain disorder.

The plaintiff sent a request to the Department of Equality and Law Reform (as it was then styled), the central authority in this jurisdiction for the purposes of the Hague Convention, seeking the assistance of the department in having H. returned to the United States on the 13th March, 1997.

The present proceedings were then issued pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991, which gives the Hague Convention the force of law in this jurisdiction. Some difficulty was experienced by the plaintiff's solicitors in effecting service of the proceedings, but ultimately that was done, and the matter came on for hearing in the High Court. On behalf of the defendant, it was argued that the removal of H. had not been in breach of any right of custody of the plaintiff, since he would not have been entitled to such a right at the time of the removal, never having been legally married to the defendant and no declaration of paternity having been made in respect of him. It was further claimed on behalf of the defendant that the return of H. should not be ordered because he would be exposed to "physical or psychological harm" or placed in "an intolerable situation" within the meaning of art. 13 of the Hague Convention.

It was agreed between the parties and accepted by the learned High Court Judge that the question as to whether the removal of H. was "wrongful" within the meaning of art. 3 of the Hague Convention should be determined as a preliminary issue. That issue having been resolved in favour of the plaintiff by the trial

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judge, this appeal was brought from her judgment and order on behalf of the defendant.

While the procedure was one which was, accordingly, acquiesced in by all concerned, I do not think that it was appropriate. Article 1(a) of the Hague Convention states that one of its two objects is:-

"To secure the prompt return of children wrongfully removed to or retained in any Contracting State."

In the present case, the allegedly wrongful removal was effected on the 3rd February, 1997. The proceedings were not, however, heard by the High Court until the 28th October, 1998. This court cannot, of course, attribute responsibility to anyone for that delay: it is sufficient to say that thereafter it was essential that the proceedings be processed as rapidly as was consistent with their just resolution. This pointed strongly, in turn, to the desirability of the entire case being dealt with in the High Court at the same time: given the likelihood of an appeal to this court by either party from the determination by the High Court of a novel and important issue which was not the subject of an authoritative decision either in the High Court or this Court, the course adopted was capable of producing further delay. Happily, the judgment of the High Court was given with considerable expedition and the appeal to this Court was also brought on for hearing within a relatively short time. In cases of this nature, however, I do not think that this procedure should be adopted in the future.

### *The issue*

The preliminary issue which was before the trial judge was whether the removal or the retention of H. was "wrongful" within the meaning of art. 3 as being:-

"In breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention"

Evidence on affidavit was given in the High Court by Timothy J. Horgan and Paul O'Dwyer, both of whom were accepted as being lawyers qualified to give evidence as to the relevant law of the State of New York. The trial judge was understandably concerned that, far from indicating any measure of agreement as to what the relevant law was, they disclosed what she described as "a welter of conflict". Mr. Horgan, on behalf of the plaintiff, said that New York law would recognise the agreement of the parties to live as husband and wife and, in a case such as the present where the parties had "a long standing *modus vivendi* on custodial decisions affecting the child", legal effect would be given to those arrangements. He concluded that:-

"It is clear that the father had rights of custody at the time of the departure. The fact that the child is illegitimate and her parents were not wedded in a civil ceremony is irrelevant to the father's right of custody as the natural father it is equally clear under the laws of the State of New York that those rights are continuing"

He also said that in determining the issue of custody, the sole consideration was "what is in the best interests of the child".

Mr. Horgan's statement of the law was vigorously disputed by Mr. O'Dwyer. He said that, without an adjudication of paternity, the New York courts could not award custody or visitation to an unmarried father, since it would violate the principle that a parent may not be deprived of custody by a non-parent, absent a showing of non-fitness. He concluded:-

"As a matter of practice, a New York State court will not entertain a custody petition filed by an unmarried father unless a paternity petition is filed at the same time, as the court could not grant the relief requested absent an adjudication of paternity"

As with petitions for custody, an unmarried father must not only plead, but also prove, that he is the father of a child in order for a court to grant his visitation rights. Again, as a matter of practice, a New York State court will not entertain an application for visitation by an unmarried father unless a petition for paternity is filed at the same time, absent a prior adjudication of paternity.

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In New York a right of custody carries with it the right to determine the child's place of residence. Absent any adjudication of paternity and either established visitation or custody rights an unmarried father has no rights whatsoever to determine the child's place of residence."

Mr. O'Dwyer said that there were two statutes in force in New York State dealing with custody issues in relation to children, the Domestic Relations Law and the Family Court Act. The first was concerned in general, although not exclusively, with the dissolution of marriages. The second dealt generally, although again not exclusively, with actions regarding the welfare of children. Section 240.1 of the Domestic Relations Law provides that:-

"In any custody proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage or (2) for a separation or (3) for a divorce, or (4) to obtain by a writ of *habeas corpus* or by petition in order to show cause, the custody of or a right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child" [emphasis added]

Section 549(a) of the Family Court Act provides that:-

"If an order of filiation is made or if a paternity agreement or compromise is approved by the court, in the absence of an order of custody or visitation entered by the supreme court the family court may make an order of custody or visitation, in accordance with [s. 240.1] of the Domestic Relations Law, requiring one parent to permit the other to visit the child or children at stated periods."

Mr. O'Dwyer summarised the legal position as follows:-

"As the plaintiff in this action is not the child's father either as a result of being married to the mother or as a result of an order of filiation having been entered by the family court, the plaintiff lacks standing to exercise any rights of custody or visitation, and has no rights to determine the child's place of residence. Any assertion to the contrary by Mr. Horgan is simply incorrect."

The conclusion of the trial judge on these divergent views of the law was as follows:-

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"Having considered the totality of the expert evidence on the applicable law of the State of New York, I cannot be satisfied that the plaintiff has established that, as the natural father of a non-marital child who had not obtained any order in his favour from the court of the habitual residence of the child, the court of the State of New York, he had on the 3rd February, 1997, established rights of custody in respect of H. under that law. Making up my own mind as best I can on the basis of the evidence before me, it seems to me that the correct position is that under the law of the State of New York the mother of a non-marital child has sole right of custody of the child until such time as an order of filiation is made or a paternity agreement or compromise is approved by the court. That para. 10 of the plaintiff's petition for visitation and the same paragraph of the defendant's petition for custody filed before the family court of the State of New York so nearly mirrors the wording of s. 549(a) of the Family Court Act, as quoted by Mr. O'Dwyer in his second affidavit, strongly suggests that this is the correct interpretation of the evidence. The position appears to be that once paternity is established by a filiation order or by a court approved paternity acknowledgement or agreement, both parents have *prima facie* right to custody, gender constituting neither an advantage nor a disadvantage and, where an issue arises between the parents, the entitlement to custody is determined by the court applying the 'best interests' test."

It was not suggested on behalf of the plaintiff in either the written or oral submissions to this court that these findings by the trial judge were in any way erroneous. It was, however, submitted on his behalf in the High Court and again in this court that, even accepting that the law of the State of New York was as stated in this passage, the removal was nevertheless wrongful as being in breach of what were described as inchoate rights of custody or access to which the plaintiff was entitled at the time of the removal, although not at that time declared by the order of the competent court in New York. That submission was accepted by the trial judge, but she rejected a further submission on behalf of the plaintiff that the removal was also in breach of a right of custody vested in the New York court itself at the time of the removal.

The defendant has appealed from the High Court order. Notice was also given on behalf of the plaintiff that the court would be asked to vary that part of the High Court judgment which found that the removal was not in breach of a right of custody vested in the New York court.

*Submissions of the parties*

Counsel on behalf of the defendant, submitted that the trial judge had erred in law in holding that the removal was in breach of inchoate rights of the plaintiff which, in the words of the judgment, "would almost inevitably have crystallised into established rights by court approval of the acknowledgement of paternity". She urged that the proposition that the rights of custody referred to in art. 3 of the Hague Convention extended to such "inchoate rights" was not reconcilable with the clear wording of art. 3 and, if accepted, would introduce serious uncertainty into the operation of the Hague Convention. She submitted that the judgment of Waite L.J. in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, which had introduced the concept of inchoate rights into the construction of the Hague Convention for the first time in England should not be followed in this jurisdiction and was, in any event, difficult to reconcile with the decision of the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1992] 2 A.C. 562. She also cited in support the decision of Hale J. in *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 F.L.R. 146, in which the court acknowledged having difficulty in reconciling the majority decision in *Re B (A Minor) (Abduction)* with the decision in *Re: J (A Minor) (Abduction: Custody Rights)*.

Counsel on behalf of the defendant further submitted that the courts in this jurisdiction should adopt the same approach as that of Hale J. in *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 F.L.R. 146, namely, that the classic case of abduction under the Hague Convention was the removal of children from their primary carer. She submitted that, on the facts in this case, the defendant was the primary carer and, hence, her action in taking the child to Ireland was not a typical case of abduction which the Hague Convention was intended to prevent. Counsel on behalf of the defendant further submitted that in this case the right of custody, to which the defendant was unarguably entitled, was being exercised by her at the time of the removal and the plaintiff had neither sought

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nor been granted any right of custody: he had confined his application to the court to access. His right to access to H. remained and he was entitled under art. 21 to apply to the central authority in this jurisdiction to make arrangements for organising and securing its effective exercise.

Counsel on behalf of the defendant further submitted that the High Court Judge was correct in law in holding that no right of custody was vested in the New York court, since that court had made no order as to custody, other than one granting temporary custody to the defendant, and had not imposed any restriction on the defendant establishing a residence with H. outside the State of New York. She said that the High Court Judge, in this context, had properly attached significance to the fact that the plaintiff's application had not been made to the central authority in the United States. Counsel on behalf of the defendant referred in this connection to the provisions of art. 15 which enable an applicant to obtain from the authorities of the state of the habitual residence a decision that the removal was wrongful. She submitted that the failure by the plaintiff to operate that provision could only be attributed to an apprehension on his part that such a decision would not have supported his claim in this jurisdiction that the removal was wrongful.

Counsel on behalf of the plaintiff submitted that the majority judgments of the English Court of Appeal in *Re B. (A Minor) (Abduction)* [1994] 2 F.L.R. 249, to the effect that art. 3 ought to be interpreted as applying to inchoate rights of custody, should be followed in this jurisdiction. Given that the objective of the Hague Convention was to spare children the adverse effects resulting from their arbitrary removal by one parent from their settled environment to another jurisdiction, the Hague Convention should be given a purposive interpretation and, in particular, the expression "rights of custody" should be construed as widely as possible. He said that it was clear that, unless the expression was to be given a narrow and literal construction, the plaintiff in this case had rights of custody which had been breached by the defendant's actions.

Counsel on behalf of the plaintiff further submitted that the judgment of Waite L.J. in *Re B. (A Minor) (Abduction)* [1994] 2 F.L.R. 249 had been approved by the Australian Family Court in *K. v. K.* (Unreported, Supreme Court of Australia, 22nd May, 1996). The decision of the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1992] 2 A.C. 562 with which, it had been suggested, the majority judgments in *Re B (A Minor) (Abduction)* were inconsistent, had been disapproved of by Barron J. in *K. v. K.* (Unreported, Supreme Court, 6th May, 1998).

Counsel on behalf of the plaintiff further submitted that each case should be decided having regard to its particular circumstances. In the present case, the New York court was actually seized of proceedings in which the defendant was seeking orders as to the custody of the child, the plaintiff had lived with the defendant as her husband for six years and he was the acknowledged father of H. To treat the defendant as not being entitled to any rights of custody, solely because of the absence of the purely formal requirement of a declaration of paternity, would be clearly irreconcilable with the objective of the Hague Convention. He cited, in support, the observations of Madame Elisa Perez-Vera in the Explanatory Report on the Convention published by the Permanent Bureau of the Conference in the Hague to the effect that art. 3 should be interpreted in a flexible manner, allowing the greatest number of cases to be brought within its scope. He urged that the recognition of an inchoate right of custody in cases such as the present was required in the interests of the children concerned, since any other approach would mean having no regard to the relationship which existed between a child and his or her father.

Counsel on behalf of the plaintiff further submitted that the fact that the plaintiff was seeking no more than visitation rights was not material. Where such rights were granted by a court, it followed that the child in respect of whom they were granted could not be removed from the jurisdiction without the consent of the person to whom they were granted.

Counsel on behalf of the plaintiff submitted that the trial judge was in error in concluding that there were no rights of custody vested in the New York court within the meaning of article 3. Where a court granted a temporary order of custody, as it had done here, it followed logically that it was vested with the power to determine the place of residence of the child and that in itself was a right of

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custody. Moreover where a court made such an order of interim custody, it was reserving to itself the right to determine the ultimate custody. He cited in support the English decisions in *B. v. B. (Abduction)* [1993] 1 F.L.R. 238; *Re B (Abduction)* [1997] 2 F.L.R. 594 at p. 600; and the decision of the Canadian Supreme Court in *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551.

### *The applicable law*

The preamble to the Hague Convention recites that the signatory states wished:-

"to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access"

Article 1 of the Hague Convention states that its objects are:-

- "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

The Hague Convention then goes on to establish a mechanism for ensuring the prompt return of children to the state of their habitual residence where they have been wrongfully removed from that state to another contracting state or are wrongfully retained in the other contracting state.

Article 3 sets out the circumstances in which a removal or retention is wrongful as follows:-

"The removal or the retention of a child is to be considered wrongful where:

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

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

Article 5 provides:-

"For the purposes of this Convention:

- (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;"

It has been pointed out that, since the Hague Convention is an international treaty applying to states with different legal systems, it is desirable that it be construed in the same manner by the courts of the various states who have ratified or acceded to the Hague Convention: *Re H (Minors) (Abduction: Acquiescence)* [1998] A.C. 72 and the observations of Lynch J. in *K. v. K.* (Unreported, Supreme Court, 6th May, 1998).

However, since the Hague Convention has the force of law in this State solely by virtue of the Act of 1991, and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Hague Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Hague Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the *travaux préparatoires* which accompanied its adoption may legitimately be used as an aid to its construction. (See the decision of this Court in *Bourke v. Attorney General* [1972] I.R. 36.)

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The objectives of the Hague Convention, as expressed in the preamble and art. 1, are clear and must be given due weight by the courts where, as here, a difficult question of construction arises. Its adoption was prompted by the increasingly frequent international abduction of children by their parents in an era of fewer border controls and greater mobility. Such abductions were frequently effected by a parent in the hope of obtaining a new decision on custody in another jurisdiction which would be more favourable to the abductor.

To trigger the mechanisms of the Hague Convention, there must have been a wrongful removal of the child from the place where it was habitually resident and for the removal to be wrongful within the meaning of the Hague Convention it must have been in breach of a right of custody as defined in article 3. The article specifies three possible legal origins of a right of custody: (a) the operation of the law of the state of the habitual residence, (b) a judicial or administrative decision or (c) an agreement having legal effect under the law of the state of the habitual residence. Common to all three is the requirement that the right should have been attributed to the person or body concerned under the law of the state of the habitual residence.

A person may be entitled to such a right of custody, although there is no order of a competent court or legal agreement giving him or her such custody. Thus, in the case of married parents in the State of New York, the parents are equally entitled by virtue of the law of the state to the custody of their children. The same, is, of course, the position in Ireland and, one may surmise, in many of the states which are parties to the Hague Convention. Married parents are, accordingly, entitled to the custody of the children without any court order or formal legal agreement to that effect and the removal by one parent of the child or children to another jurisdiction without the consent of the other will clearly constitute a wrongful removal within the meaning of art. 3, unless the rights were not being actually exercised at the time of the removal. (See the decision of the English Court of Appeal in *Re F (Child Abduction: Risk if Returned)* [1995] 2 F.L.R. 31.)

The language of the concluding paragraph of art. 3 - the use of the words "may" and "in particular" - would suggest that, while emphasis was laid on the three specified sources, it was not intended to be an exhaustive statement of the legal origin of rights of custody under the law of the state of habitual residence. As Madam Elisa Perez-Vera pointed out:-

"In this regard, para. 2 of article 3 takes into consideration some - no doubt the most important - of those sources, while emphasising that the list is not exhaustive. This paragraph provides that 'the rights of custody mentioned in sub-para. (a) above may arise in particular', thus underlining the fact that other sorts of rights may exist which are not contained within the text itself. These sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."

[Explanatory Report para. 67]

This may be of particular importance where, as here, there is no right of custody arising by agreement, judicial or administrative order or operation of law, but it is claimed that the removal of the child by a person undeniably entitled to custody was wrongful in the sense that it was calculated to frustrate proceedings in being in the court of the child's habitual residence. Depending on the circumstances of the particular case, it may be that the removal, in such a case, would be a breach of a right of custody vested in the court itself. If, for example, proceedings are actually pending before a court in the state of the habitual residence and an interim order has been made restricting a person entitled to lawful custody from removing the child from its jurisdiction without the consent of another person or of the court, there would be little difficulty in concluding that the child's removal without such consent constituted a "wrongful removal". Clearly, in such a case, the court could reasonably be regarded as having reserved to itself the right to determine where the child should reside until such time as the proceedings were finally disposed of and, having regard to the provisions of art. 5 (a) that, in turn, could be regarded as right of custody. Thus, in *C. v. C. (Minor:*

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*Abduction: Rights of Custody Abroad*) [1989] 1 W.L.R. 654, a consent order had been made by an Australian family court directing that the father and mother were to remain joint guardians of the child, that the mother was to have day-to-day custody and that neither parent was to remove the child from Australia without the consent of the other. The mother, having removed the child to England without the father's consent, it was held that this was a wrongful removal. Neill L.J. said at p. 662:-

"I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of arts. 3 and 5 of the Convention. I am further satisfied that this conclusion is in accordance with the objects of the convention"

That approach was also adopted by the Supreme Court of Canada in *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551.

In the present case, it is clear that the plaintiff had no right of custody under the law of New York by operation of law, since he was not entitled to custody unless and until a declaration of paternity was made in respect of him by the New York court. Nor was there any agreement having legal effect under the law of New York between the plaintiff and the defendant giving him such a right. Nor did the order of the New York court do any more than give the defendant interim custody. There was no order at any time requiring the defendant to obtain the consent of the plaintiff or a further order of the court before removing H. from the State of New York. Accordingly, it might at first sight seem that there is an insuperable obstacle to the submission that there were any rights of custody vested in the plaintiff at the time of the removal under the law of New York. However, as already noted, it was held by the majority of the English Court of Appeal in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249 that the concept of "rights" under the Hague Convention was not confined to rights established by law or conferred by a court order, but extended to what were described as the "inchoate rights" of persons carrying out duties and enjoying privileges of a custodial or parental character which were not formally recognised by the law but which a court should uphold, in a particular case, in the interests of the child concerned. Since this case was understandably strongly relied upon on behalf of the plaintiff, it must be considered in some detail.

The facts were as follows. The child, who was six and a half years old at the time of the appeal, was Australian. His parents were not married: his mother was English but had emigrated to Australia in 1982, while the father was Australian born. The relationship broke down and the parents separated in August, 1990. The father remained in contact with his son, and when the mother wished to take him, together with her own mother, to Britain in 1990, for a short holiday, he contributed a substantial sum to their expenses. Soon after their return to Australia, it became apparent that the mother had become addicted to heroin. The father again gave her a large sum to invest in a home for the son and herself, but she did not apply the money for that purpose and for sometime subsequently lived what was described as "a chaotic existence" as a result of her addiction.

Eventually in April, 1992, the mother left Australia and returned to Britain. Her departure was in breach of bail conditions imposed as a result of pending charges for shop lifting. The son was left to be cared for by the maternal grandmother, the father having access at weekends. From February, 1993, these roles were reversed.

In the summer of 1993, the grandmother had made a plan to return to Britain for a long holiday and wished to take the son with her. The father was not willing to allow the son to leave Australia for anything longer than a holiday of six months, after which he would return with the grandmother. He insisted, moreover, that the arrangements for the child's return should be established with proper legal formality. As a result, the father and the grandmother attended a meeting with the father's solicitor at which a reasonably elaborate minute was drawn up by the father's solicitor, intended to represent the form of a consent order to be made by the family court of Western Australia (the "FCWA"). It provided, *inter alia*, for the father to have sole custody of the child and contained detailed provisions

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to ensure that the child should be returned to the father's custody in Australia, including the deposit of a bond with the father or his solicitor. It was signed by the mother. The father was persuaded by the mother's assurances and the deposit of the bond that they were sincere in their undertaking to return the child to Australia by the agreed date, but that undertaking was not honoured and the mother stayed in the United Kingdom. Understandably, the finding of the trial judge that "the mother, assisted by her own mother, cruelly deceived the father; and she now seeks to profit by her deceit;" was not challenged in the subsequent proceedings under the Hague Convention. The trial judge having ordered the return of the child to Australia, the mother appealed.

One might have expected that the appeal would have turned on the question of whether the minute signed by the mother constituted "an agreement having legal effect under the law of [Western Australia]" within the meaning of article 3. However, the evidence as to whether it would have that effect was, it would seem, somewhat tentative and unsatisfactory. Waite L.J., with whom Staughton L.J. agreed, summed up his conclusions as follows at p. 260:-

"The purposes of The Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases that will involve giving the term the widest sense possible.

There is no difficulty about giving a broad connotation to the word 'custody'. Attention was drawn by Lord Donaldson in *Re: C (A Minor) (Abduction)* [1989] 1 F.L.R. 403 to the width of its dictionary meaning, and by Sachs L.J. in *Hewer v. Bryant* [1970] 1 Q.B. 357 at p. 373 to the diversity of the 'bundle of rights' which it incorporates in legal terminology. The same is no doubt true of the word '*garde*', which (in the phrase '*droit de garde*') provides the translation for 'rights of custody' in the French language version of the Convention.

The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who had assumed the role of substitute parent in place of the legal custodian."

He went on to point out that the father was the child's primary carer, sharing his upbringing with the maternal grandmother as his secondary carer. He described this as "a settled status" which the absent mother, the only parent with "official" custodial rights had expressly approved, and one which any court, including the family court of Western Australia, would be bound to uphold. He, accordingly, was of the view that the removal of the child was in breach of a right of custody within the meaning of article 3.

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Peter Gibson L.J., who described the mother's behaviour as "abhorrent", dissented. Citing the decision of the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, he said that the rights of custody referred to in art. 3 must be more than *de facto* rights. In the light of the uncertain evidence as to the legal status of the agreement, he concluded that it had not been established that the father had rights of custody within the meaning of the Hague Convention and concluded regretfully that the removal was not wrongful.

In *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, the legal status of an unmarried father in the context of art. 3 had also arisen. In that case, the unmarried parents had cohabited in Australia. The mother, who, like the father, had been born in England, brought their son to England with the intention of settling down there permanently, at a stage when the relationship had broken down. There were no proceedings in being at the time of the actual removal, but the father was subsequently granted custody by the Australian court and thereafter made an application under the Hague Convention in England. The trial judge refused the application and this decision was unanimously upheld in the Court of Appeal and the House of Lords. The argument that the removal was wrongful as being in breach of rights of custody was dealt with in summary terms as follows by Lord Donaldson M.R. in the Court of Appeal at p. 570:-

"Since articles 3, 4 and 5 of the Convention are solely concerned with the *rights* of custody, i.e. rights to care, custody, control or guardianship, and with rights of access - the precise terminology does not matter in any of these categories - and since the father had no such rights, for my part, I do not consider that J.'s removal from Australia, reprehensible though it may have been in the way in which the mother achieved it, could constitute a wrongful removal within the meaning of the Convention."

On the hearing of the further appeal to the House of Lords, counsel withdrew the submission that the removal by the mother was wrongful, but pursued an alternative argument that had also been rejected in the Court of Appeal, i.e. that, following the order of the Australian court, his retention by her was a breach of the father's right of custody. However, although the first limb of the father's case had been abandoned, Lord Brandon dealt with it, again reasonably tersely, as follows at p. 577:-

"So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention."

This decision was distinguished in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, apparently on the basis that the latter case was one of "shared parenting" between the father and the maternal grandmother in the complete absence from the country of the custodial parent.

In *K v. K* (Unreported, Supreme Court, 6th May, 1998), Barron J. said of the decision in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562:-

"The potential rights of the natural father in [Re: J.] should have been sufficient to prevent a change in the habitual residence."

The issue as to whether the removal of the child of unmarried parents in circumstances such as occurred in the present case was wrongful was not, however, under consideration in that case.

The argument advanced in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, to the effect that even if the removal was not wrongful, the retention of the child in England after the Australian court had made an order giving the father custody was "wrongful" was rejected in the House of Lords on the ground that the latter order was made at a stage when the child was no longer habitually resident in Australia. In later cases, however, a somewhat different approach has been taken to what have come to be called "chasing orders", viz., that it was never intended that the Hague Convention should apply in such cases. In *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551, La Forest J. said that there was nothing in the Hague Convention requiring the recognition of *anex post*

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*facto* custody order of a foreign jurisdiction. He cited in this connection the statement by Madam Perez-Vera in the Explanatory Report that "retention" essentially consisted in a refusal to return the child after a sojourn abroad where the sojourn has been made with the consent of the rightful custodian of the child's person. Accordingly, on any view, the *habeas corpus* order made by the court of New York in the present case did not, of itself, render either the original removal or the continued retention of the minor wrongful in terms of the Hague Convention.

Having regard to the facts of the present case, the position as to rights of access under the Hague Convention is of importance. It is clear from the wording of the preamble that a distinction was being drawn between rights of custody and rights of access and that is reflected in the different procedures provided for in the body of the Hague Convention for the two situations. Rights of custody are essentially protected under art. 3, whereas the machinery for enabling arrangements to be made for securing the effective exercise of rights of access appears in article 21. That was also the view of Madam Perez-Vera in the Explanatory Report in which she said:-

"Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the 14th session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other."

[Explanatory Report pp. 444/5]

(See also the decision of Hale J. in *S. v. H. (Abduction: Access Rights)* [1997] 1 F.L.R. 971).

By contrast, in *C. v. C. (Minors) (Child Abduction)* [1992] 1 F.L.R. 163, a case in which, coincidentally, the habitual residence of the child at the time of the allegedly wrongful removal was also New York, Bracewell J. held that the removal of the child from New York to England was in breach of rights of custody, although the New York court had granted custody to the mother and rights of access only to the father. Some features of that case should, however, be noted: there was evidence from New York lawyers that the order granting access rights to the father impliedly prohibited the mother from removing the children from the court's jurisdiction without the father's consent. Secondly, there is no reference in the judgment to the question dealt with subsequently by Hale J., as to whether the approach adopted is reconcilable with the different procedures prescribed by the Hague Convention in the case of rights of custody and rights of access.

#### *Conclusions*

The conduct of the defendant in the present case in taking H. to Ireland without informing the plaintiff or his lawyer cannot be condoned. At the same time, the difficulties with which she was faced when her relationship with the plaintiff broke down should not be underestimated. Whatever course she adopted could bring her into conflict with the law; if she remained in New York, she was liable to be prosecuted and deported as an illegal alien and if she left for Ireland she exposed herself to the danger of proceedings being brought such as the present. It was also understandable that she would have preferred to bring up her child, suffering as he was from some degree of disability, in this country, where she would have the support of her parents and other family members.

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The case must ultimately be decided, however, in accordance with law and not with the respective merits of the parties. The issue essentially is as to whether the removal, at the time it occurred, was in breach of rights of custody attributed to the defendant or any other institution or body under the law of the state of New York.

Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, absent any legally excusing circumstances, be wrongful in terms of the Hague Convention. The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state.

It could even be that an order by the court granting a right of access to the dispossessed parent might, by implication, be treated as prohibiting the removal of the child without the consent of the dispossessed parent or a further order of the court. That would fall to be determined in accordance with the law of the state of the habitual residence at the time of the removal. A further question could then arise as to whether, in any event, the appropriate machinery for enforcing the access rights in that case was that under art. 21 rather than art. 3, which is invoked in the present case. Since, however, at the time of the allegedly wrongful removal in the present case, no rights of access had been granted by the court in New York, it is unnecessary to express any concluded view on that question. It is sufficient to say, in the context of the present proceedings, that, giving the Hague Convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be "wrongful" within the meaning of art. 3 because it is in breach of rights of custody, not vested in either of the parents but in the court itself.

It is going significantly further to say, however, that there exists, in addition, an undefined hinterland of "inchoate" rights of custody not attributed in any sense by the law of the requesting state to the party asserting them or to the court itself, but regarded by the court of the requested state as being capable of protection under the terms of the Hague Convention. I am satisfied that the decision of the majority of the English Court of Appeal in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, to that effect should not be followed.

In this context, the decision of the Family Division of the English High Court (Cazalet J.) in *Re O (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702, is illuminating. In that case, the mother had moved from Germany to England with her daughter and partner (who was not the father of the child). After her departure, the child's maternal grandparents, with whom she had lived for some 16 months at a stage when the mother was (in the judge's words) "off the scene", made an application to a court in Germany for interim custody. There had been no order as to custody in their favour at the time of the removal and the only basis for holding that they had "rights of custody" within the meaning of art. 3 was the sixteen month period during which, with the mother's consent, they had looked after the child, a period which had expired about 10 months before the allegedly wrongful removal. The principles enunciated in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, were invoked to support a finding that, even in those circumstances, the grandparents could be said to have "rights of custody" within the meaning of the Hague Convention. It is, with respect, difficult to accept that such a result can have been contemplated by the framers of the Hague Convention.

It is clear from the facts of the present case, and from the various authorities which have been

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discussed in the course of this judgment, that the rights of unmarried fathers under the Hague Convention present particular difficulties, given the unique relationship of the natural father to his children and the fact that in a number of jurisdictions, including our own, they do not have any automatic rights to custody equivalent to those of married parents. However, the appropriate method of addressing difficulties of that nature which may arise in the operation of conventions on private international law is through the machinery of Special Commissions in The Hague which regularly monitor and review the operation of conventions in the contracting states, rather than by innovative judicial responses to admittedly difficult cases in which upholding the Hague Convention as enacted may give rise to what seems a harsh or inequitable result.

I turn again to the facts of the present case. On the unchallenged findings of the trial judge, the removal of H. was not, at that time, in breach of any right of custody to which the plaintiff was entitled under the law of the State of New York, whether arising by operation of law, judicial or administrative decision or an agreement having legal effect under that law. Nor was it in breach of any right of custody vested in the family court in the county of Nassau, New York in proceedings then in being or of any order prohibiting the defendant from removing the child to another jurisdiction, whether in the United States or abroad, without the consent of the plaintiff or under a further order of the court. Nor was it in breach of any such order which might have been implicit in an order actually granting the plaintiff visitation rights.

I am, accordingly, satisfied that the decision of the learned High Court Judge that the removal was in breach of rights of custody within the meaning of art. 3 was erroneous. The plaintiff is, of course, entitled to seek an order for custody or access in this jurisdiction pursuant to the provisions of the Guardianship of Infants Act, 1964, or to invoke the machinery of art. 21 in order to secure the effective exercise of the rights of access to which he may be entitled to the child.

I would allow the appeal.

**Barron J.**

The parties to these proceedings are the parents of H., the minor in the title hereof, who was born in New York on the 13th July, 1991. They met in New York in July, 1989. They lived together there from February, 1990, until the events giving rise to these proceedings. They did not marry in accordance with the civil law, but went through a ceremony of marriage in New York on the 5th March, 1991, in accordance with the rites of the Moslem faith. Following the birth of H. they remained at the same address with him until the 30th December, 1996. On that date the defendant left the family home with H. She remained in the State of New York until the 3rd February, 1997, when she left for this country where she has since remained.

Prior to her leaving the jurisdiction of the State of New York the defendant applied *ex parte* to the family court of the county of Nassau for a protection order - the equivalent of a barring order in this jurisdiction. She obtained this order as well as an order giving her temporary custody of H. until the 30th June, 1997. On the 3rd January, 1997, the plaintiff issued proceedings in the same court seeking visitation rights to H. Before any hearing of the claims and counterclaims could be held the defendant left the jurisdiction of New York with H. on the 3rd February, 1997. Subsequently the orders in her favour were discharged on the 25th February, 1997, and on the following day an order was made directing the defendant to produce H. before the court before the 26th March, 1997. That order was not complied with.

Proceedings under the Hague Convention were commenced by the plaintiff in this jurisdiction on 20th March, 1997. An affidavit of New York law was sworn on behalf of the defendant to the effect that an unmarried father had no legal rights to the custody of his child without a declaration of paternity in his favour, but that once such a declaration had been made an unmarried father had the same rights as a married father.

This legal position was contested by an affidavit of New York law sworn on behalf of the plaintiff

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deposing to the opinion of the deponent that New York law would give legal effect to the *de facto* arrangement between the parties for the care of H. arising from their domestic situation.

A second affidavit of law on behalf of the defendant disagreed with this opinion and reiterated that until a declaration of paternity an unmarried father would be treated as a stranger to his child.

The learned trial judge accepted this latter opinion as being the appropriate law of New York. Since no such declaration had been made at the date of the removal, the plaintiff had at that date no rights of custody within the meaning of the Hague Convention. Nevertheless although she found that no rights of custody had vested in the plaintiff she took the view that the inchoate rights of the plaintiff to custody which would almost inevitably have crystallised into established rights by court approval on the acknowledgment of paternity were rights of custody within the meaning of art. 3 of the Hague Convention. In arriving at this conclusion, she was influenced by the fact that the defendant did not contest the plaintiff's paternity and also by the fact that the order of the family court on the 26th February, 1997, was made in the absence of any declaration of paternity. Accordingly, she held on a preliminary issue that the plaintiff was entitled to raise the Hague Convention and that a full hearing should follow to consider such issues as might be applicable at such hearing.

From this ruling the defendant has appealed to this court.

The defendant submits that to allow the Hague Convention to apply in the case of persons with inchoate rights is to introduce into the operation of the Hague Convention a degree of uncertainty which is unnecessary and will prevent speedy return and involve lengthy litigation in the requested state. It is submitted on her behalf that the test of the application of the Hague Convention should depend upon the nature of the legal right to the custody of the child at the date of its removal.

The case for the plaintiff is based upon the proposition that inchoate rights are sufficient to bring the Hague Convention into force. In so submitting the plaintiff relied strongly upon in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, and the manner in which the Hague Convention was construed in that case.

In my view, the facts of this case must be considered in the light of the proper construction of the relevant articles of the Hague Convention having regard both to the preamble and to the objects of the Hague Convention as set out in article 1. The preamble to the Hague Convention is as follows:-

"We, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access"

Article 1 of the Hague Convention repeats these matters as follows:-

"The objects of the present Convention are:

- (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Other relevant provisions are contained in arts. 3, 4 and 5 which are as follows:-

*"Article 3*

The removal or the retention of a child is to be considered wrongful where:-

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

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

*Article 4*

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

*Article 5*

For the purposes of this Convention:

- (a) '*rights of custody*' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- (b) '*rights of access*' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

In construing the Hague Convention very considerable assistance is to be found in an explanatory report by Elisa Perez-Vera dealing with recommendations adopted by the fourteenth session in 1980, leading to the Convention on the Civil Aspects of International Child Abduction.

In *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, the father was Australian born and the mother had emigrated to Australia from the United Kingdom. The parties had not married. At the date of the proceedings they had one son aged 6<sup>1</sup>/<sub>2</sub> years. The mother had left the father and returned to the United Kingdom. The child remained in Australia where its primary carer was its father with assistance at weekends from the maternal grandmother. The father allowed his son to be brought by his grandmother to the United Kingdom only upon written undertakings by the grandmother and by the mother that his son would be returned at the end of six months. The father had no legal rights under the law of Western Australia without applying to court which he had not done. In the event the mother refused to return the child and applied in the United Kingdom to have the child made a ward of court. The father then applied under the Hague Convention for the child to be returned to Australia. The High Court made the order sought. This was upheld by the Court of Appeal on appeal to that court.

In the Court of Appeal, it was agreed, *inter alia*, by counsel that:-

"The Convention is to be construed broadly as an international agreement according to its general tenor and purpose, without attributing to any of its terms a specialist meaning which the word or words in question may have acquired under the domestic law of England."

Dealing with this principle Waite L.J. said at p. 260:-

"The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible."

Then dealing with how to construe those words he said at p. 261:-

"The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child

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concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient co-habitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian."

In considering this judgment it is important to realise that the House of Lords had previously in the case of *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, decided that *de facto* rights were not sufficient for the purposes of the Hague Convention. And although the majority in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249, held in favour of inchoate rights the third member of the court, Peter Gibson L.J., dissented upon the ground that rights of custody under the Hague Convention must be more than *de facto* rights, and in so doing he followed *Re J (A Minor) (Abduction: Custody Rights)*.

In the passage from the judgment of Waite L.J. which I have cited, it is clear that he regards the Hague Convention as applying not only to persons with actual legal rights under the law of the requesting state, but also to those who would not in the ordinary way have such rights. At the end of the passage he instances classes of such persons who might have greater or lesser entitlement to come within the provisions of the Hague Convention.

I agree with Waite L.J. that the right to invoke the Hague Convention should not be limited to those with established legal rights. However, I do not think it necessary to regard "rights" as being legally enforceable rights. Waite L.J. sought to protect those who were carrying out duties and enjoying privileges of a custodial or parental character which a court would be likely to uphold. He was prepared to uphold such rights on the basis that they would subsequently be given enforceability and that "rights of custody" as properly construed include such rights.

He was restrained by the decision in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562, from holding in favour of *de facto* rights. He recognised that persons who would be unlikely without a court order to obtain legal rights might still be entitled to invoke the Hague Convention. But that involves construing "arise" as "will arise". The Hague Convention requires the present position at the date of removal to be considered, i.e. under what entitlement were rights of custody actually being exercised? This entitlement while dependent upon the law of the requesting state must be an entitlement arising in one of the ways provided for by article 3. The rights do not have to be legal rights. They must be present rights the basis of which can be recognised by the law of the state of habitual residence.

This is the interpretation placed upon the words "having legal effect under the law of that State", in para. 70 of the explanatory report where the author says:-

"Lastly, custody rights may arise according to Article 3 'by reason of an agreement having legal effect under the law of that State'. In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it would have the 'force of law', as stated in the preliminary draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which the Convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be

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included within it any sort of agreement which is not prohibited by such a law and which may provide a basis for presenting a legal claim to the competent authorities."

This is an interpretation to be expected. The Hague Convention is an international convention and as such should be expected to apply in the same way in the same circumstances regardless of which convention state or states are involved. Nevertheless, there would be no point in returning a child to a state on the basis of a claim arising in circumstances which that state does not recognise.

The reality is that the Hague Convention is not concerned with legal rights under the law of habitual residence but with rights which were actually being exercised and to which the courts of that state would not totally disregard as having no legal effect within that state.

The law of England and Wales accepts that the question is a matter of construction of the Hague Convention. In *S. v. H. (Abduction: Access Rights)* [1997] 1 F.L.R. 971 at p. 974 Hale J. said:-

"But what is the significance of all this for the purpose of the Convention? The Court of Appeal has made it clear in *Re F (A Minor) (Child Abduction: Custody Rights Abroad)* [1995] Fam. 224 that whether a removal or retention is in breach of rights of custody has to be decided by reference to Convention law as applied in these courts. Hence even if the removal was not prohibited in Italian law, it could still be wrongful under the Convention."

*Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249 was followed in *Re O (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702. In that case an application was made by maternal grandparents for a return of the child. The child who was a German national was 4<sup>1</sup>/<sub>2</sub> years old at the date of its removal and had for some time been living with its maternal grandparents who were also German nationals. The mother who was a German national had taken the child to live in England with her and her partner who was a United Kingdom national.

Cazalet J. held that the grandparents were exercising joint rights of custody with the mother. He followed the decision in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249 and accepted the test propounded by Waite L.J. in that case as being "whether the individual concerned was exercising functions of a parental or custodial nature without the benefit of any official custodial status." He did not accept that there was a need for a legal agreement to bring the case within the provisions of art. 3 of the Hague Convention. Dealing with that issue he said at p. 708:-

"It is important, in addition to what I have said, to bear in mind that the word 'may' is used. (in Article 3) The paragraph starts, 'The rights of custody mentioned in subparagraph (a) above may arise' Accordingly, rights of custody, in my view, are not confined solely to the specific situations set out in the Article; the Court may step beyond them, as the Court did in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249."

This passage does not rely upon any subsequent confirmation or conferring of legally enforceable rights. In my view, it recognises what is at the heart of the Hague Convention which is the actual exercise of appropriate rights. It then also recognises that the agreement or arrangement under which such rights are exercised need not have the force of law only that it should not be prohibited; should not be contrary to law. There is nothing inchoate about such rights. Again, such a construction is appropriate where claimants need not be parents of the child concerned and are unlikely to be considering strict legal rights. Unless there have been legal proceedings which would be unusual, persons other than the parents would have rights of custody by virtue of informal agreements and almost certainly would not have them protected by legal rights.

Applying these principles, I would regard the plaintiff as coming within the Hague Convention. H. was habitually resident within the state of New York at the time of his removal. His father, his mother and he lived together in circumstances akin to that of a legal family and *de facto* the care of H.'s person was exercised jointly by the parties. The right to do so on the part of the plaintiff certainly arose through acquiescence or implied agreement between the parties. That arrangement was not contrary to the law of New York. That the type of unilateral action by the mother in cases like the

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present should come within the Hague Convention is supported by para. 71 of the report where the author says:-

"Joint custody is, moreover, not always custody *ex lege*, in as much as courts are increasingly showing themselves to be in favour, where circumstances permit, of dividing the responsibilities inherent in custody rights between both parents. Now, from the Convention standpoint, the removal of a child by one of the joint holders without the consent of the other, is equally wrongful and the wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise. The Convention's true nature is revealed most clearly in these situations; it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties."

I am however by no means satisfied that under the law of New York, the plaintiff did not exercise those rights as the father of H. Admittedly the rights of a natural father cannot be enforced without a declaration of paternity. Nevertheless it seems clear from the affidavits that from a practical point of view an unmarried father has the same rights before the courts as a married father. The only actual difference is that as well as seeking whatever relief he requires he must also seek a declaration of paternity. This places upon him the burden of proof of such paternity, but there is no suggestion in the affidavits of law that this obligation in any way affects the timing of his remedy.

The need to prove paternity may appear to prevent enforcement of his rights, but in practice it can be seen not to be so. But whichever way it is looked at those rights were always there. The declaration of paternity does not confer those rights on the father as the learned trial judge seems to have found, they exist by reason of the fact of paternity and always existed. The absence of a declaration of paternity affects the enforcement, and then only in a very technical sense, rather than their existence.

It is not the law, as it is in Western Australia, that an unmarried father has no rights until they are granted by the court. That argument is further weakened by the defendant's acknowledgment of the plaintiff's paternity. Further, the affidavit of law avers the priority of the mother's right as being based upon constitutional grounds a parent against a stranger. But if the matter ever came to court, that ground would immediately be dissolved by the mother's admission.

In any event, a lawful removal under the law of the state of habitual residence must yield to a wrongful removal under the Hague Convention.

While legal rights must be the basis of any claim under the Hague Convention in that the title of the person seeking the return of the child must have its origins in a legal right to custody either actual or derived it is not in my view the appropriate starting point. If the nature of the legal rights upon which an application for return under the Hague Convention is to be founded or if the manner in which they arise is to be determined first, this would create rigidity. Since the Hague Convention deals with situations which by their nature will have infinite variations, it is more appropriate as each case evolves to determine first what rights were actually being exercised at the date of the removal and then to decide whether such rights amount to rights of custody within the meaning of that expression as defined by article 3. Such an approach provides the necessary flexibility. Only then would it be necessary to consider the legal position.

What rights were actually being exercised at the date of removal is a question of fact. Whether they are rights of custody is a question of law and it is in answering this question that courts are likely to find the greatest difficulty. See *S. v. H. (Abduction: Access Rights)* [1997] 1 F.L.R. 971, where Hale J. found on the facts that the rights being exercised by the unmarried father were rights of access and

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not rights of custody.

In considering what rights are rights of custody it is important to note that the Hague Convention distinguishes between rights of custody - which are enforced by speedy return, and rights of access - which are not so enforced but for which the provision made is to ensure that such rights can be exercised in the place to which the child has been removed.

But it is not every right which will be affected by removal which must be a right of custody. The definition includes the right to determine the child's place of residence. This implies that where it is necessary to protect the child's place of residence the right being exercised will be a right of custody. Accordingly, it is a question of fact whether the place of residence requires to be protected for the exercise of the rights which it is claimed were actually being exercised. Since the Hague Convention of necessity will give rise to a multitude of cases each with its own facts each must be decided individually.

In the present instance the rights of custody which are claimed are those of a parent who has been taking care of the child jointly with its mother ever since its birth. Those rights are rights of custody within the Hague Convention. They were possessed by or attributed to the plaintiff at the time of the wrongful removal. The real issue in this case is whether those rights arose in a manner acceptable to the final paragraph of article 3. In my view they did.

It was submitted on behalf of the defendant that since the plaintiff only sought visitation rights in the proceedings before the courts of New York that the Hague Convention does not apply. In answer the plaintiff sought to establish that under the law of New York visitation rights included the right to determine the place of the child's residence. In my view nothing can be decided upon this basis. What happens once the break-up occurs is dependent upon the circumstances which have then arisen. In the present case the defendant sought the protection of the courts of New York and the application of visitation rights was in answer to that application. What he may or may not have sought is immaterial to what rights he may or may not have been exercising at the relevant date.

But in any event, it is not what rights the father is claiming which is material, but in which forum they should be determined. This in turn is governed by what rights were actually being exercised at the date of wrongful removal or which would have been so exercised but for such wrongful removal. In this context, wrongful must mean in breach of the rights then actually being exercised. Whether the removal was justified or not is a matter for the custody court. In the present case, the actual removal from New York took place some six weeks after removal from the home where the parties had been living. It was just as much a removal contrary to the Hague Convention as removal from the home since the rights of custody would have continued to have been exercised otherwise. Admittedly, it is not the norm for the removal to be a two step affair, the result of which in the present case is that, at the date of removal from New York, the father was prevented from exercising his rights of custody not by that removal, but by the earlier removal from the home. The reality however is that he was prevented from exercising such rights by the conduct of the mother culminating in the removal from the state. Following the removal from the home, justification for leaving and the issues of the custody and access were for the courts of New York and not those of this jurisdiction. This jurisdiction which was actually invoked by the mother in the instant case should not be ousted by the further removal from the state.

It has been submitted on behalf of the plaintiff that since at the date the defendant left the jurisdiction of the courts of New York proceedings were in being under which the place of residence of the child could be determined by the court that therefore at that date the court was exercising custody rights within the meaning of the Hague Convention and that it followed that the removal of the child being in breach of these rights of custody was a wrongful removal within the meaning of the Hague Convention. Upon the view which I take of the need for an actual exercise of the rights of custody and in the manner in which those rights may arise, this is a fallback issue to be considered only if the person seeking the return fails on the primary issue, which is not the case here. I do not consider it necessary to deal with this issue fully in the instant case. Nevertheless, once the

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jurisdiction of a family court is invoked, this must amount to a submission to the full jurisdiction of such court. This involves all aspects of the welfare of the child concerned. In Convention terms, it seems to me that this submission is an acknowledgment that the court has rights of custody in that it has power to determine the child's place of residence.

*Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 F.L.R. 146, is a case in which Hale J. was dealing with the position of unmarried fathers both in English law and under the Hague Convention. In a very full and comprehensive judgment she indicated that removal by the mother of a child who is habitually resident in the United Kingdom will be wrongful under the Hague Convention if:

- (a) the father has parental responsibility either by agreement or court order; or
- (b) there is a court order in force prohibiting it; or
- (c) there are relevant proceedings pending in a court in England and Wales; or
- (d) where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.

She was not prepared to equate the positions of married and unmarried fathers. She recognised that the children had the same rights whether their parents were married or not, but that parliament had not done the same for the parents and "did not intend that unmarried fathers should be in exactly the same position in relation to their children as married fathers."

This case dealt with two separate and distinct relationships. In neither case was the father living in the same household as his child. Hale J. did refer to para. 70 of the Report, but was unable to find the existence of any such agreement as contemplated by that paragraph. In one of the cases, she held that the removal was not wrongful. In the other, she held that it was upon the ground that the father had applied for parental responsibility to be granted. The history of these proceedings was particularly strong in favour of the father and suggested that the mother had deliberately delayed them in order to be able to remove the child before they came on for a final determination. The proceedings had been commenced in March, 1996, after which there had been interim orders and interim agreements between the parties. Ultimately, the 15th September, 1997, was fixed for the making of the final order which did in fact grant parental responsibility - in this jurisdiction custody - to the father. Meanwhile the mother and her partner had left the jurisdiction on the 5th September, 1997.

In so holding that the child in that latter case was wrongfully removed, Hale J. clearly accepted that the exercise of custodial rights "which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interest of the child concerned" was a Hague Convention matter. The quotation is taken from the passage from the judgment of Waite L.J. in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249. This judgment gives further support for the proposition that the paramount consideration is the nature of the rights actually being exercised.

The Oireachtas has also taken the same position in relation to the rights of unmarried fathers as is apparent as being the position in the United Kingdom. Nevertheless it seems to me that the Hague Convention is more interested in the rights of the children than in the rights of the parents. Our courts in custody matters are well used to the proposition that the decision of the court is dependent upon the welfare of the children and not upon the rights or wrongs of the situation between the parents. In like manner, the proper construction of the Hague Convention should not be based upon the rights of the unmarried father alone where those rights conflict with the rights of the child. In that situation the rights of the child should predominate.

I am quite satisfied that the purpose of the Hague Convention is to protect the interest of the child from harmful effects of an improper removal or retention. There can be no doubt but that to take a child of five from the only home he has ever known in which he has lived with his mother and father and to deprive him both of the security of that home and the presence of his father is a failure to protect the very interest of the child which the Hague Convention is designed to protect. A removal in such circumstances defeats the purpose of the Hague Convention. In my view, unless the Hague Convention is coercive to the

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contrary, which it is not, it should be construed to apply to that child.

Legal rights should not and cannot be ignored. But when the party entitled to the legal rights enters into an agreement whether by words or conduct whereby the *de facto* exercise of those rights is passed to another whether solely or jointly with the possessor of the rights such rights so passed arise within the meaning of art. 3 of the Hague Convention.

In those circumstances, the real issue which arises is what rights were exercised and were they passed? That is the present case. There is no need in my view for the further refinement that the person to whom those rights have been passed and by whom they were being exercised was entitled legally to such rights or would at the same time have been entitled to obtain such rights upon a legal footing.

The first question to be determined is, what rights, if any, were actually being exercised by the party seeking the return of the child at the date of its removal. Secondly, did such rights amount to rights of custody within the meaning of that expression as used in the Hague Convention. If the answer to the latter question is no, then the Hague Convention does not apply. If the answer is yes, then further questions follow. Next, were those rights being exercised, whether solely or jointly, with the consent of the person or persons entitled to the legal right to custody? Consent in this context may exist through acquiescence or any arrangement the purpose of which is and which results in the actual exercise of such rights by another. If so, then the remaining question is whether the *de facto* situation so created is contrary to the law of habitual residence? The answers to these two questions in the instant case are, Yes and No, respectively.

In indicating this approach, I make no comment on whether independently the Hague Convention should be applied because of the existence of legal proceedings in the state of habitual residence.

One of the submissions on behalf of the defendant was that inchoate rights are uncertain. For the reasons which I have given there is no reason to consider this submission. There is no need for a legal title under the law of the state of habitual residence provided that the right to custody arises in a manner within the meaning of article 3. If, which in my view is not the case, legal status can be given subsequently that would create an uncertainty, but not as to what rights would receive such status but as to whether the known rights which were being exercised would be so treated.

Too often in cases of this nature this court has had to comment on the delay taken in the matter reaching the courts. This case is no exception save perhaps in the sense that the delay here is much longer than usual. It is unfortunate that the matter was dealt with by way of a preliminary point of law in the High Court rather than the entire case being decided. That in itself is calculated to add considerably to the length of time proceedings will take.

The delay in this case will bring this jurisdiction into disrepute. It is in breach of three separate articles of the Hague Convention. Article 2 is as follows:-

"Contracting States shall take all appropriate measure to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."

Article 11 provides, *inter alia*:-

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay."

Article 16 provides:-

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of a Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been

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determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

From these provisions it is quite clear that this jurisdiction is in breach of its obligations within the terms of the Hague Convention. Those breaches have serious consequences for H. It is now over two years since he was taken from his home. Yet during the entire of that period no court has had the authority to make a firm order as to his custody. Such uncertainty for such a period of time is to be deplored.

The right contained in art. 11 should not be totally ignored as it has been in the present case. Had the right given by that article been exercised the delay in the present case could not have taken as long as it has. In this regard it is significant that Cazalet J. in *Re O (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702, apologised for the fact that the matter had not reached his court for a period of 2<sup>1</sup>/<sub>2</sub> months.

In the circumstances I would reject this appeal and return the matter to the High Court for a speedy resolution of the Hague Convention issues involved.

Solicitor for the defendant: *Diarmuid Doorly*.

Solicitor for the plaintiff: *Pauline Corcoran*.

Thomas P. Hogan, Barrister

**W.P.P. v. S. R.W.**

In the Matter of the Child Abduction and Enforcement of Custody Orders Act 1991

**W.P.P. v. S.R.W.**

2000 No. 36

Supreme Court

14 April 2000

[2001] 1 ILRM 371

(Nem. Diss.) (Keane CJ, McGuinness and Hardiman JJ)

14 April 2000 and in the Matter of the Hague Convention on the Civil Aspects of International Child Abduction and in the Matter of the minors J. W.P. and N.W.-P.

*Family Law Child Abduction Hague Convention Rights of custody Rights of access Children removed by mother from California to Ireland Whether removal of children in breach of custody rights attributable to father or Californian court Whether grant of access rights to father prevented removal of children without consent of father or of Californian court Whether court should order return of children to facilitate exercise of access rights by non-custodial parent Child Abduction and Enforcement of Custody Orders Act 1991 (No. 6) Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 3, 5, 12, 21*

**Facts**

Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction states that a child who has been wrongfully removed from its place of habitual residence shall be returned forthwith if less than one year has elapsed from the date of the wrongful removal to the date of initiation of proceedings under the convention. Article 3 provides that removal of a child shall be considered wrongful where it is in breach of the custody rights of another person or body under the law of the state in which the child was habitually resident immediately before the removal. Article 5 provides that custody rights under the convention shall include the right to determine the child's place of residence. Article 21 requires the central authorities of contracting parties to promote the peaceful enjoyment of access rights.

The marriage between the plaintiff and defendant was dissolved by order of a Californian court in 1994. The court further ordered that the defendant was to have sole legal and physical custody of the minor children of the parties, J. W.-P. and N. W.-P., but that the plaintiff was to have reasonable visitation with the children. Both parties agreed to notify each other of any changes to the visitation schedule and to discuss any proposed trips out of the state of California. In September 1999 the defendant, without informing the plaintiff, left California for Ireland, taking the minor children with her. The plaintiff instituted proceedings under the Hague Convention on the Civil Aspects of International Child Abduction and the Child Abduction and Enforcement of Custody Orders Act 1991 seeking, inter alia, an order for the return of the minors to the jurisdiction of the Californian court. In a judgment delivered on 27 January 2000 Kearns J refused the relief sought. The plaintiff appealed on the ground that the removal of the minor children was wrongful within the meaning of the convention and the 1991 Act as being a breach of rights of custody vested in him or in the Californian court. The defendant contended that she had sole custody of the minor children and that the plaintiffs claim, if any, was under the access provisions of the convention, which he had failed to invoke.

*Held*, by the Supreme Court (Keane CJ; McGuinness and Hardiman JJ concurring) in dismissing the appeal and affirming the order of the High Court:

(1) The order of the Californian court gave the plaintiff rights of access only. It did not expressly prohibit the removal of the minor children without the consent of the plaintiff or a further order of the court. Furthermore, the evidence before the court as to Californian law did not suggest the plaintiff had any right to determine the childrens place of residence and thus a right to custody within the meaning of article 5 of the Hague Convention. Therefore the removal of the minor children was not in breach of any

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rights of custody attributable to the plaintiff or to the Californian court and thus was not wrongful within the meaning of articles 3 and 12 of the Hague Convention. H.I. v. M.G. [1999] 2 ILRM 1 considered.

(2) On the evidence before the court as to Californian law and the facts of the case, it was at least doubtful whether the granting of rights of access to the plaintiff, by implication, prohibited the removal of the minor children without his consent or a further order of the court. Even assuming that it did, the appropriate machinery for enforcing such rights is article 21 of the Hague Convention. However, the terms of the convention do not warrant the return of children and their custodial parent to the jurisdiction in which they were formerly habitually resident so as to entitle the non-custodial parent to exercise his rights of access. Hence the relief sought by the plaintiff would be refused.

Per curiam: A parent who does not have physical custody of the child but has the right to determine the place of residence of the child has, under article 5, a right of custody which is protected by the convention.

**Cases referred to in judgment**

H.I. v. M.G. [1999] 2 ILRM 1

Marriage of Burgess, In re (1996) 13 Cal 4th 25

Thomson v. Thomson [1994] 3 SCR 551

**Representation**

Cormac Corrigan SC and Mire Whelan for the plaintiff

Inge Clissman SC and Marian McDonnell for the defendant

**KEANE CJ**

(McGuinness and Hardiman JJ concurring) delivered his judgment on 14 April 2000 saying: This is an appeal from a judgment and order of the High Court (Kearns J) of 27 January 2000 refusing to grant an order for the return of the minors named in the title to the proceedings to the jurisdiction of the courts of the State of California in the United States of America pursuant to article 12 of the Hague Convention. The facts, in so far as they are not in dispute, are as follows. The plaintiff is the father and the defendant is the mother of the minors who were born on 2 September 1989 and 16 November 1990 respectively and, accordingly, are now aged 10 and 9 respectively. The plaintiff and the defendant were married to one another but the marriage was dissolved by an order of the Superior Court of California for the County of Santa Barbara made on 16 December 1994. The petitioner in those proceedings was the defendant, they were not contested and the plaintiff was not present when they were heard.

In addition to the order dissolving the marriage, the court also made other orders which are set out in an attachment to the order and which, it is not in dispute, reflected an agreement entered into between the parties prior to the court proceeding but not reduced to writing. They are as follows:

*Child custody and visitation:*

Petitioner shall have sole legal and physical custody of the minor children of the parties, J. W.-P. (Birth date 9/2/89) and N. W.-P. (Birth date 11/16/90). Respondent shall be allowed reasonable visitation with children as follows: children will be in respondents care from Saturday mornings at 9.00 a.m. until Monday mornings when respondent will take children to day care, beginning 5/22/93 for every other weekend. One child will spend a Wednesday night over-night with respondent each week. Both agree to give the other at least forty-eight (48) hours notice of any changes in the schedule. Both also agree to discuss with each other any out of state trips with the children.

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*Child support:*

Child support has been awarded to petitioner in Santa Barbara Superior Court case No. 200860. This court reserves jurisdiction to modify that order. Until further court order, the child support awarded in Superior Court case No. 200860 shall remain in full force and effect.

*Spousal support:*

Spousal support has been waived by petitioner and the court hereby terminates jurisdiction therein.

There follow lists of COMMUNITY PROPERTY AND OBLIGATIONS and SEPARATE PROPERTY which are not material to these proceedings.

The order also stated that:

jurisdiction is reserved to make other orders necessary to carry out this judgment.

As appears from that order, the defendant had been granted a decree of child support by the court in Santa Barbara in August 1994 in the sum of 1,063 per month. As of the month of November 1997 there was outstanding a sum of 45,794.90 on foot of that order and in the month of March 1998 the defendant was granted an attachment of earnings order. The plaintiff says that this was due to the failure of a business he was engaged in and health problems.

The defendant, as a result, was in serious financial difficulties and filed for bankruptcy in 1995. On a number of occasions she informed the plaintiff that, because of the financial difficulties she was in, she thought that she would have no alternative but to return to Ireland.

On 3 September 1999 the plaintiff saw the two minors, presumably on foot of the access arrangements set out above. Two days later the defendant left for Ireland with the children and, since then, has been living in Ireland. She informed the plaintiff by telephone of her arrival in Ireland after the event, but had not told him on 3 September that she was leaving for Ireland almost immediately. On 24 September 1999, the court in Santa Barbara ordered the District Attorneys office to:

take all reasonable actions necessary to locate the minor children named above and to return them to either the respondents custody, the courts jurisdiction, or Santa Barbara County Child Protection Services, as determined by the District Attorney Office Agent(s) to be in the best interest of the aforementioned minor child(ren).

On 30 September 1999, the plaintiff made an application under the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention) for assistance and proceedings were then instituted in this jurisdiction by way of special summons in the High Court under the Child Abduction and Enforcement of Custody Orders Act 1991 (hereafter the 1991 Act). The plaintiff sought an order for the return forthwith of the minors to the jurisdiction of the Californian Court and a notice of motion was also brought seeking that relief and orders restraining the removal of the minors from this jurisdiction. Affidavits were filed on behalf of the plaintiff and the defendant including affidavits giving evidence as to the relevant law in the State of California sworn respectively by Aimee M. Libeu, an attorney at law of the State of California who had been appointed by the Superior Court to locate the minors, and by William Q. Liebmann, an attorney at law of the State of California, on behalf of the defendant.

The matter having come on for hearing before Kearns J, as already noted he refused to make the order sought, giving his reasons in a brief ex tempore judgment. From that judgment, an appeal has now been brought on behalf of the plaintiff/appellant. On Friday, 31 March, this Court gave liberty to the

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plaintiff to file a further lengthy affidavit as to the law of California. The appeal was heard by the court on the following Tuesday, 4 April.

The submissions made on behalf of the respective parties can be briefly summarised. The plaintiff says that, although the defendant was, under Californian law, solely entitled to the legal and physical custody of the minors, the defendant in removing the minors from the jurisdiction of the courts of California, without first seeking the leave of the court in Santa Barbara or, at the least, notifying the plaintiff of her intention to remove the minors from that jurisdiction, thereby effectively frustrating him in the exercise of the rights given to him under the order of that court, acted in breach of a right of custody vested either in him or in the court of Santa Barbara and that, in these circumstances, the removal of the minors was wrongful within the meaning of the convention and the 1991 Act. The defendant says that as the person entitled to the legal and physical custody of the minors under Californian law she was also the person who was entitled to determine where they should reside and that, accordingly, their removal was not wrongful within the meaning of the convention and the 1991 Act and that, if the plaintiff wished to enforce the right of access granted to him under the order of the court of Santa Barbara, he should have applied under the appropriate provisions of the convention, but had elected not to do so. It is necessary at the outset to refer to the relevant provisions of the convention, the text of which is set out in the First Schedule to the 1991 Act. The preamble reads as follows:

The States signatory to the present convention

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a convention to this effect, and have agreed upon the following provisions.

Article 12 provides that:

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

Article 3 provides that:

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

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 21 under the heading RIGHT OF ACCESS provides that:

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An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the central authorities of the contracting states in the same way as an application for the return of a child.

The central authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject.

The central authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The central authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

The meaning of the expression rights of custody in article 3 of the convention was recently considered by this court in *H.I. v. M.G.* [1999] 2 ILRM 21. In my judgment in that case (with which Hamilton CJ, Denham and Barrington JJ agreed), I said (at p. 40):

Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, absent any legally excusing circumstances, be wrongful in terms of the convention. The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state.

In the present case, there were no proceedings in being at the time of the removal of the minors in which the plaintiff was seeking the custody of the minors. Nor was there any order prohibiting the removal of the minors without the consent of the plaintiff or a further order of the court itself. Accordingly, that passage would be of no assistance to the plaintiff in the present case. However, I went on to say (at p. 40):

It could even be that an order by the court granting a right of access to the dispossessed parent might, by implication, be treated as prohibiting the removal of the child without the consent of the dispossessed parent or a further order of the court. That would fall to be determined in accordance with the law of the state of the habitual residence at the time of the removal. A further question could then arise as to whether, in any event, the appropriate machinery for enforcing the access rights in that case was under article 21 rather than article 3, which is invoked in the present case. Since, however, at the time of the allegedly wrongful removal in the present case, no rights of access had been granted by the court in New York, it is unnecessary to express any conclusive [sic] view on that question. It is sufficient to say, in the context of the present proceedings, that, giving the convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be wrongful within the meaning of article 3 because it is in breach of rights of custody, not vested in either of the parents but in the court itself.

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In the present case, unlike *H.I. v. M.G.*, the dispossessed parent, i.e. the plaintiff, had, at the time of the removal of the minors, a right of access to them granted by the Californian court. Accordingly, the first question that falls to be determined in this case is whether, under the law of California, the granting of the right of access, by implication, prohibited the removal of the child without the consent of the plaintiff or a further order of the court.

The first affidavit of Ms Libeu did not address that matter, although it did point out that the removal of the minors was in breach of the Californian Penal Code, para. 278.5 which provides that:

- (a) Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right of visitation, shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars or both that fine and imprisonment.

In his affidavit, Mr Liebmann referred to the fact that a trial court did have authority to enter a specific order restraining a parent from relocating with the child without prior agreement or court approval, such authority being contained in Family Code para. 3024. However, he said that it was his opinion that a custodial parent, such as the defendant, was entitled to move without prior court approval, unless a specific order was entered under para. 3024. He added that there appeared to be a conflict between the civil code and the penal code in this context, having regard to para. 278.5 of the Penal Code. He said that he was not aware of any cases which discussed an application made to a court in the United States to return a child to another jurisdiction in circumstances where the party seeking such return had rights of access only and not a right of custody.

In the further affidavit filed with the leave of this Court, Ms Libeu referred to the provision in the order under which the parties agreed to discuss with each other any out of state trips with the children. She said that, since the defendant never discussed any out of state trip with the plaintiff, she deprived him of a most important right under Californian family law. She cited in support of this proposition the decision of the Californian Supreme Court in a case of *In re Marriage of Burgess* (1996) 13 Cal 4th 25. However, that decision, which is annexed to the affidavit, determined one matter only, i.e.: whether a parent seeking to relocate after dissolution of marriage is required to establish that the move is necessary before he or she can be awarded physical custody of minor children.

In that case, a parent with temporary physical custody of two minor children had sought a judicial determination of permanent custody and expressed the intention to relocate with the children to another town, approximately 40 miles away. The Supreme Court concluded that a custodial parent seeking to relocate did not bear the burden of establishing that it was necessary so to do. Instead, he or she had the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.

The decision gives no guidance as to whether a parent, who has, as in this case, not merely the temporary, but the permanent legal and physical custody of the child, is obliged to notify the other parent or the court before relocating the child in another jurisdiction.

The affidavits as to Californian law, accordingly, do not afford any conclusive guidance as to whether the granting of rights of access to the plaintiff by implication prohibited the removal of the minors to another jurisdiction, whether in the United States or elsewhere, without the leave of the court or the consent of the plaintiff. Mr Liebmann did not, in his affidavit, address the question as to whether the provision in the attachment to the order that the parties agreed to discuss any out of state trips meant that the relocation of the minors in another jurisdiction was, in this case, a breach of the court order. Nor could he be expected to do so, since it was raised for the first time in the affidavit filed immediately before the hearing of the appeal. It is sufficient to say that the undisputed facts in this case are that the defendant informed the plaintiff on a number of occasions that she proposed to return to Ireland with the children and that the plaintiff, for whatever reason, did not apparently think it necessary to apply to the court for an order restraining her from so doing. Whether in these circumstances the removal of the minors without the leave of the court or the consent of the plaintiff was in breach of the order of the court in *Santa Barbara* must be at least doubtful.

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In these circumstances, the question arises in this case, which did not arise in *H.I. v. M.G.* as to whether, even assuming that the granting of the rights of access by implication prohibited the removal of the minors without the consent of the plaintiff or a further order of the court, the appropriate machinery for enforcing the access rights is under article 21 rather than article 3.

In the course of her explanatory report on the convention, Madame Elisa Perez-Vera said (at para. 65):

As for what could be termed the juridical element present in these situations, the convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the state of the child's habitual residence, i.e. by virtue of the law of the state where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during \*380 the 14th Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it was sought to prevent.

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrates that decisions concerning the custody of children should always be open to review. This problem, however, defied all efforts of the Hague conference to co-ordinate views thereon. A questionable result would have been attained had the application of the convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

In *Thomson v. Thomson* [1994] 3 SCR 551, La Forest J, speaking for the majority of the Canadian Supreme Court, said that it was clear from the wording of the preamble and article 3 of the convention that the primary object of the convention was the enforcement of custody rights. By contrast, the convention left the enforcement of access rights to the administrative channels of central authorities, designated by the states who were parties to the convention. He also said:

It is clear also from the definitions of custody and access in article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of article 3. The convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.

Counsel for the plaintiff cited in support of his arguments article 5 of the convention which provides that:

(a) rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

Accordingly, he said, the right which he submitted the plaintiff had to be notified of the decision of the defendant to alter the minor's place of residence was itself a right of custody within the meaning of the convention. I am unable to accept that proposition. No doubt a parent who has the right to determine the child's place of residence but who may not have the right to the physical custody of the child is regarded, by virtue of that article, as having a right of custody which is protected by the convention. The affidavits as to Californian law do not suggest that the plaintiff enjoyed any such right: on the contrary, they proceed on the basis that the defendant, as the parent having custody, was entitled to determine the minor's place of residence. The issue was as to whether the defendant could unilaterally exercise that right in circumstances where the court had already awarded the plaintiff access rights.

The exercise of the right to determine a child's place of residence may, of course, be restricted by the order of the court awarding custody to one parent by prohibiting the removal of the child from the jurisdiction of the court without the further leave of the court or the consent of the other parent. In such a case, as already indicated, the removal of the child, without such leave and without the consent of the

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other parent may constitute a breach of a right of custody vested in the court. In this case, however, we are concerned with an order which gave the plaintiff rights of access only. It is clear, in my view, that the appropriate machinery for enforcing such rights is article 21 of the convention. To order the return of children and their custodial parent to the jurisdiction in which they were formerly habitually resident merely so as to entitle the non-custodial parent to exercise his rights of access is not warranted by the terms of the convention.

In reaching that conclusion, I have not lost sight of the fact that the more appropriate course for the defendant to have taken in the present case would have been to inform the plaintiff that she intended to bring the minors to Ireland, thereby enabling him to make an application, if he wished, to the Californian court prohibiting her from removing the minors from the jurisdiction of the court. Whether such an order would have been granted by the Californian court having regard to the undisputed facts of the present case is another matter entirely. It is sufficient to say that the removal of the minors was not in breach of any rights of custody attributed to either the plaintiff or the Californian court and, accordingly, was not wrongful within the meaning of articles 3 and 12 of the convention.

I would dismiss the appeal and affirm the order of the High Court.

**Representation**

Solicitors for the plaintiff: Gardiner St Law Centre

Solicitors for the defendant: Kilkenny Law Centre

Grinne Mullan Barrister

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**M.S.H. v L.H.**  
**and in the Matter of the Hague Convention on the Civil Aspects of International Child**  
**Abduction and in the Matter of the minors J.L.H. and B.J.H.**

2000 No. 196

Supreme Court

31 July 2000

**[2001] 1 ILRM 448**

(Nem. Diss.) (McGuinness, Hardiman and Geoghegan JJ)

31 July 2000

In the Matter of the Child Abduction and Enforcement of Custody Orders Act 1991

*Family Law—Child Abduction—Hague Convention—Wrongful removal—Whether rights of custody or rights of access—Whether exercising custody rights at time of removal—‘Grave risk’—Test applicable—Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 1, 3, 5, 12, 13, 21—Guardianship of Infants Act 1964 (No. 7)—Child Abduction and Enforcement of Custody Orders Act 1991 (No. 6), First Schedule—Children Act 1989 (U.K.) (c. 41), ss. 2(9), 8(1)*

**Facts**

The parties were a married couple resident in the United Kingdom with two young children. The appellant established a new relationship while the respondent was serving a prison sentence. The respondent obtained an order prohibiting the removal of the children from England and Wales. The appellant did not seek to overturn this order, but instead filed an application seeking the leave of the court to remove the children to Ireland. Although she indicated that she might not proceed with her application, the appellant subsequently removed the children from the jurisdiction. The respondent made an application under the Hague Convention for the return of the children and some time later they were traced to Galway.

In the High Court Herbert J ordered the return of the children to England accompanied by the paternal grandmother or grandparents. This order was conditional on a series of undertakings given by the grandparents and it was directed that the children should remain in their care. The appellant appealed.

*Held*, by the Supreme Court (McGuinness J; Hardiman and Geoghegan JJ concurring) in dismissing the appeal and ordering the return of the children to England pursuant to article 12 of the Hague Convention:

(1) The respondent possessed joint rights of parental responsibility under English law. Imprisonment had reduced his practical involvement in the lives of the children, but this did not change his legal position with respect to them. The fact that a parent had a low level input into the day to day physical care of a child did not of itself deprive that parent of a legally established right of custody. A parent was not divested of a legal established right to custody of his children because he or she was serving a term of imprisonment.

(2) Failure by the requesting parent to exercise rights of custody must be clearly and unequivocally established. The burden of proof falls on the abducting parent and this had not been discharged. The respondent was deemed to have been actually exercising his custody rights at the time of removal and therefore he did not fall within article 13(a) of the convention which provides that there is no obligation to order the return of the child where the person having the care of the child was not actually exercising the custody rights at the time of removal. The respondent's application for an order prohibiting removal was clear exercise of his right to custody.

(3) The return of the children would not involve a grave risk that they would be placed in an intolerable situation within the meaning of article 13(b) of the convention. The phrase ‘grave risk’ applied to both circumstances outlined in *\*450* article 13(b), namely exposure to physical or psychological harm and placement in an intolerable situation. It was for the appellant to establish the existence of a grave risk and this had not been done. The risk must be weighty and substantial

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and not a trivial one. *C.K. v. C.K.* [1994] 1 IR 250; *K. v. K.* Supreme Court 1998 No. 49, 6 May 1998 considered.

(4) In any event, the appellant had removed the children in express contravention of a court order of which she had knowledge and without waiting to pursue her own application for permission to remove them to Ireland. In addition, the matter was listed before the English court on 24 July 2000 and this would enable any immediate threats to the children's welfare to be addressed. These two factors further militated against the court exercising its discretion under article 13 of the convention in favour of refusing to order the return of the children.

(5) Although the giving of undertakings had been approved in a number of Hague Convention cases, these were not given by third parties but by parties to the proceedings who were usually also present in court. In general, the foreign jurisdiction involved was a common law jurisdiction and the matter was less certain where children were being returned to a very different legal system. However, this ground of appeal was now moot as the appellant had agreed to return herself with the children, thereby making the undertakings of the grandparents redundant.

**Cases referred to in judgment**

*A. (a Minor: Abduction), In re* [1988] 1 FLR 365

*C.K. v. C.K.* [1994] 1 IR 250

*K. v. K.* Supreme Court 1998 No. 49, 6 May 1998

*L.P. v. M.N.P.* High Court 1996 No. 568 Sp (McGuinness J) 14 October 1998

*O. (Child Abduction: Undertakings), In re* [1994] 2 FLR 349

*Thomson v. Thomson* [1994] 3 SCR 551

*W.P.P. v. S.R.W.* [2001] ILRM 371

**Representation**

Cormac Corrigan SC and Marian McDonnell-Cahill for the appellant

Máire Whelan for the respondent

**McGUINNESS J**

(Hardiman and Geoghegan JJ concurring) delivered her judgment on 31 July 2000 saying: This is an appeal from a judgment and order of the High Court (Herbert J) of 8 June 2000 directing the return of the minors named in the title of the proceedings to the jurisdiction of the courts of England pursuant to article 12 of the Hague Convention.

The factual background of the proceedings may be summarised as follows. The plaintiff/respondent ('the father') and the defendant/appellant ('the mother') are a married couple who were married on 31 January 1997. They are the father and mother respectively of the two children J.L.H. and B.J.H. named in the title. J.L.H., a girl, was born on 31 January 1996 and is now four years of age. B.J.H., a boy, was born on 14 April 1997 and is now three years of age. Both children have always resided in the custody and care of their mother. The mother, the father, and both children were all born in England, have always resided in England, and are citizens of the United Kingdom. It is accepted by the parties that, prior to their removal to this country, the habitual residence of the children for the purposes of the Hague Convention was England, and on the evidence there can be no doubt of that fact. The life of the parties has not been without its difficulties. The plaintiff/respondent is at present in prison having been convicted in September 1997 of an offence which is described in the affidavit evidence as 'drug dealing' and having been sentenced to a term of 4½ years. It appears that he became eligible for parole in June 2000 but to date has not been granted parole. He is due to be released from prison in January 2001. It appears that he served two previous prison sentences, from September 1994 to May 1995 and from October 1995 to June 1996. According to the mother's affidavit the couple met in September 1994 only three days before the respondent was imprisoned, so that the couple have actually cohabited for a period of six months in 1995 and fifteen months in 1996 to 1997. The mother states in her affidavit that during the 1996/7 period both parties were addicted to heroin but that with the help of her family she has overcome her addiction problems.

From the time of his imprisonment in September 1997 until in or about the end of 1998 the mother brought the two children to visit their father in prison on a regular basis, initially each week and later once a month. Subsequently the children were brought to visit their father by their paternal

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grandparents. The evidence of the mother is that these visits took place once a month; the paternal grandmother avers in an affidavit sworn in the High Court proceedings that the visits took place on average once a fortnight and that the father maintained a good relationship with the children.

It appears that the appellant entered into a new relationship with one C.H. in or about August 1999. She has in recent weeks given birth to a child by Mr H. In her affidavit she deposes to difficulties which arose between her and the respondent and members of his family subsequent to her embarking on this new relationship.

On 13 October 1999 the plaintiff/respondent through his solicitor made an *ex parte* application to Oldham County Court for a 'prohibited steps order' pursuant to s. 8(1) of the Children Act 1989, which is the main English statute dealing with both public and private law matters concerning children. The district judge made an order that the children should not be removed from England and Wales pending further order of the court and set a return date for the matter to be further considered on 19 October 1999. This order was served personally on the mother. On 19 October 1999 the district judge gave further directions providing, *inter alia*, that statements of evidence be filed and that the court welfare officer should file a report on the family. The application was listed for final hearing on 27 January 2000. The mother attended the hearing on 19 October and was represented by a firm of solicitors. She did not seek to overturn the prohibited steps order at this hearing but indicated that she proposed to make an application seeking the leave of the court to remove the children to Ireland. On 25 October 1999 she filed this application. On 19 November 1999, in correspondence which was exhibited in the instant proceedings, the mother's solicitor advised that she might not wish to proceed with her application and on 23 November 1999 the mother did not attend a meeting arranged for her and the children with the court welfare officer. In or about 25 November 1999 the mother brought the children to Ireland and took up residence in Galway. As a result of the removal of the children the County Court vacated the hearing scheduled for 27 January 2000 and directed that the application be listed for further directions on the application of either party.

The plaintiff father was unaware of the whereabouts of his wife and children but assumed that they were in Ireland and made an application for their return through the English Central Authority under the Hague Convention. The English Central Authority conveyed this application to this jurisdiction on 15 December 1999 and the present proceedings were instituted on 27 January 2000. By then the children had been traced to the address where they were living with their mother in Newcastle, a suburb of Galway. The father had received a card from the children postmarked Gaillimhe. There is no evidence before the court as to the circumstances of the mother and children in Galway or as to whether the mother is cohabiting with her new partner C.H. on a continuing basis.

In addition to the affidavits sworn by the father's solicitor, by the mother and by the paternal grandmother, an affidavit of laws was sworn by Christopher Healy, the solicitor who is acting for the father in the English proceedings. This deals with such matters as 'parental responsibility' under the English Children Act 1989 and the legitimation of the older child by the marriage of the parents. When the appeal came on for hearing before this Court, the court permitted the filing in court of two further affidavits, one sworn by the paternal grandmother and one by the respondent's English solicitor, exhibiting a statement by the respondent. These did not raise new matters of evidence, but dealt with the making of undertakings as sought by the High Court judge.

The proceedings were heard by Herbert J in the High Court on 18 May 2000. Judgment was given on 22 May, the court directing that the children were to be returned to England. There were further hearings in regard to the details of the return on 25 May, 1 June, 6 June and 8 June. On 8 June Herbert J ordered that the paternal grandparents or the paternal grandmother alone should bring the children back to England not later than 10 July 2000 and that the children should remain in their or her care. This order was conditioned on a number of undertakings which are set out in a schedule as follows:

2. The said parents shall at all times keep the said minors at the residence 88, Donnington Freehold, Rochdale, Lancashire, and shall fully and properly protect, care for, maintain and support the said minors pending an order of Oldham County Court or other court of competent jurisdiction in England and thereafter shall abide by any order such court may make in relation to the said minors.
3. The plaintiff and his parents shall within fourteen days from the date hereof make sufficient funds available to enable the defendant and her new born infant travel from Galway to

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Rochdale with or as she may choose separately from the said minors.

4. The plaintiff and his parents shall pending order of Oldham County Court or other court of competent jurisdiction in England afford the defendant full and unrestricted access to the said minors at all times between the hours of 10 am and 7 pm each day and shall abide by any order such court may make in relation to the said minors.

5. The plaintiff and his parents shall until the defendant obtains a crisis loan or income support whichever do first occur from the Department of Social Security in England pay the defendant a sum of sterling £100 per week to maintain her and her new born infant in England.

6. The plaintiff shall reinstate the proceedings before Oldham County Court and shall do all things in his power to prosecute and to expedite the said proceedings.

7. The plaintiff and his parents by themselves or otherwise howsoever will not harass nor threaten the defendant nor attend at or near nor watch nor beset any premises where the defendant may from time to time be residing nor cause, procure or permit the same.

The learned High Court judge refused a stay on his orders.

After some delay and difficulty the appellant was granted legal aid and on 7 July 2000 a notice of appeal to this Court was filed. This Court placed a stay on the order of the High Court until the hearing of the appeal on 13 July 2000. On that date this Court made an order directing that the two children were to be returned to England within one week. Since the mother was willing to accompany the children back to England it was ordered that they return in her care and remain in her custody and care until a further decision of the English County Court. At the request of the court the mother gave a sworn undertaking both that she would return the children to England and that she would attend the court hearing in Oldham County Court which had been fixed for 24 July 2000.

The court reserved the stating of the reasons for its decision.

**The Hague Convention**

It is necessary at the outset to refer to the relevant provisions of the Hague Convention, the text of which is set out in the First Schedule of the Child Abduction and Enforcement of Custody Orders Act 1991 (the 1991 Act). The preamble reads as follows:

The States signatory to the present convention

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a convention to this effect ....

Article 1 provides:

The objects of the present convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

Article 3 provides:

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

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(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 5 provides:

For the purposes of this convention:

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence: ...

Article 12 provides:

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

Article 13:

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation ....

**Submissions of counsel**

Senior counsel for the defendant/appellant, Mr Corrigan SC, firstly submitted that the removal of the children was not in breach of the father's 'rights of custody' as defined in article 5 of the convention. While the father had under the English law joint parental responsibility this arose solely as a matter of law from the fact that he was the father of the child and was married to the mother. Rights of custody under the convention were also matters of fact, and had to include at least some element of 'the care of the person of the child' at the date of removal. Even where a parent had the right of determination of the place of residence he or she must also have, and be exercising, rights relating to the care of the person of the child. In this case, the father, due to the repeated periods which he had spent in prison, had spent remarkably little time in the family home, and it was clear that at the time of the removal he had no input into the actual care of the children. Even with regard to the right to determine the child's place of residence, on the facts the wife and children had changed their place of residence within England on two or three occasions without reference to the father and without his having any part in determining such place of residence.

In reply to questions from the court, Mr Corrigan stressed that he was not submitting that all persons who were serving a prison sentence automatically lost their 'rights of custody' (as defined by the convention) to their children. Nor did he submit that mere physical absence from the home for long periods necessarily led to loss of 'rights of custody'. Each case was to be considered on its own facts. In this case the father had rights of access, but not rights of custody.

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In the alternative Mr Corrigan submitted that, even if the father had rights of custody, he was not exercising those rights at the time of the removal (see article 13(a)). To all intents and purposes the mother was the sole custodial parent, the carer for the children. The children had always lived in the care of the mother. In November 1999 they were visiting their father in prison either once or twice a month in the company of the paternal grandparents. This clearly was a situation where the children had access to their father. They were not in his custody. There was no evidence that he was availing of the maximum possible number of opportunities to see his children while he was in the prison.

With regard to the position where a parent had rights of access, but not rights of custody, Mr Corrigan referred to the recent judgment of this Court ((Keane CJ) in *W.P.P. v. S.R.W.* [2001] 1 ILRM 371). In that case this Court held that the appropriate machinery for enforcing access rights is under article 21 rather than article 3. At p. 379 of his judgment the learned Chief Justice referred to and quoted the explanatory report on the convention written by Madame Elisa Perez-Vera (at para. 65) as follows:

As for what could be termed the juridical element present in these situations, the convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the state of the child's habitual residence, i.e. by virtue of the law of the state where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the 14th Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it was sought to prevent.

This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrates that decisions concerning the custody of children should always be open to review. This problem, however, defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.

Keane CJ went on to refer to *Thomson v. Thomson* [1994] 3 SCR 551. In that case La Forest J, speaking for the majority of the Canadian Supreme Court said:

It is clear from the wording of the preamble and article 3 of the convention ... that the primary object of the convention is the enforcement of custody rights. By contrast, the convention left the enforcement of access rights to the administrative channels for central authorities, designated by the state and parties to the convention.

Keane J quoted La Forest J in that case as stating:

It is clear also from the definitions of custody and access in article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of article 3.

The convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and has been so taken deliberately with the view to render the further enjoyment of access rights impossible.

Mr Corrigan submitted that on the facts of the instant case the remedies available to the plaintiff/respondent arose only under article 21 of the convention and the removal of the children was not a wrongful removal.

Mr Corrigan submitted in addition that the court should not return the children to England because this would place the children in an intolerable situation (article 13(b)). In her affidavit the

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mother had set out a number of factors which bore this out. In particular she had averred to the father's addiction to and involvement with heroin and stated that in addition to introducing her to heroin that the father had on occasion taken the infant J.L. as cover when he was dealing heroin. She avers that when she visited the father in prison he put pressure on her to bring drugs to the prison for him and that it was for this reason that she stopped visiting him. Subsequent to her entering into the new relationship with C.H. she states that she was subjected to threats of violence by the plaintiff and members of the plaintiff's family, that members of the plaintiff's family, broke windows and kicked in the door of her home and that the plaintiff telephoned her and threatened to kill her. She avers that she was obliged to move home and was then evicted from her new home at 229 Kensington Street, Rochdale. Having resided temporarily with members of her own family she was then obliged to obtain accommodation with the children in a hostel for the homeless where conditions were totally unsuitable for and contrary to the best interests of the welfare of the children. This evidence by the mother had not been challenged in any of the affidavits filed on behalf of the plaintiff/respondent. Mr Corrigan referred to the judgment of Denham J in the High Court in the case of C.K. v. C.K. [1994] 1 IR 250 in which the learned judge discussed the interpretation of article 13(b) and held that the test must be read as a whole. In argument Mr Corrigan also referred to the judgment of Denham J in this Court in the case of K. v. K. Supreme Court 1998 No. 49, 6 May 1998, in which he submitted that Denham J had indicated that the words 'grave risk' in article 13 (b) referred to the threat of serious physical or psychological harm and not to the danger of the children being placed in an intolerable situation. He submitted that the mother's evidence was sufficient to show that if the children were returned to England they would indeed be placed in an intolerable situation.

Finally, counsel for the mother submitted that if the children were to be returned to England they should be returned in the care of their mother, who was willing to undertake to accompany them. He argued that the learned High Court judge had erred in accepting undertakings from persons who were not parties to the proceedings (the grandparents), particularly when there was no evidence that such undertakings would be enforceable in a foreign jurisdiction.

Counsel for the plaintiff/respondent, Ms Whelan, submitted that the English law with regard to parental responsibility was clearly set out in the affidavit of laws sworn by Mr Healy. The father, as a married father, had joint parental responsibility, just as he would have joint custody by operation of law under the Guardianship of Infants Act 1964 in this jurisdiction. The mother had never over the years made any attempt to alter this situation. Given that he was serving a prison sentence the father took as much part as was open to him in the care of the children and the evidence was that he had a good relationship with them. With regard to their place of residence, when he came to fear that the children might be removed from the English jurisdiction he immediately obtained an order from the English courts prohibiting their removal. This clearly showed that he exercised a power to determine their place of residence.

With regard to his exercise of rights of custody, Ms Whelan reiterated that in seeing the children frequently while in prison he was exercising the rights of custody in so far as he could. There was no suggestion that he did not fully exercise rights of custody during the periods when he was at liberty. When his wife ceased to bring the children to see him he arranged for his parents to do so. In principle, Ms Whelan argued, it would be wrong for the court to hold that prolonged absence from the family home, whether on account of imprisonment or otherwise, in the absence of other factors such as formal separation or divorce, resulted in a loss of custody rights or a failure to exercise custody rights. Lengthy absence could be caused by factors such as illness, employment abroad, or training and education. The court should look at the facts of the continuing relationship with the children, the frequency of visits, and the general background.

Ms Whelan stressed that the burden of establishing that there was a grave risk that the children would be placed in an intolerable situation if they returned to England lay on the defendant/appellant. The burden was a heavy one and the risk must be a grave or serious risk as described by the learned Denham J in her judgment in K. v. K. (see above). The mother's affidavit evidence was general in character and she did not produce any independent evidence to support her claims. It did not appear that she had raised any of these matters in the English court when she had the opportunity to do so. Ms Whelan stated that it was by no means entirely clear throughout the course of the hearing in the High Court that the mother was indeed willing to return with the children and remain with them in England. With regard to the matter of undertakings Ms Whelan submitted that the undertakings in question had

been agreed by the grandparents and that the practice of receiving undertakings in Hague Convention cases had been approved both by the High Court and by this Court in a number of earlier cases.

### Conclusions

There can be no doubt of the fact that the habitual residence of these children prior to their removal to this country was England. This is accepted by both parties and on the evidence it does not appear that either Mr or Mrs H. or the two children had any prior connection whatever with this jurisdiction.

Equally there is no doubt that the father possesses jointly with the mother, rights of parental responsibility for the children under the English Children Act 1989. This is further explained at paragraph 3 of the affidavit of laws sworn by Christopher Healy as follows:

S. 3(1) of the Children Act 1989 defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property'. Parents acting jointly have the right to emigrate and arrange the child's emigration. One parent acting alone needs the consent of the other parent or a court order.

In Madame Perez-Vera's explanatory report on the convention she states at paragraph 64:

Article 3 as a whole constitutes one of the key provisions of the convention, since the setting in motion of the convention's machinery for the return of the child depends upon its application. In fact, the duty to return a child arises only if its removal or retention is considered wrongful in terms of the convention. Now, in laying down the conditions which have to be met for any unilateral change in the status quo to be regarded as wrongful, this article indirectly brings \*460 into clear focus those relationships which the convention seeks to protect. Those relationships are based upon the existence of two facts, firstly the existence of rights of custody attributed by the state of the child's habitual residence and, secondly, the actual exercise of such custody prior to the child's removal.

In examining the matter further at paragraph 65 Madame Perez-Vera states:

As for what could be termed the juridical element present in these situations, the convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the state of the child's habitual residence, i.e. by virtue of the law of the state where the child's relationship developed prior to its removal.

I do not accept that the clear position of the father in English law can be negated or nullified by the fact that, due to his imprisonment, he is not at present playing a large part in the physical day to day care of the children. There are many circumstances in which one parent may have a low level input into the day to day physical care of a child. It could not be that that fact alone would deprive that parent of a legally established right of custody. Still less could it be right for this Court to hold because a parent is serving a term of imprisonment he or she is divested of a legally established right to custody of his or her children.

The situation in the W.P.P. v. S.R.W. case is not comparable, since in that case the parties were divorced and court orders governed the custody and access arrangements. In that case it was clear that the father had rights of access only.

Under article 13(a) the question arises as to whether the father was 'actually exercising the custody rights' at the time of the removal. This question was carefully considered by the learned High Court judge in his judgment and I agree with his conclusions. At p. 9 of his judgment he quotes from paragraph 72 of the report of Madame Perez-Vera, where she explains that the burden of proving that the requesting parent was not exercising rights of access falls on the abducting parent. The learned High Court judge goes on to say:

I do not understand Professor Perez-Vera in these paragraphs or in any part of her report to be advancing the proposition that it is not sufficient for persons seeking relief

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under article 12 of the Hague Convention to establish that the particular custody right upon which reliance is placed and which is alleged to have been breached by the other party was exercised by them but that such persons must in addition in every case establish that they were to some extent taking immediate care of the person of the child at the date of the alleged wrongful removal.

Should this be the case, then persons under a disability, for example, a person \*461 serving a term of imprisonment, persons incapacitated by sickness or accident and persons whose occupation necessitates long absences from home such as mariners would all be deprived of the benefits of the Hague Convention in the case of an unauthorised removal of their children. In my judgment this could hardly have been the intention of the contracting states in entering into this agreement on the civil aspects of international child abduction.

Whether or not Mr H. was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this Court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition his application to the Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody. Failure to exercise rights of custody must be clearly and unequivocally established. In my view the defendant/appellant has not discharged the burden of proof required and I consider that article 13(a) does not apply in this case.

I now turn to article 13(b) — the question of ‘grave risk’ that the children, if returned to England, will be placed in an intolerable situation. I do not accept Mr Corrigan's submission that the phrase ‘grave risk’ can in any way be disjoined or separated from the latter part of the sentence in article 13(b). It seems to me that the meaning of subparagraph (b) must be that either there is a grave risk that his or her return would expose the child to physical or psychological harm or there is a grave risk that his or her return would otherwise place the child in an intolerable situation. The requirement that there should be a grave risk applies to both situations. As is clear from the wording of article 13 itself, it is for the mother to establish that this grave risk exists.

The test to be applied under article 13(b) has been discussed by the learned Denham J in both *C.K. v. C.K.* [1994] 1 IR 250 and in *K. v. K.* Supreme Court 1998 No. 49, 6 May 1998. In *C.K. v. C.K.* at p. 260 the learned judge quotes from *Re A. (a Minor) (Abduction)* [1988] 1 FLR 365 where the Court of Appeal in England considered the words of article 13(b). Nourse LJ said at p. 372:

I agree with Mr Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words ‘or otherwise place the children in an intolerable situation’. It is unnecessary to speculate whether the *eiusdem generis* rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view.

Denham J states that this is a reasonable test and she adopts it. In that case, of course, the learned Nourse LJ was discussing the first half of the test — the risk \*462 of physical or psychological harm — but nevertheless his emphasis that the risk must be a weighty one and must be substantial and not trivial would apply also to the ‘intolerable situation’ test.

In the later case *K. v. K.* at p. 26 of her judgment, the learned Denham J states:

The grave risk contemplated in the Hague Convention is that of a serious risk. In *Thomson v. Thomson* [1994] 3 SCR 551 La Forest J of the Supreme Court of Canada stated at p. 596:

In brief, although the word ‘grave’ modifies ‘risk’ and not ‘harm’, this must be read in conjunction with the clause ‘or otherwise place the child in an intolerable situation’. The use of the word ‘otherwise’ points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.

In the present case the learned High Court judge expresses considerable doubt as to the mother's evidence of the possible intolerable situation and criticises the absence of corroborating

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evidence and of detailed documentation. He also follows up in great detail the question of what state benefits would, or would not, be available to the mother in England.

While I appreciate the care and attention the learned High Court judge has given to this matter, I would not for my part consider it necessary to seek what in reality should be expert evidence on the whole social welfare system in Britain. Nor would I entirely share his detailed criticisms of the mother's evidence. It was, as pointed out by Mr Corrigan, unchallenged, although both the father and the paternal grandmother had quite sufficient opportunity to challenge it on affidavit. In point of fact I have no great difficulty in believing that the mother's new relationship with Mr H. gave rise to trouble with both the father and his family. This could hardly be unexpected.

The difficulty with the mother's evidence of risk, in my view, is that it is indeed very general and lacking in detail; indeed it highlights the paucity of factual evidence on either side as to the circumstances of the children either before they left England, during their residence in Galway, or prospectively if they return to England. This situation serves to illustrate the wisdom not only of the policy of the Hague Convention but also of the former rule that the question of the welfare of children is best decided by the courts of the jurisdiction with whom they have the closest real connection, in general the courts of their habitual residence. All the evidence which is so lacking in this Court and in the court below will be readily obtainable in the English court which already has seisin of the matter. It does not appear to me that the defendant/appellant has sufficiently established that there is a grave risk that the children will be placed in an intolerable situation if they return with her accompanying them to England and if they remain in her care pending a decision of the English court. It must, of course, also be borne in mind that article 13 is a discretionary provision, which states that:

The judicial or administrative authority of the requested state **is not bound** to order the return of the child .... (my emphasis).

In the instant case, quite apart from the fact that I do not feel that the mother has discharged the necessary burden of proof, there are two additional factors which in my view militate against any exercise of the court's discretion in favour of refusing to return the children. Firstly, the mother removed the children in the full knowledge that the court had made a prohibited steps order forbidding precisely that action. In addition she herself had applied to the court for an order permitting her to bring the children to Ireland but did not wait to pursue that application. Secondly this Court was informed that the matter of the children's welfare is again listed before the English court on 24 July 2000. This will enable the court itself to deal, at least on an interim basis, with any immediate threats to the safety or welfare of the children, while at the same time pursuing in the longer term its investigation of the question of the general welfare and future of the children.

The final ground of appeal before this Court was the propriety, and indeed the effectiveness, of the High Court judge's action in requiring persons who were not parties to the proceedings to give undertakings as quoted above. Ms Whelan is correct in saying that the use of undertakings in the Hague Convention cases has been approved authoritatively both by the High Court and by this Court in a number of cases. However these have been undertakings given by persons who were parties to the proceedings and in general who were present in court. They have also in general been given where the foreign jurisdiction involved was a common law jurisdiction. The effectiveness and enforceability of undertakings given to a court in this jurisdiction when the children are being returned to a country with a very different legal system is somewhat less certain. This arose in the case of *L.P. v. M.N.P.* High Court 1996 No. 568Sp (McGuinness J) 14 October 1998. Similar caution with regard to the enforceability of undertakings in a foreign court was expressed in England by Singer J in *Re O. (Child Abduction: Undertakings)* [1994] 2 FLR 349.

However, it is now unnecessary for this Court to decide on this ground of appeal. The undertakings sought and given in the High Court were given in the context of the children returning to England in the care of the paternal grandparents. In this Court the mother expressed her willingness to return to England with the children and to care for them there. She has given an undertaking \*464 in this regard. The mother clearly has a right to custody of the children, who have always lived in her care. Ms Whelan acknowledges that this is so. The need for undertakings by the grandparents therefore no longer arises. They themselves have generously agreed on a voluntary basis to pay the fares of the mother and children to England and to give her a sum of £100 sterling to tide her over until she obtains

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some form of social welfare support. The court also notes that the plaintiff/respondent is willing to abide by the undertaking he gave to the High Court not to harass or threaten the defendant/appellant or to attend at her residence.

These were the reasons for the court's decision to order the return of the two children named in the title hereof to England pursuant to article 12 of the Hague Convention.

**Representation**

Solicitors for the appellant: Galway Law Centre

Solicitors for the respondent: Law Centre, Gardiner St.

*Sinéad McMullan Barrister*

**P. v. B.**

[1999] 4 IR 185, [1999] 2 ILRM 401

In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991:

**P. v B. (No 2)**

Supreme Court

[1999] 4 IR 185, [1999] 2 ILRM 401

26 February 1999

*Family law - Child abduction - Wrongful removal - Delay - Acquiescence - Behaviour of parent - Whether delay is 'stand alone' defence - Whether parent acquiesced in removal of child - Whether child settled in new environment - Whether grave risk that return would expose child to physical or psychological harm - Child Abduction and Enforcement of Custody Orders Act, 1991 (No 6) - Convention on the Civil Aspects of International Child Abduction, 1980, arts. 12 and 13.*

The Convention on the Civil Aspects of International Child Abduction signed at the Hague on the 25th October, 1980 (the "Hague Convention") was incorporated into Irish law by the Child Abduction and Enforcement of Custody Orders Act, 1991.

Article 12 of the Hague Convention provides, inter alia:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings ... a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

Article 13 of the Hague Convention provides:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

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R, the child of the plaintiff and defendant, her father and mother respectively, was born in Spain on the 19th October, 1991. R was the subject of an application to the High Court pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991 in 1994. That application was the subject of an appeal to the Supreme Court reported at *P. v B. (Child Abduction: Undertakings)* [1994] 3 IR 507. The Supreme Court ordered that R should be returned to Spain.

Following the return of R to Spain civil proceedings in relation to custody and access were initiated in the Spanish courts which at all material times were still ongoing. The defendant had de facto custody of R. The defendant subsequently applied to the Spanish court for leave to bring R to this jurisdiction. The Spanish court ordered that R should not leave the national territory of Spain and that the defendant would commit a crime of serious disobedience to judicial authority if she were to leave the national territory in the company of R. The order of the Spanish court was extant at all material times.

In October, 1996, the defendant removed R from Spain and brought her to this jurisdiction.

The plaintiff applied, twenty months after the removal of R from Spain, for an order directing that the defendant forthwith return R to the jurisdiction of the courts of Spain pursuant to art. 12 of the Hague Convention.

Held by the High Court (Laffoy J), in making an order under art. 12 of the Hague Convention, 1, that insofar as the court was entitled to have regard to the welfare of the child in applying the provisions of the Hague Convention, the court must give it priority over the imperative to condemn the behaviour of the defendant even where such behaviour was deserving of the most serious condemnation.

2. That applications under the Hague Convention must be initiated with due expedition.

3. That delay was not a "stand alone" defence to a claim under the Hague Convention. Delay, on its own, could not be determinative though it was a component of other defences available under the Hague Convention, such as the child being settled in her new environment and the defence of subsequent acquiescence. If delay was established, it was a factor to which the court must have regard in exercising its discretion whether to return the child to the state of its habitual residence.

4. That acquiescence may be active arising from express words or conduct, or passive arising by inference from silence or inactivity and meant an acceptance of the changed circumstances arising from the wrongful removal and/or wrongful retention by a parent in such circumstances that it was reasonable that he or she should be bound by it.

5. That the question for the court was whether, having regard to all of the circumstances viewed objectively, it was to be inferred from the plaintiff's conduct that he had subjectively accepted R's removal so as to forego his entitlement to enforce his rights under the Hague Convention.

*W. v W. (Child Abduction: Acquiescence)* [1993] 2 F.L.R. 211; *K. v K. (Unreported, Supreme Court, 6th May, 1998)* considered.

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6. That the meaning of the phrase in art. 12 of the Hague Convention "that the child is now settled in its new environment" meant a degree of settlement which was more than mere adjustment to surroundings. In this context the word "settled" involved a physical element of relating to, being established in a community and an environment and an emotional element denoting security and stability. In considering the "new environment" the court ought to consider such factors as place, home, school, people, friends, activities and opportunities but not, per se, the relationship with the mother save insofar as it impinged on the new surroundings.

7. That the grave risk defence to a claim under art. 13(b) of the Hague Convention was a rare exception to the fundamental principle that a child who had been wrongfully removed or retained should be returned to the state of its habitual residence and might only succeed in very exceptional circumstances such as where the child was put in imminent danger by being returned to a zone of war, famine or disease or in cases of serious abuse or neglect or extraordinary dependence in which the court in the country of habitual residence was incapable or unwilling to give the child adequate protection.

*Friederich v Friederich* (1996) 78 F.3d. 1060; *K. v K.* (Unreported, Supreme Court, 6th May, 1998) followed.

8. That art. 13(b) of the Hague Convention must be read as a whole and the physical or psychological harm contemplated in art. 13(b) was harm to a degree that amounted to an intolerable situation.

*Thompson v Thompson* (1994) 3 RC.S. 511; *K. v K.* (Unreported, Supreme Court, 6th May, 1998) followed.

The defendant appealed to the Supreme Court.

Held by the Supreme Court (Hamilton CJ, Denham and Barrington JJ.), in allowing the defendant's appeal, 1, that the child's interest was paramount in Hague Convention matters.

2. That the conduct of the abducting parent was in most cases crucial and determinative but that the court might look past that conduct to the manifest needs of the child and might consider defences to the application of the plaintiff despite the wrongdoing of the abducting parent where the child's interests so demanded.

*Re M.* (Abduction: Psychological harm) [1997] 2 F.L.R. 690 approved.

3. That the Hague Convention envisaged a summary procedure to enable the prompt return of children to the place of habitual residence to protect children from the effects of being wrongfully abducted across state borders.

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4. That culpable delay by an applicant might be a form of acquiescence but that even where culpable delay did not constitute acquiescence, it might well be reasonable to determine that culpable delay by an applicant was such that the Hague Convention procedures were not applicable.

*Re N. (Minors)(Abduction)* [1991] 1 F.L.R. 413 considered.

6. That in the special circumstances of the case, in particular the inappropriate delay by the plaintiff, the Court should exercise its discretion under the Hague Convention in favour of the child remaining in Ireland.

Cases mentioned in this report:-

*A.S. v P.S. (Child Abduction)* [1998] 2 IR 244.

*Friederich v Friederich* (1996) 78 F. 3d. 1060.

*Hay v O'Grady* [1992] 1 IR 210; [1992] ILRM 689.

*In Re Petition for Coffield* (Ohio App 11 Dist. 1994).

*K. v K.* (Unreported, Supreme Court, 6th May, 1998).

*C.K. v C.K.* [1994] 1 IR 250; [1993] ILRM 534.

*Orr v Ford* (1989) 167 CLR. 316.

*P. v B. (Child Abduction: Undertakings)* [1994] 3 IR 507; [1995] 1 ILRM 201.

*Re A. (Minors) (Abduction: Custody Rights)* [1992] 2 DPP 536; [1992] 1 All ER 929; [1992] 2 F.L.R. 14; [1992] Fam Law 381; [1992] 2 F.C.R. 9.

*Re H. (Minors) (Abduction: Acquiescence)* [1998] AC 72; [1997] 2 DPP 563; [1997] 2 All ER 225.

*Re M. (Abduction: Psychological Harm)* [1997] 2 F.L.R. 690.

*Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413; [1991] Fam Law 367; [1991] F.C.R. 765.

*Re S. (Child Abduction: Delay)* [1998] 1 F.L.R. 651.

*Re S. (A Minor) (Abduction)* [1991] 2 F.L.R. 1.

*Re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819; [1994] 2 F.C.R. 945.

*Thomson v Thomson* (1994) 3 RC.S. 551.

*W. v W. (Child Abduction: Acquiescence)* [1993] 2 F.L.R. 211; 1993 Fam Law 451.

*Zarate v Perez* (1996 US Dist. Lexis 10947).

*Gerard Durcan SC* (with him *Cormac Corrigan*) for the defendant.

*Inge Clissmann SC* (with her *Dervla Browne*) for the plaintiff.

*Cur. adv. vult.*

**Hamilton CJ**

I have read the judgment about to be delivered by Denham J and I agree with it.

**Denham J**

This is an appeal by the defendant from the order and judgment of the High Court (Laffoy J), of the 6th November, 1998. The matter relates to R, a minor, and arises on the Child Abduction and Enforcement of Custody Orders Act, 1991, which Act gives the force of law in Ireland to the Hague Convention on the Civil Aspects of International Child Abduction.

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R has previously been the subject of an application and order under the Act of 1991. That application resulted in a Supreme Court decision, *P. v B. (Child Abduction: Undertakings)* [1994] 3 IR 507.

R was born in Spain in October, 1991. The plaintiff, her father, is Spanish and the defendant, her mother is Irish. The parties are not married but have lived together in Spain with R

*Previous case*

In December, 1993, a written request for the child's return was received in Ireland from the Central Authority in Spain under the Act of 1991. Proceedings under the Act of 1991 having been heard and determined in the High Court, were appealed to the Supreme Court. It was held that R had habitual residence in Spain prior to her removal in May, 1993; there had been an unlawful removal of the child by the defendant; there was no acquiescence by the plaintiff to her removal or retention in Ireland. It was found that the plaintiff had been informed immediately of the safe arrival of R and the defendant in Ireland; that the plaintiff had telephoned the defendant on a number of occasions and that she had told him she "needed time"; the plaintiff understood that the defendant would return to Spain with R in due course as she had done previously. Undertakings were given by the plaintiff and the Supreme Court ordered that R be returned to Spain. The undertakings ensured a secure situation for R, the child remaining in the care of the defendant on returning to Spain pending the Spanish court hearing the case. The issues of custody and access of the child were for the Spanish court, being the country of the child's habitual residence. That order, to return the child to Spain, was made on the 19th December, 1994, and accordingly R and the defendant returned to Spain on the 20th January, 1995. The order included liberty to apply to the court.

*Facts of this case*

The pleadings in this application were brought under the title and number of the previous application. The case came before the court by way of notice of motion. The facts on the return to Spain in January, 1995, as found by Laffoy J were:-

"Civil proceedings in relation to custody and access were initiated in the Spanish courts. It appears that the defendant had de facto custody of R when they returned to Spain and initially the plaintiff had access pursuant to an order of the Spanish court. However, in March, 1996, the defendant alleged that, while exercising his right of access to R, the plaintiff had sexually abused

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R, whereupon the Spanish court ordered that access by the plaintiff to R should cease. In July, 1996, the defendant applied to the Spanish court for leave to bring R to this jurisdiction. On the 20th August, 1996, the Spanish court made an order that R should not leave the national territory of Spain and that the defendant would commit a crime of serious disobedience to judicial authority if she were to leave the national territory in the company of R

In October, 1996, the defendant removed R from Spain and brought her to this jurisdiction. Within days the defendant took up residence with R in her parents' home in the midlands of Ireland. The defendant and R continue to live in the midlands of Ireland, but not in the defendant's parents' home.

Following the making of the allegations of sexual abuse by the defendant against the plaintiff, a criminal investigation into the allegations commenced in Spain. ( This court was told that following receipt by the Spanish criminal court of an independent report from two psychologists in Madrid dated the 22nd January, 1997, the criminal investigation was 'archived', which I understand to mean that the file was closed and the investigation by the prosecuting authority, the Fiscal, terminated. This court was also told that thereupon the defendant initiated a criminal process in the Spanish criminal courts something akin to a private prosecution in this jurisdiction.

. . . in October, 1996, the civil proceedings in Spain in relation to custody and access issues concerning R were in being and ( there was an extant order of the Spanish court prohibiting the removal of R from Spanish national territory. Further, it is common case that in October, 1996, a criminal investigation of the defendant's allegations of sexual abuse against the plaintiff was ongoing at the behest of the Spanish prosecuting authority, the Fiscal. It is also common case that some form of criminal investigation is still ongoing in relation to the allegations of sexual abuse. Finally a criminal process has commenced in Spain to make the defendant answerable for her disobedience to the order of the 20th August, 1996."

*Proceedings*

These proceedings come before the court in a somewhat unusual form. The case does not emanate from either the Spanish or Irish Central Authority. It comes before the court by notice of motion brought by the plaintiff, dated the 23rd June, 1998, returnable for the 17th July, 1998, (under the number and reference of the previous application under the Act of 1991) in which motion is sought, inter alia,

- (a) an order directing that the defendant do forthwith return R to the jurisdiction of the courts of Spain pursuant to art. 12 of the Hague Convention; and
- (b) an order directing that the defendant shall be committed to prison for her wilful defiance of the order of the Supreme Court of the 19th December, 1994.

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*The High Court*

In the High Court Laffoy J ordered:-

"Having considered all of the relevant factors, including the delay in bringing this application, I have come to the conclusion that an order should be made under art. 12 for the return of R to Spain. However, I consider that before the order takes effect, the defendant should have a reasonable time to get advice from the psychological services of the Midland Health Board in relation to preparing R for the move and addressing any emotional difficulties she may have. I will hear submissions from counsel on what period would be reasonable in the circumstances."

*The Appeal*

The defendant has appealed against the judgment and order of the High Court on four issues:-

1. the delay in the proceedings;
2. the child is now settled in a new environment;
3. acquiescence by the plaintiff in the removal of the child; and
4. to return the child would be a grave risk or place her in an intolerable situation.

1. The delay in the proceedings

The facts relevant to the delay commence when R was wrongfully removed by the defendant from Spain to Ireland in October, 1996. These proceedings were commenced by motion dated the 23rd June, 1998. Thus the time in issue is that between October, 1996 and June, 1998, twenty months.

In his affidavit the plaintiff explained the time taken to commence proceedings on the child's abduction by deposing:-

"I say and believe that in or about the month of October, 1996, the defendant did wrongfully and in breach of the court orders, both of the Irish Supreme Court and of the Spanish courts remove the said child from the jurisdiction of the courts of Spain to a place unknown. I say and believe that thereafter exhaustive efforts were made to trace the whereabouts of the defendant.

I say that for almost a year thereafter it was impossible to trace her whereabouts and eventually Interpol traced the whereabouts of the defendant. To the best of my knowledge and belief the defendant is residing at [address in the midlands] with the said minor."

The plaintiff then set out the reason for the further delay deposing:-

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". . .since tracing the whereabouts of the said minor it has been necessary for your deponent to take all necessary steps to get together all the documentation and to retain Irish lawyers to act in connection with this action. I say and believe that I have acted and moved with all due expedition in connection with this matter and I am desirous that the said infant should be returned forthwith to the jurisdiction of the courts of Spain. . ."

In the duration from October, 1996, when the child was wrongfully removed, to the 23rd June, 1998, when these proceedings were commenced, there are thus two spans of time. The first was that time before Interpol traced the defendant and informed the plaintiff of her location, the second was between that finding of the defendant and the launch of the proceedings.

Of the first time span the defendant deposed:-

"I say that to the best of my knowledge personally and, from being advised by my parents, in this matter whom I believe, the plaintiff at no time telephoned my home subsequent to my returning to Ireland. I say that the plaintiff herein was aware at all times of my parents' address and telephone number, was aware that on the occasion when I previously brought R to this jurisdiction that I resided with my parents, and I say further that the plaintiff herein in fact visited at and attended at the home of my parents.

I beg to refer to the documents exhibited by the plaintiff herein. I say that included in the said documents is what appears to me to be a court document dated the 10th January, 1997, and signed by the magistrate judge in which it is clearly stated that R at that time could be in the "Republic of Ireland at the home of [the defendant's] parents, in Ireland, [address]". I beg to refer to the document dated the 2nd May, 1997, and signed by the police superintendent in which it was stated that Interpol had communicated that I, this deponent and R were living [address]. In this regard I finally beg to refer to the further document dated the 30th April, 1997, also exhibited by the plaintiff herein, and which appears to be a copy of a faxed statement from the Interpol office in Madrid to the police in [Spain]. I say that this informs the recipient that I together with R was living at [address]. Accordingly, I say that it is only misleading and untrue of the plaintiff herein to imply that he did not know where I might have been. Secondly, I say that it is additionally untrue and misleading to suggest that for "almost a year" after October, 1996, it was impossible to trace my whereabouts. Again in order to ensure that there is no confusion herein I can confirm that upon my departure from [Spain] I returned within days to [a midland town] to reside with my parents."

On this first span of time the plaintiff further deposed:-

"( on the 5th November, 1996, before the court of the first instruction ( in [Spain], Mr Adolfo Lopes De Soria was asked to explain why his client was not there and he indicated that he did not know why his client was not there or where she was . . .

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. . . by order of the magistrates dated January, 1997, Interpol became engaged in searching for the infant.

. . . I say that it was on foot of my application and by order of the Spanish court that Interpol became involved in locating the defendant and the infant R I say that although Interpol communicated with the police station of [Spain] on the 30th April, 1997, and notified the court on the 2nd May, 1997, I did not receive this information until the 11th June, 1997."

As to the second span of time the plaintiff further explained the situation thus:-

". . .from this date [11th June, 1997] until May, 1998, my Spanish lawyer was in the process of accumulating the extensive documentation in respect of what transpired in the Spanish courts and was instructing my Irish solicitor to take action before this court [the High Court]."

The case was before the Irish courts in August, 1998, adjourned to October, 1998, and heard by the learned High Court Judge on the 21st, 22nd, 23rd, 27th and 28th October. The court reserved judgment which was delivered on the 6th November, 1998. From that decision this appeal was brought and heard by the Supreme Court on the 18th January, 1999.

*The High Court*

On the issue of delay the learned trial judge held:-

"It is well settled in this jurisdiction that applications under the Hague Convention must be initiated with due expedition and must be processed by this court with due expedition. However, no limitation period is prescribed in the Hague Convention or in the Act of 1991 and by its own terms the Hague Convention envisages a period of more than a year elapsing between the wrongful removal or retention and the commencement of proceedings in the requested state. I reject counsel for the defendant's submission that delay should be treated as a 'stand alone' defence to a claim under the Hague Convention. Delay on its own cannot be determinative. However, delay by an applicant is undoubtedly a component of other defences available under the Convention, for instance the defence of the child being settled in its new environment provided for in art. 12 and the defence of subsequent acquiescence provided for in art. 13(a), both of which are relied on by the defendant in this case. Moreover, if delay is established, it is a factor which the court must have regard to in exercising its discretion whether to return the child to the state of its habitual residence, where such discretion is reposed in the court under the Hague Convention."

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*Evidence*

The evidence on the issue of delay in the High Court was on affidavit. Thus it was not a situation where the trial judge had the opportunity of seeing and hearing witnesses, or observing the manner in which the evidence was given or the demeanour of those giving it: *Hay v O'Grady* [1992] 1 IR 210. The appellate court in considering the evidence is in the same position as the High Court. Consequently, the issue of delay may be fully reviewed.

*Defendant's wrongdoing*

In an application such as this the most important consideration is the child. There is no doubt that the defendant wrongfully removed R from Spain. She knew it was wrong. She had done it before and been ordered by the Irish courts to return to Spain. The Spanish court had ordered that she not return with R to Ireland. There can be no doubt that the defendant has acted wrongfully. If she alone were the issue for the Court there would be no doubt that she should not profit in any way from her wrongdoing.

However, the Hague Convention and the Act are instruments for the benefit of the child. The child's interest is paramount. Consequently, defences to the application of the plaintiff, which go to the core of the proceedings or which are specifically mentioned in the Act, may be considered by the Court in spite of the reprehensible behaviour of the defendant.

This approach was taken by Butler-Sloss LJ., in *Re M. (Abduction: Psychological harm)* [1997] 2 F.L.R. 690, which I adopt, where she stated at p. 699:-

"The children are habitually resident in Greece. They have been wrongfully retained by the defendant for the second time. She is clearly in breach of the Convention. She litigated with the plaintiff in Greece and a competent Greek court made the decision that the children should live with the plaintiff in Greece and have generous staying contact with the defendant in England. By her actions she has frustrated the purpose of that court order which is a matter which an English court takes very seriously. The judge was very critical of her and took carefully into account her reprehensible behaviour. He was right to do so. The behaviour of the offending parent is of crucial importance and the reliance by a defendant on grave risk of psychological harm created by her, if accepted and relied on by the court, would drive a coach and four horses through the Convention (The conduct of the defendant second time round is equally to be criticised and she cannot improve her position by doing the wrong thing twice. Indeed it makes it worse. Putting to one side for a moment the very real problems facing the children, the defendant's actions require the deepest disapproval of the English Court. . .

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The conduct of the abducting parent is, as I have already said, crucial and in most cases determinative. It cannot, however, exclude the rare case where the court has to look past that conduct to the manifest needs of the child concerned. Article 13 gives the requested State this limited but none the less important opportunity to look at the specific welfare of these children at a time when the application for summary return is made. This is such a rare case. The grave risk to these children of psychological harm if they are directed to return at this stage to Greece is of greater consequence than the importance of the court marking its disapproval of the behaviour of the defendant by refusing to allow her to benefit from it."

Consequently, I agree with the learned High Court Judge and uphold this approach to the case: this is one of the rare cases where the court has to look past the conduct of the defendant to the needs of the child, the welfare of R has priority.

*The law on delay*

The Act of 1991 provides that the Hague Convention shall have the force of law in the State: section 6(1). In the Preamble to the Convention it is stated:-

" . . . the interests of children are of paramount importance in matters relating to their custody,"

"Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, (" the Hague Convention provisions were agreed upon.

In art. 1 the objects include:-

" . . .to secure the prompt return of children wrongfully removed. . ."

Article 2 states:-

"Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available."

Article 7 states:-

"Central Authorities shall co-operate with each other. . .to secure the prompt return of children . . ."

Article 11 states:-

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings, the applicant or the Central Authority of the

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requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. . ."

It is clear that the Convention envisages a summary procedure for the prompt return of children wrongfully removed from one jurisdiction to another. The repeated use of words such as "prompt" and "expeditious" make this evident.

In the explanatory report by Elisa Pérez-Vera on the Convention the importance of expeditious procedures and according priority to abduction cases is stressed in her statement that:-

"The importance throughout the Convention of the time factor appears again in this article. Whereas art. 2 of the Convention imposes upon Contracting States the duty to use expeditious procedures, the first paragraph of this article restates the obligation, this time with regard to the authorities of the State to which the child has been taken and which are to decide upon its return. There is a double aspect to this duty: firstly, the use of the most speedy procedures known to their legal system; secondly, that applications are, so far as possible, to be granted priority treatment.

The second paragraph, so as to prompt internal authorities to accord maximum priority to dealing with the problems arising out of the international removal of children, lays down a non-obligatory time limit of six weeks, after which the applicant or Central Authority of the requested State may request a statement of reasons for the delay. ( In short, the provision's importance cannot be measured in terms of the requirements of the obligations imposed by it, but by the very fact that it draws the attention of the competent authorities to the decisive nature of the time factor in such situations and that it determines the maximum period of time within which a decision on this matter should be taken."

Of art. 11 Judge Garbolino wrote in *International Child Abduction: Guide to Handling Hague Convention Cases in US Courts* (hereinafter referred to as the "Guide") at pp. 46 and 47:-

"Clearly the language in this article anticipates that six weeks is sufficient time for the court to reach a decision on the petition. A review of the cases indicates that some courts are well under that mark. [*Walton v Walton*, 925 F. Supp. 453 (S.D. Miss. 1996) (Court ruled on merits of petition thirty days after petition was filed); *In Re Coffield*, 96 Ohio App 3d 52 644 N.E. 2nd 662 (1994) (twenty-one days); *Navarro v Bullock*, 15 Fam L. Rep (BNA) 1576 (Cal. Super. No 86481 1989) (eight days); *Grimer v Grimer*, 1993 WL 545261 (D.Kan. 1993) (seven days); *Levesque v Levesque*, supra, 816 F. Supp 662 (D.Kan) (nine days); *David S. v Zamira S.*, [151 Misc. 2d 630], 574 N.Y.S. 2d 429 (forty-four days)]."

To enable a speedy process the vehicle of habeas corpus has been used in some courts. Judge Garbolino describes this in his Guide at p. 47 and 48:-

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"There is a growing trend to litigate Convention claims by the filing of a petition for writ of habeas corpus. This procedure is familiar to family law practitioners as a remedy to obtain a child who is being illegally held by a parent or other person. Its use in Convention cases is particularly appropriate. In *Zajaczkowski v Zajaczkowska*, 932 F. Supp. 128 (D. Md. 1996), the trial court treated plaintiff's pro se petition for return of a minor to Poland as a petition for a writ of habeas corpus.

'Unquestionably at the heart of the Convention is prompt action by courts. [citations omitted]. This comports with the obvious desideratum that any dispute involving custody of a child be decided quickly so as to minimise the anxiety and unsettlement of the child and to avoid assimilation of the child into strange environs which could lead to subsequent difficulties in separation. [citations omitted]. The rules of procedure applicable to ordinary civil cases would seem to be at odds with the Convention [and the Act's] premium on expedited decision making. In the Court's view, however, there exists a familiar vehicle suitable to these circumstances and that is the writ of habeas corpus'."

Concern has been expressed previously by this court at the delay in Convention cases, e.g. *A.S. v P.S. (Child Abduction)* [1998] 2 IR 244 at p. 265. Elsewhere this concern has also been expressed. The Report of the Second Special Commission Meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction 33 ILM. 225 (1994) states:-

"Delay in legal proceedings is a major cause of difficulties in the operation of the Convention. All possible efforts should be made to expedite such proceedings. Courts in a number of countries normally decide on requests for return of a child on the basis only of the application and any documents or statements in writing submitted by the parties, without taking oral testimony or requiring the presence of the parties in person. This can serve to expedite the disposition of the case. The decision to return the child is not a decision on the merits of custody."

The additional time factor arising because of an appeal has also been considered. Some states have introduced special procedures to enable expeditious appellate hearings, although this is not required under the Convention.

In England and Wales there are rules and procedures which are intended to meet the requirement of expedition. This was described by Wall J in *Re S. (Child Abduction: Delay)* [1998] 1 F.L.R. 651 at p. 660:-

"As has been said many times, proceedings under the Convention are summary. There is, accordingly, a proper emphasis on speed of disposal. In this context the Central Authority for

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England and Wales and both the High Court and the Court of Appeal have an exemplary record. I propose to give some examples.

The English Central Authority, the Child Abduction Unit ('the Unit'), measures the time from the receipt of a request from a foreign central authority to its allocation by the Unit to a specialist firm of solicitors in hours rather than days. The unit sets itself an 80% target of forwarding incoming cases to solicitors within 24 hours: in fact it invariably achieves a 100% rate.

The average turnaround time between receipt of an incoming application under the Convention and the final order is 6 weeks. For applications which are decided following an appeal from the High Court judge to the Court of Appeal, the average turnaround time is 15 weeks."

In that case there was a significant delay caused by either the plaintiff or his German lawyers in the proceedings and an application for an adjournment by the plaintiff was refused. Wall J stated that the application to adjourn by the plaintiff raised an important issue:-

"( about the manner in which applications under the Convention are conducted in England and Wales, and the need for applicants under the Convention and any lawyers in their native countries to understand that the court expects those who invoke the jurisdiction of the Convention to act with expedition."

Wall J then described the summary proceedings for Hague Convention applications in England, as set out above, and continued at p. 661:-

"The maximum time permitted for any adjournment of proceedings under the Convention is 21 days - see the Family Proceedings Rules 1991, r6.10. In the instant case, the originating summons was issued on 30 June, 1997. On the same day Hale J made an ex parte order securing S's continuing presence at her defendant's address. The matter came before me on 10 July, 1997. The defendant was ordered to file further evidence by 18 July, 1997 (which she did). The plaintiff was ordered to file his evidence in reply no later than 30 July, 1997. He did not do so. His affidavit was not sworn until 11 August, 1997. (

On 10 July, 1997 I was told that the case could not be ready until 25 September, 1997. This was more than 12 weeks from the date of the issue of the originating summons, double the average disposal time for an application under the Hague Convention. In order to accommodate the plaintiff, therefore, I was persuaded to grant a series of artificial adjournments.

No blame in this case for the delay can be laid at the door of the solicitors allocated by the Unit. The failure to give them proper instructions and the failure to attend court must be laid fair and square at the door of the plaintiff and his German lawyers.

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It must be made clear to parties involved in proceedings under the Convention that in the English High Court cases are dealt with expeditiously. Delay will simply not be permitted. Cases under the Convention are given priority and are regularly inserted into already busy Family Division lists, often to the prejudice of other cases. Accordingly, if a litigant delays or fails to give his solicitor adequate instructions, he is likely to find that his application to adjourn the hearing date of the originating summons will be refused."

In this decision Wall J considered the issue of delay in relation to the rules of the English court, his discretion and the Hague Convention. The rules requiring speedy hearings arise from the objects of the Hague Convention. Thus, even if the rules were not present the court would have the same power to enforce speedy hearings.

Time is of the essence in cases under the Act of 1991: see approach in *C.K. v C.K.* [1994] 1 IR 250 at p. 269. It is important that both in the State from where a request comes and in the requested State that all parties and professionals address these cases speedily.

I am concerned that there are not as yet rules of court in Ireland under the Act to provide a specific, expeditious process for cases under the Hague Convention. However, I am very pleased to learn from counsel that draft rules have been sent to the rules making committee. It is to be hoped that appropriate rules will soon be in existence to enable such cases run on a fast track in the courts.

Delay may have a factor of culpability by a party. Thus in *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413 Bracewell J considered the delay of the applicant plaintiff stating at p. 419:-

"Finally, I consider it appropriate to say that even if I had been satisfied under art. 12, which I am not, I would have exercised my discretion in favour of returning the children to the Texas jurisdiction. The reasons why I would have exercised my discretion thus is that, first, this is a plain case of abduction by the defendant; secondly, if the proceedings had, in fact, been commenced by 16 October, it would have been a plain case for the return of the children, and it is relevant to consider that the children had been in this country for 2 days over the one-year period before proceedings were commenced; and thirdly, there is a good explanation as to why proceedings were not commenced earlier. There is no culpable delay on the part of the plaintiff. It arose solely because of inaccurate advice and the failure of the fax machine at the Lord Chancellor's Department."

The latter point raises the query as to what would have been his view if there was culpable delay. The implication is that it would be a factor against the plaintiff.

*Analysis*

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Unfortunately in this case there has been very significant delay in commencing the proceedings under the Act of 1991. The delay can be divided into two parts.

First, there was the delay after the defendant wrongfully removed the child from Spain and before Interpol informed the Spanish authorities where the defendant and R were. In light of all the circumstances it is inappropriate that the plaintiff did not contact, or attempt to contact, or take steps to see if the defendant and R were at, the defendant's parents' house in the midlands of Ireland. Her parents' home was where she had gone to when she previously wrongfully removed R from Spain. She had on other occasions brought R there to visit. That is where she had sought permission to go to with R. It is her family home. She is not wealthy, she has no independent means; the court had ordered maintenance for her by the plaintiff in the previous order. The plaintiff was aware of her home address. He knew she visited there before. He knew she had gone there before when she wrongfully removed the child. He himself has visited her home. It is extraordinary that he did not telephone her parents or attempt to do so to inquire of her and R. It is remarkable in the circumstances that Interpol was asked to trace her - that neither the plaintiff or his lawyers rang her home in Ireland. In assessing the evidence it is clear that common sense would have suggested that the defendant had once again returned to her parents and this could have been confirmed easily and speedily.

Secondly, there was the delay of approximately one year, after the plaintiff was informed of Interpol's discovery that the defendant had been traced to her parents' house, before these proceedings commenced. The reason given, that his lawyers were preparing documentation, is not appropriate to explain a delay of approximately one year in commencing proceedings under the Hague Convention. It is a totally inadequate reason.

There are important factors in considering the delay in this case. This delay must be viewed in the overall picture of the child's life. She was born in Spain but has spent the following times in Spain and Ireland:-

Spain: October, 1991 to May, 1993, ie 19 months

Ireland: May, 1993 to January, 1995, ie 20 months

Spain: January, 1995 to October, 1996 ie 21 months

Ireland: October, 1996 to these proceedings commenced in June, 1998, ie 20 months.

The delay has meant she has spent a critical time in Ireland during her development. The plaintiff knew of the Hague Convention. He has been through the process before. Indeed, on his previous application under the Hague Convention the order of the Supreme Court, as well as ordering the return of the child to Spain, granted him liberty to apply. This was not availed of by the plaintiff on this occasion.

If a request had been made for R by the plaintiff on her wrongful removal in October, 1996, or in November, 1996, it would probably have been processed expeditiously in light of the previous Supreme

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Court order. Instead it was 1998 before the proceedings were initiated. The essence of the Convention - prompt return - appears impossible to achieve.

The Convention envisages a summary procedure to enable a child to be returned expeditiously to the place of its habitual residence to protect the child from the effects of being abducted across state borders wrongfully. The summary process is possible because of the intended expedition - as such the welfare of the child is not an issue.

The Hague Convention stresses the necessity for expedition in the requested state. It is the clear policy of the Convention that there be expedition throughout the whole period of the wrongful removal - not just after the proceedings have commenced in the country of application. This expedition is for the welfare of the child. The expedited process is the grounding upon which a summary procedure, without a hearing on the welfare of the child, is envisaged. However, delay affects the child's position, and that is recognised in art. 12 by reference to a particular aspect of the child's welfare.

Delay is contrary to the Hague Convention. Significant culpable delay by a requesting party is contrary to the fundamental policy of the Convention. Sometimes culpable delay may be a form of acquiescence. However, there may well be circumstances where there is culpable delay and yet no acquiescence. It may well be reasonable to determine in certain circumstances that delay by an applicant is such that the Convention procedures are not applicable.

## 2. Settled in a new environment

Article 12 of the Hague Convention imposes a mandatory obligation on the court stating:-

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

The judicial or administration authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

The nature of this obligation varies according to the length of time which has elapsed since the child was removed. In this case R was wrongfully removed in October, 1996. The plaintiff commenced his notice of motion in June, 1998, 20 months after the wrongful removal. Thus even though the motion was brought within the original proceedings it is "the proceedings" within the meaning of art. 12 for the

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purpose of this application. Consequently, this application falls to be determined under the second paragraph of art. 12.

The second paragraph of art. 12 continues an obligation to return the child unless the child is settled in the new environment. It is for the defendant to prove that R is settled. The position is described by Elisa Perez-Vera as:-

"The provision does not state how this fact is to be proved, but it would seem logical to regard such a task as falling upon the abductor upon the person who opposes the return of the child, whilst at the same time preserving the contingent discretionary power of internal authorities in this regard."

This discretion is also referred to elsewhere. Thus art. 16, states:-

"After receiving notice of a wrongful removal or retention of a child in the sense of art. 3, the judicial or administrative authorities of a contracting state to which the child has been removed or in which it has been retained, shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

Again the Convention is referring to two of its fundamental principles, (a) that hearings under the Convention do not review the merits of custody, and (b) that such proceedings must be brought within reasonable time.

Article 18 also refers to judicial discretion stating:-

"The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

While it refers to the discretion to order the return of a child there is also the corollary to this discretion and inherent in the jurisdiction the discretion to refuse to return the child. Consequently, throughout the Convention there is reference to the discretion left to the national authorities.

On the matter of art. 12 the learned High Court Judge held:-

"In my view, the evidence relied on by counsel on behalf of the defendant does not go much further than indicating 'mere adjustment to surroundings' by R. It certainly does not indicate that R's current situation vis- -vis the various factors enumerated by Bracewell J, place, home, school, people, friends, activities and opportunities, has or is likely to have in the future the element of permanence which the word 'settled' connotes. For instances, it is clear from the evidence that when the defendant returned to this jurisdiction in October, 1996, with R, they both resided for some period of time with the defendant's parents. It is also clear that the defendant and R now live elsewhere in same town. However, there is no evidence of the basis on which R and

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the defendant occupy their current accommodation, whether they have security of tenure, although not using that term in any technical sense, what sources of support and maintenance are available for R and whether her living environment, as regards place and people, is likely to change in the short or mid term. Under the provision of art. 12 which is under consideration, the onus is on the defendant to demonstrate that R is now settled in her new environment. In my view, the defendant has not discharged that onus."

The interpretation of the phrase "settled in its new environment", referred to by the learned trial judge, by Bracewell J in *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413 at pp. 417 and 418 states:-

"The second question which has arisen is: what is the degree of settlement which has to be demonstrated. There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the defendant can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas LJ. in *Re S.* did advert to art. 12 at p. 35 of the judgment and he said:-

'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.'

He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in *M. v M.* and at first instance in *Re S.* The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass. The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the defendant, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings."

I find this to be a very helpful analysis. As too is the description by Garbolino J in the Guide at p. 136 where he describes art. 12 and its application in the United States as:-

"The delay in filing an action for more than one year is only the first prong of the 'delay' defense. Even if it is established that a year or more has passed since the wrongful removal or retention, the second prong of this defense requires that the child must have been 'settled' in his or

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her new environment. In absence of evidence that the child has become settled, the defense is not established."

*Analysis*

The first prong of this defence is the delay. As set out earlier in this judgment delay has been established. Further, the nature of the delay has been established. Whereas the reason the delay is important is because of the effect on the child, if a party has been culpable in the delay that may be a factor in balancing the defence too. In this case the delay of the plaintiff was inappropriate, especially for the latter part of the duration. This is a factor in the circumstances of this case in determining the matters raised under art. 12 for the inferences it raises as to the comparative homes of R

The second prong - whether R has become settled - now falls to be determined. R's new environment is in a town in the midlands of Ireland. It is not necessary to determine the meaning of the word "new" in art. 12 as the position has not changed significantly since those proceedings were commenced.

The relevant facts commence with the length of time which the child has lived in this environment - without any application for her removal. This has several elements; (a) the physical presence of the child in the town and all its consequences, and (b) the absence of contact from the plaintiff requesting her return; (c) the emotional element. The reasonable and logical inference to be drawn from this length of time is that to a child of the tender age of R it would be a most significant length of time and one in which roots would have been put down in the community. In light of the special circumstances of this case strong inferences may be drawn from the delay. These arise because the defendant had returned to her family home with R, there was no contact from the plaintiff, who had every reason and opportunity to make contact with the defendant's family home, for twenty months. However, the burden of proof is higher than that which arise solely by inferences from the delay in this case.

Whereas there is not a very precise picture detailed (perhaps understandable because of the attitudes of the parties) it is more appropriate if there is a fuller picture painted. However, certain facts are before the Court. R is at school. This is of particular importance. If R had been returned shortly after her wrongful removal she would have commenced school in Spain. The situation now is that she has commenced school in Ireland. This of itself sets down roots and also is of importance because of language considerations.

The court knows from the evidence in this motion and the previous application that the defendant has an extended family in the midland town. This has favourable consequences for R

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There was some evidence relevant to the state of mind of R. While neither the issues of alleged child sexual abuse by the plaintiff, or custody and access are matters for the court, some evidence given by Dr Swann and others is relevant to other matters such as the settled environment and must be considered by the court. The learned trial judge excluded Dr Alice Swann's report insofar as it relates to evidence of the alleged sexual abuse by the plaintiff. However, insofar as Dr Swann could assist the court in other matters the ruling did not apply. I agree with this approach and find in Dr Swann's report evidence relevant to R being settled in a new environment.

Dr Alice Swann gave evidence of interviewing R and stated of R whom she met on the 30th and the 31st January, 1997:-

"(beforehand I was given much detail about the family here. There was much spontaneous talk. She was at ease. She gave very rich detail. She had very good language and play skills. She was totally at ease and it was clear she had a close relationship to those she was speaking about, the extended family as well as her defendant."

Dr Swann referred R to the Community Care Psychological Services. The report from the clinical psychologist also addresses, inter alia, the issue of the psychological well being of R in the community and paints a picture of a child whose emotional condition has greatly improved. This is illustrated especially by the interviews with R's teacher which describe a position of great progress over her year in school, addressing both educational and social skills.

I find this to be strong evidence that R is settled in the community, both from the physical and psychological point of view. The learned trial judge erred in not addressing the significance of the evidence of Dr Swann and Ms Burke insofar as it related to the issue of the child being settled in the community. That evidence, together with the defendant's and the inferences which in the circumstances of the long delay in this case have arisen, put together, are sufficient to establish that R is settled in her new environment.

That being the case this court has a discretion as to whether to order her return to Spain. In spite of the opprobrium to be cast upon the defendant for wrongfully removing R from Spain in 1996, in the special circumstances of this case, which arise largely because of the inappropriate delay in commencing the proceedings, I am satisfied that the discretion of the court should be exercised in favour of the child remaining in Ireland in its new settled environment. In light of this decision it is unnecessary to consider the other grounds of appeal. I would allow the appeal.

**Barrington J**

I agree.

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**THE HIGH COURT**

**1996 No. 568 Sp**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF  
CUSTODY ORDERS ACT 1991  
AND IN THE MATTER OF E. P. AN INFANT  
BETWEEN**

**L.P.**

**PLAINTIFF**

**AND**

**M.N.P.**

**DEFENDANT**

**[1998] IEHC 151 (14th October, 1998)**

**JUDGMENT of Mrs Justice McGuinness delivered the 14th day of October 1998**

In these proceedings the Plaintiff father sought the return to Italy of the child E. who had been brought to Ireland by her mother, the Defendant. The proceedings were commenced by Special Summons issued on the 18th November, 1996 and on the 12th February, 1997 this Court ordered the return of the child to Italy, subject to certain undertakings given both by the father and by the mother. As is the normal procedure in cases under the Child Abduction and Enforcement of Custody Orders Act, 1991 and the Hague Convention, the proceedings were handled through the Central Authorities appointed under the Convention in both jurisdictions.

The factual background may be briefly summarised. The husband, who is Italian, and the wife, who is Irish, were married in Italy in 1983. E., the only child of the marriage, was born on the 19th July, 1990 at Turin. Both the husband and the wife were at all material times in employment in Italy and the family home was in that country. It was agreed by all parties that the habitual residence of the child was in Italy.

Unhappy differences arose between the husband and the wife and on the 2nd May, 1996 the wife sought a decree of judicial separation in the Italian Courts. Interim negotiations took place between the parties within the framework of the Court proceedings but these did not lead to any agreement. It appears that in or about August, 1996 the wife raised her suspicions with regard to sexual abuse of the child by the husband. The husband at around the same time alleged that the wife was suffering from some form of psychiatric instability. The local Social Services became involved and a proposal was made that the child should be placed in the custody of the husband's elderly parents.

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On the 1st October, 1996 the wife left the family home with the child, without giving any notice to the husband. She stayed for two nights with a friend locally and on 3rd October, 1996 she travelled by car to Switzerland and thence by air to Ireland. She and the child went to live with her relatives in the Cork area.

On 2nd October, 1996 the husband made an application to the Italian Court and an Order was made granting custody of the child to the paternal grandparents and directing that the child should not be removed from Italy. There is some conflict as to whether this Order was served on the wife but it is acknowledged that she was informed of its contents.

As soon as the wife arrived in this jurisdiction she made an application to this Court pursuant to the Guardianship of Infants Act, 1964 and on 7th October, 1996 an Order was made granting her interim custody of E.. This Order was served on the husband by post by a letter from the wife's Solicitors dated the 10th October, 1996.

The husband then issued his proceedings under the Hague Convention and the 1991 Act. The matter came on for hearing before me in February, 1997. During the course of the hearing the wife, through her Counsel, acknowledged that under the terms of the 1991 Act and the Convention, her removal of the child to Ireland was a wrongful removal. In her defence the wife relied on Articles 13 and 20 of the Hague Convention, which allow the Court to refuse to Order the return of a child which has been wrongfully removed if it is held that there is a grave risk that the return of the child will expose her to psychological harm, that the return of the child would otherwise place her in an intolerable situation, or that the return of the child should be refused by reason of the fact that it would not be permitted and should not be permitted by the fundamental principles of the State relating to the protection of human rights and fundamental freedoms. As is to be expected in such cases there was a high level of conflict on the evidence and allegations and counter allegations were made. Under the principles of the Convention it was not necessary for this Court to resolve most of these conflicts. However, on the evidence I accepted firstly that the child E.'s primary and most constant relationship was with her mother; secondly, that no final decision on the custody of the child would be reached by the Italian Court for some considerable time; and thirdly that no appeal lay from the various interim Orders in regard to the child which had been made or might be made in the future by the Italian Court. I also had very considerable concerns with regard to the nature of the Affidavit evidence produced to the Court by the husband. These purported Affidavits by third parties had not been notarised and appeared to have been sworn in a somewhat irregular manner. Fortunately the content of the purported Affidavits was not such as to influence my decision one way or the other.

During the course of the hearing my chief concern, bearing in mind the constitutional rights of the child as a "fundamental principle of the State" was that if she was returned to Italy she would for an

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indefinite and lengthy period, and without possibility of appeal, be removed from the custody of her mother with whom she had an extremely close relationship. The medical reports produced in evidence before me did not bear out any allegation of psychiatric or psychological difficulties on the part of the mother.

However, on the final day of the hearing, Senior Counsel for the mother informed me that the situation had changed, in that the Italian Court had varied its interim Custody Order and granted custody to the mother. This entirely altered the context in which this Court had to make its decision and indeed removed the chief obstacle to the child's return.

There remained the practical questions of accommodation and maintenance for the child and the mother pending further and final decisions by the Italian Court. Both the husband and the wife through their Counsel offered to give undertakings to cover the period of the child's return and the immediate aftermath. Bearing in mind the decision of the Supreme Court in *P -v- B* [1995] ILRM 201 (to which I shall refer later) I accepted that the giving of undertakings was a suitable means of dealing with the situation. In the light of the undertakings given by both the husband and the wife I felt able to make an Order returning the child, in the company of her mother, to Italy.

The husband gave the following undertakings:

1. Mrs P. and the child were to be provided with accommodation at an apartment at a given address until the matter of the family and the accommodation of the parties was decided by the Italian Court.
2. Mr P. was not to attend at or enter or otherwise watch or beset the apartment in which Mrs P. was residing and he was not to approach Mrs P. or interfere with her in any way.
3. Mr P. was to pay maintenance to Mrs P. for herself and her child in a sum equivalent to £400 per month, the first payment to be made in advance to Mrs P.'s Solicitor on 12th February, 1997.
4. Mr P. was to pay the airfares from Ireland to Italy to enable Mrs P. and the child to return to Italy on the 20th February, 1997.
5. Mr P. was to permit his wife to collect her personal effects and those of the child from the family home by appointment on the 21st February, 1997.

The wife undertook as follows:

1. Mrs P. was to hand in the child's passport to the Italian Court for the period of transition until the Italian Court took up the case.
2. Mr P. was to have access to E. on three evenings each week and also at the weekends at times which were specified in the undertaking. The access was to take place in the presence of, and under the supervision of either or both of Mr P.'s parents at their home.

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Both parties also undertook to co-operate in ensuring the prompt disposal of the proceedings in the Italian Courts.

In addition at my request and on account of my concerns as to the admissibility of the purported Affidavit evidence, the husband undertook to arrange for the notarisation of the un-notarised Affidavits which had been filed in the proceedings.

In giving Judgment ex-tempore on the 12th November, 1997 I stated

*"Under the Hague Convention the only basis on which this Court can refuse to return the child is under Article 13, where there is a grave physical or psychological risk if the child is returned. The Article also provides that in suitable cases the child's own view should be taken into account. That, of course, would depend on the child's own maturity, intelligence and ability to understand matters. This child is a very young child and I feel there is nothing to gain in the Court interviewing her.*

*Under Article 20 of the Convention the return of the child may be refused where this is necessary in the interests of the protection of human rights and fundamental principles. If, as was hitherto the case, this little girl was to be deprived of the care and society of her mother if she was returned to Italy, it might well be argued that her fundamental rights were affected, but now that it appears that under the latest Order of the Italian Court she will be in the care of her mother I do not think that Article 20 comes into effect.*

*As I have said the situation has now changed with regard to this young child from what it was at the start of this hearing. Otherwise this Court would have had some concerns under Articles 13 and 20 of the Convention. This is not a criticism of the grandparents in whose the custody the child was to be according to the original Order of the Italian Court. I am sure that they love their granddaughter dearly. However, under the Constitution of Ireland the parents have inalienable and imprescriptable rights and the child has a concomitant right to be brought up in the family of a parent. Under the Guardianship of Infants Act, 1964 the grandparents would have no locus standi to apply for custody, although in certain situations under the Child Care Act 1991 the child could be placed by the Court in the grandparents' care, but only if both parents were found to be totally unfit to care for the child.*

*In the simultaneous Italian Court proceedings the application which was made on Mrs P.'s behalf by her legal representatives resulted in a change of circumstances from that which obtained at the commencement of the hearing in this Court. The child is now to remain in the de facto custody of the mother. There is therefore no longer a prejudice under Articles 13 and 20 which would prevent the return of the child. There is time for arrangements to be made for the child to return*

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*to school. The parties should return to Italy on the 20th February, 1997 to allow for the weekend as a period of settling down so that the young child can return to school on the Monday."*

Subsequent to the making of this Order a number of brief applications were made to the Court as to the exact effect of the undertakings and a number of rulings on these were made. The child and the mother then returned to Italy. As far as this Court was concerned that should have been the end of the matter.

However, this proved not to be the case. From time to time during the following months Counsel for the wife made applications to the Court concerning the virtually complete failure of the husband to abide by the various undertakings given by him. Even more serious was the fact that the Order granting de facto custody to the wife made by the Italian Court shortly before the 12th February, 1997 had been varied on the 4th March, 1997, some two weeks after the child's return. This new Order removed the child from the custody of both parents and placed her in an institution, with minimal access to her mother and father. This Order was apparently based on a report from the Social Services. According to Counsel for Mrs P., she has neither been served with this report at any time nor been informed of its contents. It was also submitted by Counsel for Mrs P. that it appeared that the Italian Court was unaware of the undertakings given to this Court by the husband and that, in any event, no mechanism existed in the Italian legal system for the enforcement of undertakings.

While these events, in particular the removal of a six year old almost entirely from contact with her family, could not but cause concern, the matter of the custody of the child was now in the hands of the Italian Court and it would be neither desirable nor possible for this Court to attempt to intervene at the behest of the mother. Mr P.'s undertakings had, however, been given to this Court, and he had given the undertakings voluntarily and with full legal advice from his Senior Counsel, Miss Dunne. His Solicitors also remained on record in this Court.

Accordingly, I permitted the bringing of a motion in December 1997 to enforce the husband's undertakings. This motion was served on his Solicitors, and by courtesy on the Solicitors for the paternal grandparents who had been represented at the original hearing. The response of both firms of Solicitors was to bring motions to come off record in the proceedings since they could obtain no instructions from their respective clients. Miss Gallagher, Solicitor for Mr P., also exhibited in her Affidavit correspondence she had sent to his Italian lawyers requesting that the Affidavits to which I have referred earlier be properly sworn and notarised. To this correspondence she received no satisfactory response. There was clearly no alternative but to permit both firms of Solicitors, who were not themselves at fault, to come off record as and from 10th February, 1998. At this point I was also informed that on 13th

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January, 1998 Mr P. had been charged in the Italian Criminal Courts with offences in connection with the sexual abuse of the child E..

At the hearing before me on 10th February, 1998 Counsel for the mother, Miss Baker, submitted that this Court should make use of the procedure set up by the Hague Convention and should request the Central Authority for Italy to inform the Court as to the procedures that were invoked to ensure the performance by Mr P. of the undertakings which he gave to this Court and further to request an explanation from the Central Authority for Italy as to the delay in dealing with the custody application in respect of the child E. P. in the Italian Courts. Miss Baker pointed out that by virtue of Section 8 of the 1991 Act the Central Authority for Ireland has the powers and obligations set out in Article 7 of the Hague Convention. In particular under this Article Central Authorities are required to co-operate with each other and promote co-operation among the competent authorities of their respective States inter alia to achieve the objects of the Convention. Under Article 7 sub paragraphs (a) to (i) specific functions are set out which include an obligation to take all appropriate measures to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; to secure the voluntary return of the child or to bring about an amicable resolution of the issues; to provide information of a general character as to the law of their State in connection with the application of the convention; and to keep each other (Central Authorities) informed with respect to the operation of the convention and as far as possible to eliminate any obstacles to its application.

21. Miss Baker also referred the Court to the Judgment of the Supreme Court in **P -v- B** [1995] ILRM 201. In that case the Supreme Court accepted that a party to proceedings under the Child Abduction and Enforcement of Custody Orders Act, 1991 might be requested by a Court to give undertakings which are for the welfare of the child during the transition from one jurisdiction to the other. The Supreme Court accepted that the Court is entitled to accept those undertakings which are consistent with the objectives of the 1991 Act and the Convention. These undertakings are also in accord with the constitutional protection of the child and its welfare and may also act to protect parents in the exercise of their rights under the Constitution. Miss Baker also referred the Court to the Judgment of Butler-Sloss L J in the English Court of Appeal in the case of **Re M (Abduction: Undertakings)** 1 FLR [1995] 1021. In her Judgment Butler-Sloss L J quoted with approval the previous decision of Waite L J in the Court of Appeal in **Re M (Abduction Non-Convention Country)** [1995] 1 FLR 1989 where the learned Lord Justice had said the following

*"Judges in one country are entitled and bound to assume that the Courts and welfare services of the other country will all take the same serious view of a failure to honour undertakings given to a Court (of any jurisdiction), failure to maintain financially, failure to afford contact, and so*

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*forth. It is to be assumed that the Courts in every country will not hesitate to intervene to enforce what ever Orders or to direct what ever enquiries are called for in the children's best interests. In that process every judge is bound to take into full and careful account what his or her colleagues have already ordered in antecedent proceedings in another jurisdiction."*

22. It appeared to me that the whole question of the giving and receiving of undertakings and their enforcement was one of very considerable importance in cases arising under the 1991 Act and the Hague Convention. As had been stressed both by the Supreme Court and by the English Court of Appeal the use of undertakings to cover an interim period could be of great practical advantage. Its use, however, depended on there being legal procedures for the recognition and enforcement of undertakings in the Courts of the country to which the child was returned.

23. Accordingly, I accepted the submission of Counsel for the mother and requested the assistance of the Central Authority for Ireland in making enquiries of the Italian Central Authority. On 10th May, 1998 Senior Counsel for the Central Authority for Ireland appeared before me and most helpfully expressed the willingness of the Central Authority to carry out all necessary enquiries. I therefore made an Order directing the Central Authority for Ireland to take or cause to be taken all steps to obtain answers from the Central Authority for Italy to questions with regard to E. P. and to report to the Court on or before the 2nd day of July, 1998. The questions which were to be put by the Central Authority were agreed by Counsel and approved by the Court. As regards the matter of undertakings the questions were as follows:

1. When was the Irish High Court Order brought to the attention of the Italian Court? Which Italian Court was involved? When was the translated version of the Irish High Court Order dispatched to the relevant Italian Court?
2. What was done to enforce the obligations of the parties pursuant to undertakings given to the Irish High Court?
3. What procedures are available in Italian Law for the enforcement of undertakings given to a foreign Court?
4. Is there a procedure in Italian law for the requiring of undertakings by a party to proceedings? If so, what procedure is available for enforcement?

24. A number of other queries were raised in regard inter alia to the time scale of the Italian custody proceedings and the lack of access by the child to her mother, but I consider that these questions, and the replies to them, in essence deal with matters properly within the jurisdiction of the Italian Court.

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25. The matter was listed before me again on the 2nd July, 1998, at which time the replies provided by the Italian Central Authority had become available. As far as the matter of undertakings was concerned the replies were as follows:

1. The Irish High Court Order was brought to the attention of the Italian Court on 23rd April, 1997. The Turin Civil and Criminal Court was involved and the translation of the above Order was forwarded to them on May 5th, 1997. It is hereby pointed out that the Italian Judge had granted the child's custody to the father's parents on 2nd October, 1996 and the latter had filed an application for return on 15th November, 1996 under the Hague Convention of 25th October, 1980.
2. & 3. In order to enforce the obligations of the parties pursuant to the Irish Order, the Italian Court has to recognise the legal enforceability of the Order in Italy. Such recognition (exequatur) must be applied for by legitimately concerned people.
4. The Italian procedural law provides for the parties to undertake obligations which are defined in the "conciliation report", which is self-executing (Article 185 Code of Civil Procedure).

26. It is not clear from these replies whether the common law concept that a party may give undertakings to the Court and that the failure to abide by such undertakings constitutes a contempt of Court is a normal part of the Italian legal code. It may well be that this also applies to many other non-common law jurisdictions. In the instant case an additional complication is that the content of the Order of this Court made on the 12th February, 1997 was not conveyed to the Italian Court until the 23rd April, 1997 and even then not translated until the 5th May, 1997. The child E. had already been removed from the custody of her mother on the 5th March, 1997. Clearly this Court cannot know the reasons for the lengthy delay in conveying the content of the Order of 12th February, 1997 to the Italian Court and of having it translated. Nor can it know whether any attempt was made by the legal representatives of the mother to have the Order legally enforced in Italy. The answer given by the Central Authority for Italy does not in fact make it clear whether it is the Order itself which may be recognised as enforceable or whether the undertakings as apart from the Order may be recognised as enforceable. Unfortunately it appears to me that the situation is now such that there is no useful further action that this Court can take in the matter.

27. As has already been stated, the giving of undertakings was accepted as being a useful and practical measure in abduction cases by the Supreme Court in *P -v- B* [1995] ILRM 201. In that case the mother had wrongfully removed the child from Spain to Ireland without notice to the father. During the trial the husband gave undertakings that if the child was returned to Spain he would provide weekly maintenance for the wife and the child and would lodge five months maintenance in the bank account in the wife's

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name. He also undertook to provide appropriate accommodation for her and the child. It will be seen that these undertakings were very similar in nature to those given by Mr P.. In her Judgment the learned Denham J (with whom Hamilton C J and Egan J concurred) stated (at page 210)

*"I am satisfied that undertakings may be given by a party to proceedings under the 1991 Act and accepted by the Court. They are entirely consistent with the 1991 Act and the Hague Convention; they are for the welfare of the child during the transition from one jurisdiction to another.*

*Undertakings may be of particular relevance to very young children.*

*Undertakings in this situation are compatible with the Act and international law which have as their objectives the desire to protect children internationally from the harmful effects of their wrongful removal from the country of their habitual residence and the establishment of procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.*

*Furthermore, undertakings which are for the welfare of the child are in accord with the constitutional protection of the child and its welfare."*

28. The learned Judge went on to say (at page 211)

*"I am satisfied that such undertakings are reasonable in the circumstances of this case to protect the young child on her return from this jurisdiction to the jurisdiction of the Spanish Courts.*

*These undertakings are for the benefit of the child who will remain in the care of her mother on returning to Spain from Ireland pending the Spanish Court hearing the case. In view of the fact that the child is still of tender years, and has at all times been in the care of the Respondent, who has indicated that she will return with the child to Spain, the undertakings ensure a secure situation for the child and mother on their return to Spain. The undertakings do not in any way usurp the jurisdiction of the Spanish Courts to determine the questions of custody and access."*

29. This Judgment of the Supreme Court is clear authority for the acceptance by this Court of undertakings of the type given by Mr P.. It does not, however, deal with the question of enforcement of the undertakings by the foreign Court.

30. That question has been discussed at some length by Singer J. In the English High Court case of **Re O (Child Abduction: Undertakings)** [1994] 2 FLR 349. In that case the habitual residence of the family was Greece. The mother left the father in 1993, when she took the children and flew to England. The father brought proceedings under the Hague Convention. He offered various undertakings with regard to the

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provision of accommodation and maintenance for the wife and children, pending the final decision of the Greek Court. It is of interest to note that in **Re O** the question of the length of time which might be taken by the Greek Courts to decide the issues concerning the children also arose. In the circumstances of the case the learned Judge attached considerable importance to the undertakings to be given by the husband and to whether in fact such undertakings would be upheld and enforced by the Greek Courts. During the course of the trial he sought the assistance of an amicus curiae, and he also, as I have done in the instant case, sought information and assistance from the Central Authorities in both jurisdictions pursuant to Article 7 of the Convention.

31. At page 366 of the Report the learned Singer J. states:

*"One aspect of the difficulties in this case is that upon the basis of the evidence before me no such mechanism as an undertaking has evolved in Greek jurisprudence. Thus it is not clear to see (upon the basis of the expert evidence which I have summarised) whether, if at all, effect might be given to the undertakings in Greece, should the father's performance of his undertakings prove less than reliable in that interim period before the appropriate Greek Court will be in a position to deal fairly between the parents with issues relating to the children, and thus be in a position to alleviate any hardship effecting them.*

*The question does therefore arise, in evaluating the effective undertakings which are properly regarded as a pre-requisite to return, how far it is permissible or may in some cases be obligatory for an English Court to investigate and to form what inevitably amounts to a value Judgment upon the legal procedures of a co-signatory to the Convention, for differences there will be inevitably be between one domestic jurisdiction and another."*

32. At page 367 the learned Judge continued:

*"The Hague Convention operates as between Contracting States. The provisions of the Convention set out in Schedule 1 to the Child Abduction and Custody Act, 1985 have effect given to them in English Law between the UK and other Contracting States for the time being specified in an Order in Counsel made under Section 2 of the Act. Greece became a Contracting State for that purpose and by that process with effect from 1st June, 1993.*

*Should the fact that the Convention thus applies mean that is not open in an appropriate case for the English Court to consider the domestic law of the requesting State, whereas in a non-Convention case it is clear that it may need to do so?*

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*This is a question of difficulty and delicacy, the resolution of which led me in December, 1993 to invite the assistance of an amicus curiae.... The essence of the submission of the amicus to me was that if a point seemingly requiring investigation of the domestic law of a Contracting State is raised by the party resisting return, and if the English Court considers that investigation necessary for the determination of an Article 13 defence to summary return, then such an investigation should and could properly take place, notwithstanding well recognised principles of comity.*

*In a case where the Court finds, as I have here, that an Article 13(b) grave risk would be established unless alleviated by undertakings offered or required, and honoured or enforced, it is reasonable.... for this Court to consider whether the undertakings will be adequately enforceable in the requesting State.*

*The best practice where such issues arise would be for general information concerning its available processes of enforcement of undertakings to be requested from the Central Authority of the home State pursuant to the provisions of Article 7(e), and consistent with the relaxation upon the reception of evidence as the foreign law which Article 14 provides. However if, as here, sufficient information cannot be derived from that source then it may well be necessary to direct the parties to file expert evidence in the more conventional manner.*

*If in relation to any particular Contracting State that process revealed the absence of machinery adequate to give backing to undertakings the observance of which the English Court relied upon to relieve the children of risk of an intolerable situation, then it would be relevant to consider whether the parent proffering the undertakings genuinely intended to honour them."*

33. In summing up his discussion of the issues at the end of his Judgment the learned Singer J concluded (at page 372)

*"Mis-interpretation and mis-understanding of another country's system of law and their approach to the resolution of delicate questions, such as those which can arise under Article 13(b), can easily develop. That risk exists between any two States, but must be higher when their jurisprudence has developed down different paths, their language may not be shared, and their concepts may not even be readily translatable.*

*Article 7 requires Central Authorities to co-operate with each other and to promote co-operation amongst the competent authorities in the Contracting States. That can include (see Article 7(b)) taking appropriate measures to prevent further harm to the child or prejudice to interested*

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*parties by taking or causing to be taken provisional measures. That may be as apt in the requesting State to secure the welfare of a child when returned there as plainly it is in the requested State before an Order can be made for that return. Similarly under Article 7(c) measures to bring about an amicable resolution of the issues are encouraged, which undertakings or some other form of commitment intended to be binding in a proper case may promote rather than hinder. And under Article 7(i) the Central Authorities are to take all appropriate measures to keep each other informed with respect to the operation of this Convention and as far as possible to eliminate any obstacles to its application.*

*These provisions prompt me to volunteer the suggestion that there may be some scope for developing, probably on a bi-lateral basis at least to start with, communication and discussion between Central Authorities so that each may have the opportunity of explaining and, it may be, justifying the approach their domestic Courts take to issues which commonly arise in Convention cases. Such an issue may well be these Courts use of undertakings designed to smooth the speedy passage home and to the door of the proper Court of children who should never have been taken from its jurisdiction. By such discussions and the exchange of views and information it may be that comity would be strengthened, and an understanding achieved that neither country wishes to cause any offence to the Courts of the other, nor to seek to interfere with or to influence what that Court then does.*

*Moreover, it may well be that if such opportunity for the exchange of views does assist to promote co-operation, it should be possible in an appropriate case for the Central Authority of the requested State to liaise with its counterpart in the requesting State to put in place measures agreed by the parties or reasonably required as a proper pre-condition of return."*

34. In the context of the instant case I find the discussion of the issue of undertakings contained in **Re O** both helpful and enlightening and I would readily concur with the conclusions of the learned Singer J in that case. Unfortunately, in the present case it seems to me that it is not open to this Court to make any effective Order at present. Nevertheless, Counsel for Mrs P. has specifically requested that I should set out, as far as possible, the factual and legal reasons which have precluded the making of any Order. I gladly accede to this request, and in doing so express the hope that the further communication and discussion between Central Authorities on these issues will take place as suggested in **Re O** , and that such discussions will produce fruitful results in the interests of the welfare and protection of children.

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**In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991, and in the matter of K.T.M. and H.L.M., infants: T.M.M., Plaintiff, v M.D., Defendant, (Child Abduction: Article 13) [SC No 162 of 1999]**

The Supreme Court

8 December 1999

[2000] 1 IR 149

*Family law - Child abduction - Custody - Hague Convention - Grave risk - Interview with child - Undertakings - Whether reasonable grounds to hold that situation could not be met by undertakings - Whether evidence of grave risk - Whether interview of child by trial judge a reliance on interview in refusing return was inappropriate or in error - Hague Convention on the Civil Aspects of International Child Abduction 1980 art 13 - United Nations Convention on the Rights of the Child 1989 art 12 - Guardianship of Infants Act 1964 (No 7) - Child Abduction and Enforcement of Custody Orders Act 1991 (No 6)*

The Hague Convention on the Civil Aspects of International Child Abduction, 1980, was incorporated into the law of the State by the Child Abduction and Enforcement of Custody Orders Act, 1991.

Article 13 of the Convention provides:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

...

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." The plaintiff was the mother of two children, who were born in England and were habitually resident in England.

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The defendant was the children's maternal grandmother. The defendant lived near the plaintiff in England until she returned to Ireland in or about 1995. In 1997, the children were brought to Ireland by the defendant and their grandfather where they lived since that time.

The plaintiff instituted proceedings under Part II of the Child Abduction and Enforcement of Custody Orders Act, 1991, claiming, inter alia, an order directing the return of the children to the jurisdiction of the courts of England and Wales.

The High Court (McGuinness J) refused the orders sought by the plaintiff. The plaintiff appealed to the Supreme Court.

It was submitted on behalf of the plaintiff that the trial judge erred in refusing to return the infants to their country of habitual residence and that the refusal was unreasonable. Secondly, it was submitted that the trial judge erred in holding that there was a very real risk of physical and psychological harm to the children, that the risk could not be met by undertakings and that the plaintiff was still abusing alcohol. Thirdly, it was submitted that the trial judge's interview of one of the infants and the reliance on same in refusing to return the infants was inappropriate and was an error in law and in fact and that the use of unsworn evidence was erroneous in law and in fact in the circumstances of the case. Fourthly, it was submitted that the trial judge's use of the test of welfare of the child in relation to the proceedings was incorrect in law.

*Held* by the Supreme Court (Denham, Lynch and Barron JJ.), in dismissing the appeal, 1, that there was evidence before the trial judge which entitled her to conclude that there was a grave risk of an intolerable situation and, in so concluding, the trial judge had a discretion to refuse to return the infants under art. 13.

2. That, there was evidence upon which the trial judge could hold that the plaintiff was still abusing alcohol and in all the circumstances, there were reasonable grounds to hold that the situation could not be met by undertakings and that undertakings were inapplicable.

3. That it was appropriate and in accordance with the summary procedure for the trial judge to consider the social welfare reports exhibited with the affidavits with the consent of the parties despite their hearsay nature.

4. That art. 13, para. (b), of the Hague Convention, which refers to the grave risk of physical or psychological harm, was completely separate from the penultimate para. of art. 13, which authorised the refusal of an order for the return of a child by reference to the child's objection to being returned, and the penultimate para. ought not be interpreted as importing a requirement to satisfy para. (b) or to interpret the word "object" to mean something stronger than its literal meaning.

*S. v S. (Child Abduction) (Child's Views)* [1992] 2 F.L.R. 492 followed.

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5. That the trial judge's interview with the child was neither inappropriate nor an error of law and the trial judge did not err in relying upon the interview with the child.

6. That the interests of the child as envisaged under the Convention are not identical to the concept of the welfare of children under national legislation and the trial judge was entitled to consider the interests of the child as she did.

*Per curiam*: Proceedings under the Hague Convention were intended to be summary and completed in a speedy fashion and should be on a fast-track management process.

*Cases mentioned in this report:-*

*A.S. v P.S.* (Child Abduction) [1998] 2 IR 244.

*Re B.* (Abduction: Article 13 Defence) [1997] 2 F.L.R. 573.

*Re C.* (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 F.L.R. 478.

*D.C. v L.C.* (Unreported, High Court, Morris J, 13th January, 1995).

*Re K.* (Abduction: Psychological Harm) [1995] 2 F.L.R. 550.

*K. v K.* (Unreported, Supreme Court, 6th May, 1998).

*Re M.* (Abduction: Psychological Harm) [1997] 2 F.L.R. 690.

*N. v N.* (Abduction: Article 13 Defence) [1995] 1 F.L.R. 107.

*P. v B.* (No 2) (Child Abduction: Delay) [1999] 4 IR 240; [1999] 2 ILRM 401.

*S. v S.* (Child Abduction) (Child's Views) [1992] 2 F.L.R. 492.

*Appeal from The High Court .*

The facts are summarised in the headnote and are set out in full in the judgment of Denham J, *infra*.

By special summons dated the 11th March, 1998, the plaintiff claimed, *inter alia*:-

1. A declaration that the defendant wrongfully retained the infants named in the title from their place of habitual residence and into the jurisdiction of the courts of Ireland within the meaning of art. 3 of the Hague Convention on the Civil Aspects of International Abduction, 1980.
2. In the alternative, a declaration that the defendant wrongfully retained the said infants in the jurisdiction of the courts of Ireland within the meaning of art. 3 of the said Hague Convention.
3. An order, pursuant to Part II of the Child Abduction and Enforcement of Custody Orders Act, 1991, and art. 12 of the Hague Convention, for the return forthwith of the said infants

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to their place of habitual residence.

The matter was heard by the High Court (McGuinness J) on the 20th January, 1999, on foot of notice of motion dated the 13th March, 1998. In an ex tempore judgment, McGuinness J refused the plaintiff's claim.

The plaintiff appealed to the Supreme Court by notice of appeal dated the 30th July, 1999.

The appeal was heard by the Supreme Court (Denham, Lynch and Barron JJ.) on the 10th November, 1999.

**COUNSEL:**

Anne Dunne SC (with her Raghnaid O'Riordan) for the plaintiff.

Solicitors for the plaintiff: Kieran McCarthy & Co

Cormac Corrigan SC (with him Miriam O'Regan) for the defendant.

Solicitor for the defendant: Sean Cregan.

*Cur. adv. vult.*

**Denham J**

8th December, 1999

This is an appeal by the plaintiff against a decision of the High Court (McGuinness J) made on the 20th January, 1999, refusing to return the children to the place of their habitual residence. The plaintiff's application was made pursuant to the Child Abduction and Enforcement of Custody Orders Act, 1991, and the Hague Convention on the Civil Aspects of International Child Abduction, 1980, in regard to the abduction of the two children from the jurisdiction of England and Wales.

The plaintiff is the mother of the two children and the defendant is their maternal grandmother. K.T.M. was born on the 28th October, 1987, and H.L.M. was born on the 21st December, 1992. The children were brought to Ireland on the 23rd October, 1997, by the defendant and their grandfather and have resided continuously in this jurisdiction since then in the Cork area. Proceedings under the Hague Convention were issued by the plaintiff on the 11th March, 1998. The defendant swore an affidavit on the 25th March, 1998, and a supplementary affidavit on the 26th March, 1998. There was a gap in the proceedings. It was submitted that as a result of an assault on her by her partner the plaintiff sustained an injury in the month of May, 1998, and she was unable to deal with the proceedings for some considerable time. It appears that there was time at the end of March and during the whole of April within which the plaintiff could have responded prior to the assault alleged in May. However, the plaintiff swore an affidavit on the 27th October, 1998. A further affidavit was sworn by the defendant on the 9th November, 1998, and an affidavit of laws was sworn on the 4th November, 1998. Finally, there was a further

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affidavit sworn by the solicitor for the plaintiff, which exhibited an English social welfare report, on the 17th November, 1998.

The affidavits and exhibits were opened before the learned trial judge. It was acknowledged before her that both social welfare reports were hearsay and would be inadmissible according to the ordinary rules of evidence. However, it was agreed by counsel that the learned trial judge would read both social welfare reports. McGuinness J read the reports, relying on the consent of counsel and on art. 13 of the Hague Convention.

The learned trial judge spoke to the elder child. Of this McGuinness J stated at p. 3:-

"In addition, again pursuant to art. 13 of the Convention, I spoke to the older child, K, whom I considered to have sufficient maturity so that it was appropriate to take her views into account. I did not interview the child, H., because it appeared to me that she was too young to be interviewed by the court."

The facts of the case were found by the learned trial judge to include, at p. 3:-

"The plaintiff and her husband, G.M. were married on the 21st June, 1995, in a registry office in England, and they were divorced on the 28th May, 1997. They had had a long prior relationship, and it appears they may have been married in the Roman Catholic Church in or about 1986. They lived in England throughout their relationship and marriage. The children were born in England and until they were removed to Ireland have always been resident in England. Until in or about 1995, Mr & Mrs D., that is the defendant and her husband, also lived in England and the plaintiff's siblings, her sister J and brother P., and her sister K. all lived in England for a large part of the children's lives. The plaintiff lived across the road from the mother and father, Mr & Mrs D., in London. It is fully accepted that prior to the removal to this jurisdiction the habitual residence of the children was in England."

The learned trial judge found that the defendant and the children's grandfather, Mr & Mrs D., are Irish and that they had wished to return to reside in Ireland, which they did in 1995. As to the plaintiff, the learned trial judge stated at pp. 3 and 4:-

"From the social welfare report of Janet Martin of Lambeth Social Services, the plaintiff has a ten year history of alcohol abuse and periodic bouts of depression, and she also records that the children's father had a history of alcohol abuse and depression and was, at the time of the report, living in an alcohol recovery unit. On account of the alcohol abuse the plaintiff and both children spent long periods of time in the de facto custody and care of their grandparents, their married aunt K.D.A. and her husband. Their uncle P., their unmarried aunt JD., also cared for them and played a large part in their upbringing. Apparently when Mr & Mrs M. went on

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holidays to Egypt with the children, Miss D. accompanied them so as to help care for the children and make sure of their safety."

The learned trial judge found that the background history given by the defendant was borne out by the report of Janet Martin, the social welfare worker in England, who had stated that the infants remained with the extended family for three or four months at a time. The learned trial judge also noted the acknowledged violent abuse by Mr M., the father of the children, of the plaintiff. It was noted also that Mrs M. herself sets out that there was violence in her new relationship, which was one of the reasons for the delay in the proceedings.

As to the present position of the plaintiff's alcoholism, the learned trial judge said at p. 4:-

"1/4 it is acknowledged clearly by the social worker, Janet Martin, that Mrs M. has made considerable efforts to overcome her alcoholic problem, but I am somewhat doubtful as to how successful these efforts have been. This is to some extent also borne out by what the child K. herself says."

The learned trial judge found that the children's aunt, K.D.A., removed the children from the care of the plaintiff on the 4th October, 1997, and kept them for a period of two weeks. It appeared that she did this because the plaintiff had returned to drinking. Then on the 23rd October, 1997, the defendant removed the children to Ireland. A letter was sent to the plaintiff informing her that the children were being moved to Cork and that they would be living there with her mother (their grandmother, the defendant) and attending a named school in Cork. On the 28th October, 1997, the plaintiff gave authority to the Central Authority in England and Wales to seek the return of the children under the Hague Convention.

Before the High Court there were a number of defences argued, including (a) that there was no wrongful removal of the children; (b) that there was acquiescence by the plaintiff; and (c) that there was a defence under art. 13(b) of the Hague Convention. On (c), the third issue raised, the learned trial judge stated at pp. 9 and 11:-

"In this case, however, it is accepted that the mother was unable to care for her children over long periods of time during their whole lifetime, because of her alcoholism. It seems to me the social welfare report of Janet Martin is very guarded in regard to the prognosis of the plaintiff. It is not at all clear how far she has recovered from her alcoholism, and in some ways the small incident which occurred in this court might suggest a remaining lack of control.

The father of the children is no longer on the scene and clearly he is not a satisfactory alternative carer. It is accepted that he behaved violently towards his wife and that he too has severe drinking problems. The mother's new boyfriend, if he is still part of the relationship, seems to be an additional risk

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of violence. It seems to me that on the facts as shown in the affidavits, which are not fully denied, that there is a very real risk of physical and psychological harm which, in my view, cannot be met by undertakings, although of course I accept that the English courts would enforce undertakings, and there are no problems as might arise in other jurisdictions.

The children have been in Ireland for fifteen months, which I cannot ignore, and they are at school and doing very well. K. herself stressed to me that this was the longest time she had ever spent in any school and that she was extremely happy in the school that she is in. It is by no means certain that the English courts would give custody to the mother, in fact Mrs D. has proceedings in being in the English courts seeking custody of the children, and these proceedings have been adjourned generally with liberty to re-enter, but they can be re-entered or restored, as it says in English law.

If the children again come before the courts in England there is still a possibility that they would be returned to Ireland in the custody of their grandmother. This would cause even more disturbance than they have already suffered, and they have suffered quite enough disturbance in their young lives. If proceedings in regard to their custody take place in this jurisdiction, there is no threat to the mother in Irish law. Her position in Irish law if anything is even stronger than in English law because she has the constitutional right of custody, which must be to the forefront of any wardship proceedings. So that there is no question of her being discriminated against in proceedings in this jurisdiction.

Finally, I would turn to the views of K., herself. Counsel for the plaintiff drew my attention to p. 611 of Mr Shatter's 4th ed. of his book on Family Law where he deals with this question, and refers to cases which have come before the courts and there are a number where children have been interviewed. He states on p. 611:

"The child's return may also be refused if the child objects to being returned and 'is of an age and of a degree of maturity at which it is appropriate to take account of its views'. In *D.C. v v L.C.* (Unreported, High Court, 13th February, 1995) Morris J held that a child's objection to return to its country of origin can only be relied upon where the objection was advanced for 'mature and cogent reasons'."

The learned trial judge held, at pp. 11 and 12:-

"I think that it would be wrong for the court to rely only on K.'s opinion. She is quite a young child, though she did seem to me in conversation with her to be a highly intelligent child and quite a mature young lady for eleven years of age. Indeed, sadly some of her maturity can be due to the fact that she has led a somewhat difficult life in the past.

I have interviewed children on a number of occasions in regard to family matters, although it is not a practice that I would go in for very often. I am well aware of the danger that children may be coached in what they are to say to the court. This child was, I am certain, not

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coached. I am sure she was expressing her sincere opinion. I do not wish to go into all the details of what she said. I don't think it would be fair, but there are one or two things I feel I must convey in this judgment. Firstly, K. not merely objects to returning to England and to the custody of her mother, she exhibits a very real fear of so doing. I am convinced that this fear is sincerely held and not induced by any third party. She gave details of the cogent reasons for her fear. K. is very happy in Cork with her grandparents, and in particular she is happy at her school. As I say, she stresses it is the school in which she has been longest in her whole life. She tells me that she is even getting on quite well in catching up on the Irish language, which of course she did not learn in England. She appreciates and understands her present stability and she fears to lose it.

Finally, some concerns were expressed by the social welfare worker in Cork, Miss. O'Neill, and were mentioned in court in regard to the children having nightmares and sleep-walking. I had some concerns about this and I asked K. about the frequency and nature of her nightmares. She told me that they were decreasing but that she was still walking or talking in her sleep. I asked her about the nature of the nightmares and sadly she told me that they were nightmares of her mother coming to get her, and drunkenness and the other aspects of her earlier life. She found it hard to control her tears at the prospect of returning to her former situation in England."

The learned trial judge came to the conclusion, at pp. 12 and 13:-

"Given the entire background to this case, together with the feelings expressed by K., I cannot but conclude that there is a grave risk that a return to the English jurisdiction, which must, in the circumstances, mean a return to the custody of the plaintiff, poses a grave risk of physical and psychological harm to these children, and would place them in an intolerable situation. I also take into account both the child's objections and under art. 13, the social welfare report of Janet Martin. It is a sad situation and the mother's difficulties are very unfortunate but, as is always the case in this type of proceedings, it is the child's welfare which must be foremost in the court's mind.

I will therefore refuse the orders sought in the special summons. I understand from Miss O'Regan, counsel for the defendant, that wardship proceedings are being prepared. I am conscious that the present proceedings are summary proceedings and do not deal fully with all of the issues of custody, access and so on because it is important that these aspects should be dealt with in a full way with evidence from all sides. So I would urge Mr and Mrs D. to press ahead with wardship proceedings so that all of the evidence in regard to the welfare of these children can be brought before the court and a secure decision made as to their future."

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On this appeal it was not contested that the infants were wrongfully removed by the defendant from England on the 23rd October, 1997. Nor was the matter of any acquiescence by the plaintiff a significant feature of the submissions in this court. The appeal was argued by counsel for the plaintiff, Ms Anne Dunne SC, on the following grounds:-

1. It was contended on behalf of the plaintiff that the learned trial judge erred in law and in fact in refusing to return the children and each of them to their country of habitual residence and that the refusal was unreasonable where the learned trial judge deemed that such return meant a return to the custody of the plaintiff when, in fact, proceedings in England and Wales in relation to the custody of the children by their aunt were extant and upon the reliance by the learned trial judge upon future putative wardship proceedings to be brought by the defendant.
2. It was submitted on behalf of the plaintiff that the learned trial judge erred in fact in relying upon the plaintiff's distress in court as a matter to be taken into account when refusing the return of the children; in finding that there was very real risk of physical and psychological harm to the children; in holding without evidence or sufficient evidence before her that the plaintiff was still abusing alcohol and in holding that there was a very real risk of physical and psychological harm which could not be met by undertakings and in holding that undertakings were inapplicable to the facts of the situation.
3. It was submitted on behalf of the plaintiff that the interviewing of one of the said infants by the learned trial judge and her reliance on same to ground the refusal to return the children was inappropriate and was an error in law and in fact. It was further submitted that the use of unsworn evidence obtained in the absence of the legal representatives of the parties, in particular the plaintiff, where the subsistence of same was not revealed in front of the parties and in circumstances where there was no corroboratory evidence and which had such a prejudicial effect upon the plaintiff, was erroneous in law and in fact.
4. It was submitted on behalf of the plaintiff that the use by the trial judge of the test of welfare of the child in relation to the child abduction proceedings was incorrect in law.

Reference was made to case law by counsel for the plaintiff: *A.S. v P.S. (Child Abduction)* [1998] 2 IR 244; *K. v K.* (Unreported, Supreme Court, 6th May, 1998); *N. v N.* (Abduction: Article 13 Defence) [1995] 1 F.L.R. 107; *Re. C.* (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 F.L.R. 478; *Re. B.* (Abduction: Article 13 Defence) [1997] 2 F.L.R. 573; and *Re. K.* (Abduction: Psychological Harm) [1995] 2 F.L.R. 550.

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On the first ground argued by counsel for the plaintiff, that it was not any risk to return the children to the jurisdiction of England and Wales but that a risk might be in the return of the children to the plaintiff, I am satisfied that the plaintiff's submission fails. There was evidence before the High Court upon which the learned trial judge could determine that the return of the children to England would in fact be a return of the children to the plaintiff. Whereas their aunt has commenced proceedings before the courts in England and Wales seeking their custody, the plaintiff remains their parent with custody in England and Wales and any such return at this time would be to the plaintiff. This, of course, is not to suggest in any way that the courts of England and Wales would be incapable of protecting the children, it is merely that on the facts of the case, if they were returned, they would be returning to the custody of the plaintiff.

In relation to the second series of grounds submitted by counsel for the plaintiff, I am satisfied that it was appropriate for the learned trial judge to rely upon events which take place in the courtroom before the trial judge when considering whether or not to return children to a parent who is before the court. Thus, the learned trial judge was entitled to rely upon the plaintiff's conduct in court as one of the matters to be taken into account. Further, I am satisfied that in the circumstances of the case and art. 13 it was entirely appropriate to rely upon the social welfare reports exhibited with the affidavits which, with the consent of counsel (quite properly) were read and considered and accepted by the learned trial judge. Taking the evidence in the affidavits and the social welfare reports into consideration, there was evidence upon which the learned trial judge could find facts and hold that the plaintiff was still abusing alcohol and that in all the circumstances there were reasonable grounds to hold that the situation could not be met by undertakings and that undertakings were inapplicable.

The grave risk defence arises under art. 13 which states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The learned trial judge made a determination on the facts. There was evidence before her which entitled her to come to the conclusion as to grave risk which she did. Thus, the discretion for the court envisaged under art. 13 arose. The learned trial judge had evidence upon which she could find the facts she did and whereupon she could exercise the discretion in favour of refusing the application to return the children.

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In relation to the plaintiff's claim that it was inappropriate on behalf of the learned trial judge to consider the social welfare reports and to rely upon them as evidence, it is relevant to note the final para. of art. 13 which states:-

"In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

In relation to this article, the Explanatory Report on the Convention on the Civil Aspects of International Child Abduction by Elisa Perez-Vera states at para. 117:-

"1/4 the third para. contains a very different provision which is in fact procedural in nature and seeks on the one hand to compensate for the burden of proof placed on the person who opposes the return of the child, and on the other hand to increase the usefulness of information supplied by the authorities of the State of the child's habitual residence. Such information, emanating from either the Central Authority or any other competent authority, may be particularly valuable in allowing the requested authorities to determine the existence of those circumstances which underlie the exceptions contained in the first two paragraphs of this article."

Applying this article it was appropriate for the court to consider the social welfare reports exhibited together with the affidavits. This was especially so in this case as counsel consented to such a process. This is a summary procedure and it is entirely in accordance with such a process that such an approach be taken. Consequently, I uphold the approach of the learned trial judge on this matter.

On this appeal counsel for the plaintiff laid stress on the third ground. It was submitted that the interviewing by the learned trial judge of the elder child and the reliance on same to ground the refusal to return the children was an error in law and in fact.

Counsel for the defendant, Mr Cormac Corrigan SC, pointed out that there were no regulations providing how the courts should implement the Child Abduction and Enforcement of Custody Orders Act, 1991. He referred to the United Nations Convention on the Rights of the Child, 1989, art. 12, which states:-

"1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through

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a representative of an appropriate body, in a manner consistent with the procedural rules of national law."

Counsel for the defendant submitted that the learned trial judge was a very experienced judge in family law and that she had approached the interviewing of this child and the weighing of the evidence of the child in an entirely appropriate manner. He submitted that the judge cannot be faulted for her method of interviewing the child.

The penultimate para. of art. 13 of the Hague Convention states:-

"The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

The Explanatory Report on the Convention on the Civil Aspect of International Child Abduction by Elisa Perez-Vera in discussing arts. 13 and 20, ie the possible exceptions to the return of the child, states at para. 113:-

"In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions give judges a discretion - and does not impose upon them a duty - to refuse to return a child in certain circumstances."

In addition, it is stated at para. 30:-

"In addition, the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. In this way, the Convention gives children the possibility of interpreting their own interests. Of course, this provision could prove dangerous if it were applied by means of the direct questioning of young people who may admittedly have a clear grasp of the situation but who may also suffer serious psychological harm if they think they are being forced to choose between two parents. However, such a provision is absolutely necessary given the fact that the Convention applies, *ratione personae*, to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover, as regards this particular point, all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities."

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This aspect of art. 13 is a separate ground. The child's views alone are sufficient basis to refuse to return her. I agree with the approach in *S. v S. (Child Abduction) (Child's Views)* [1992] 2 F.L.R. 492, where it was determined that the part of art. 13 which relates to the child's objection to being returned is completely separate from para. (b) which referred to the grave risk of physical or psychological harm and that there is no reason to interpret that part of the article as importing a requirement to satisfy para. (b) or to interpret the word "object" to mean something stronger than its literal meaning. However, this is an area where the exercise of the discretion of the judge must be done with great care. I agree with the approach of Balcombe LJ., in *S. v S. (Child Abduction) (Child's Views)* where he stated at pp. 500 and 501:-

"(2) The establishment of the facts necessary to 'open the door' under article 13

(a) The questions whether:

(i) a child objects to being returned; and

(ii) has attained an age and degree of maturity at which it is appropriate to take account of its views;

are questions of fact which are peculiarly within the province of the trial judge. Miss Scotland submitted that the child's views should not be sought, either by the court welfare officer or the judge, until the evidence of the parents has been completed. We know of no justification for this submission. She also asked us to lay down guidelines for the procedure to be adopted in ascertaining the child's views and degree of maturity. We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Convention is primarily designed to secure a speedy return of the child to the country from which it has been abducted.

(b) It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

(c) Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we. In this connection it is material to note that art. 12 of the U.N. Convention on the Rights of the Child 1/4 provides as follows 1/4

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(d) In our judgment, no criticism can be made of the decision by Ewbank J, to ascertain C.'s views, nor of the procedure which he adopted for that purpose. There was evidence which entitled him to find that C. objected to being returned to France and that she had attained an age and degree of maturity at which it was appropriate to take account of her views. Those are findings with which this court should not interfere."

The learned trial judge had a discretion. It was entirely appropriate for the trial judge to have interviewed the elder child. The method by which she interviewed the child, whilst not exclusionary of other appropriate methods, was not inappropriate. Nor was it an error of law. Nor was the learned trial judge in error in relying, as she did, upon the interview with the child. The Convention is quite clear on its face that a child who objects to being returned and who has attained an age and degree of maturity is entitled to have his or her view taken into account. The trial judge addressed specifically the age and maturity of the child and her views. Consequently, the trial judge was entitled to rely upon the child's view as she did. It was entirely appropriate that the trial judge did so in such a way as to make it quite clear that the child's view accorded with other determinations which she had made in this case so as to protect the child's long-term psychology. Whilst it is a separate ground, a decision not to return a child to the country of its habitual residence is a decision of the court and care should be taken, as here, that it is not, nor does it appear to be, the decision of the child.

The fourth and final ground of the appeal by the plaintiff related to the test of the welfare of the child in relation to abduction proceedings as being incorrect in law. Counsel for the defendant, Mr Cormac Corrigan SC, submitted that the trial judge did not deal with the welfare of the children in the context of a custody dispute. He submitted that there is authority that the interests of the children are paramount. He referred to the preamble of the Convention and *P. v B. (No 2) (Child Abduction: Delay)* [1999] 4. IR 240. He also referred to *Re M. (Abduction: Psychological Harm)* [1997] 2 F.L.R. 690. He submitted that all these cases state that the interest of the child is paramount. He argued that it is appropriate and permissible to take into account such evidence as establishing the interest of the child within the context of art. 13 of the Convention. He accepted that the broad sweep of evidence relevant to the welfare of the child, for example under the Guardianship of Infants Act, 1964, would be impermissible. But, he submitted, the learned trial judge considered the welfare of the child in the context of art. 13(b), and that that is permissible.

It was quite clear that the Convention does not require the court to consider the welfare of the child in the same way as is required under the Guardianship of Infants Act, 1964, and other child related legislation in Ireland. Indeed such plenary hearings are contrary to the summary procedure envisaged under the Convention. Nor is the issue of any balancing between the care under the abductor or under the person from whom the child was abducted a factor in the Convention. The Convention envisages

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summary proceedings to return infants to the place of their habitual residence unless the exceptional circumstances under the Convention arise. However, it was equally clear that the Convention does enable the court to look at the interests of the child. In the explanatory report by Elisa Perez-Vera on the Convention it is stated at para. 116:-

"The exceptions contained in [article 13(b)] deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this sub-paragraph. Each of the terms used in this provision is the result of a fragile compromise reached during the deliberations of the Special Commission and has been kept unaltered. Thus it cannot be inferred, a contrario, from the rejection during the Fourteenth Session of proposals favouring the inclusion of an express provision stating that this exception could not be invoked if the return of the child might harm its economic or educational prospects, that the exceptions are to receive a wide interpretation."

Consequently, the learned trial judge was entitled to consider the interests of the child as she did. The interests of the child as envisaged under the Convention are not identical to the concept of the welfare of children under national legislation.

*Delay*

It is with concern that once again I note that in a child abduction case there has been considerable delay in processing the application. Proceedings under the Hague Convention are intended to be summary and completed in a speedy fashion. This is the type of case which should be on a fast-track management process.

*Conclusion*

For the reasons set out in this judgment I would dismiss the plaintiff's appeal on all grounds.

**Lynch J** I agree.

**Barron J** I also agree.

**T. v. O.**

**Judgment Title:** T. -v- O.

**Neutral Citation:** [2007] IEHC 326

**High Court Record Number:** 2007 22 HLC

**Date of Delivery:** 10 September 2007

**Court:** High Court

**Composition of Court:** McKechnie J.

**Judgment by:** McKechnie J.

**Status of Judgment:** Approved

**Neutral Citation Number [2007] IEHC 326**

**THE HIGH COURT  
FAMILY LAW**

**[2007] 22 HLC**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY  
ORDERS ACT 1991  
AND IN MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF  
INTERNATIONAL CHILD ABDUCTION DONE AT THE HAGUE ON 25TH OCTOBER 1980  
AND IN THE MATTER OF COUNCIL REGULATION NO. 2201/2003 (EC)  
AND IN THE MATTER OF S.A.T. (A MINOR) AND R.G.T. (A MINOR):  
BETWEEN**

**G.T.**

**APPLICANT**

**AND**

**K.A.O.**

**RESPONDENT**

**AND**

**THE ATTORNEY GENERAL**

**NOTICE PARTY**

**JUDGMENT delivered by Mr. Justice William M. McKechnie on 10th day of September, 2007.**

**Introduction**

**I.** Just over three years into their relationship, almost the entirety of which was spent living like man and wife and as part of a *de facto* family unit, the respondent mother, in January 2007, took the twin boys identified in the title of the within proceedings, from this jurisdiction to her parents place of residence in England. She did so without the knowledge, consent or approval of their natural father, the applicant herein. At some point in time thereafter she made a decision not to return to the family home in the Leinster region. The father instituted proceedings in both the courts of Ireland and the courts of England. In the latter jurisdiction, he sought a return of his children under both the Hague Convention and Council Regulation, No. 2201/2003 (EC). These proceedings stand adjourned pending this Court's decision on

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whether or not the removal or retention of the children in England is “wrongful” within the meaning of article 3 of the Convention and/or article 2 of the Regulation. The resolution of this matter would be entirely straightforward if the parties had been married to each other. However they were not. Accordingly the answer to the question depends in part on what rights, if any, an unmarried father has in respect of his children in this jurisdiction.

**2.** The applicant, who is an Irish citizen, is by profession a teacher and is presently studying for a PhD. The respondent is both an Irish and British citizen and has had her principle career in the Civil Service. She is also a professional singer. By a previous marriage she has one son J. who is now about nine years of age. In late 2003 she first met the applicant and their friendship quickly developed into a full relationship. This occurred in January, 2004 at a time when the applicant was teacher/ training in Wales. Soon after meeting they agreed to set up home, get engaged and get married, rear children and function as a family unit. Some time in February of that year the respondent became pregnant. They remained in Wales cohabitating with each other between January, 2004 and July of that year. In or about that time they moved to the Isle of Man where the applicant had obtained a teaching post for the academic year 2004 – 2005. The twins were born in that jurisdiction on 13th October, 2004. Details of their respective births were recorded, as required by Manx Law, under the Civil Registration Act, 1984. Their birth certificates show the applicant as their father with each certificate being signed by both mother and father. The children have dual citizenship being both Irish and British. In July, 2005 all five as a unit, moved to this jurisdiction where in Dublin on 12th August, the applicant and respondent got engaged. They lived together at two different addresses in this jurisdiction until 2nd January, 2007, when, as previously stated, the mother took the children to England where they presently remain.

**3.** On 12th February, 2007 Mr. G.T. instituted proceedings, in fact three sets of proceedings, under the Guardianship of Infants Act, 1964 (the Act of 1964) as amended. All applications issued simultaneously and had a first return date of 9th March. One application was made under s. 6A of that Act, as inserted by s. 12 of the Status of Childrens Act, 1987 (the Act of 1987) wherein he sought to be appointed guardian of his children. In the second application he sought joint custody under s. 11 (1) of the Act of 1964 and in the third sought directions, again under s. 11, with regard to access. On the return date the presiding District Court judge raised doubts about his jurisdiction to deal with the issues and adjourned each application to the 13th April. As it happened the matters were further adjourned until 4th May, when the local District Court made an order adjourning all three applications generally with liberty to re-enter (i.e. liberty to apply).

Whilst I do not have the precise reasons as to why this course of action was adopted by the learned judge, it most probably resulted from his jurisdictional concerns as well as from being informed of the applicant’s intention to pursue a return of his children through the English courts.

**4.** In any event High Court proceedings issued in the Courts of England and Wales, under I assume, both the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25th October, 1980 (“The Hague Convention” or “The Convention”) and Council Regulation No. 2201/2003 (EC) (“The Brussels II Regulation (R)” or “The Regulation”). On 2nd July, 2007, the English High Court adjourned the proceedings with a request that an *inter partes* application would be made expeditiously to the High Court in Ireland, seeking a determination from that court as to whether or not the removal and/or retention of the children in England is wrongful within the meaning of article 3 of the Convention and/or article 2 of the Regulation. This request, which no doubt was made under article 15 of the Hague Convention and perhaps also under article 15 of the Regulation was acted upon by the issue of a family law special summons made returnable for 25th July, 2007. On 31st July a detailed pre-trial order was made, giving directions as to what pleadings should be filed and by what date. Submissions were provided for and in accordance with Order 60 Rule 2 of the Rules of the Superior Courts the Attorney General was joined as a notice party. A trial date of the 29th August which was suitable to the parties was

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assigned to the case. On that occasion both the applicant and respondent were professionally represented by solicitor and senior counsel as was the Attorney General. All parties made submissions and judgment was reserved at the end of the three day hearing. It is that judgment which this Court now gives.

5. In accordance with regular practice the procedure adopted in this case followed that which is appropriate to a special summons whereby the evidence is outlined by way of sworn affidavit. Both parties were however given permission to serve a notice of intention to cross examine on the respective affidavits sworn by each of them. Having effectively heard the entire case including the substantive submissions of all three parties I enquired if either the applicant or the respondent wished to pursue this notice of intention to cross examine. The applicant's counsel was satisfied to rest the evidence on affidavit but the respondent sought to cross examine Mr. G.T. on one specific area, namely the grounds for his sworn belief that his two children and their mother were still habitually resident in this jurisdiction up to, at the earliest, about the 13th April, 2007. I so agreed and that cross examination was conducted and concluded.

6. Counsel on behalf of the respondent then, rather unusually, sought to call her own client to give oral testimony after the applicant again declined a further offer to cross examine her. A simple reiteration of her affidavit evidence was not what was intended. Rather counsel wished to elicit from Ms. O. new or fresh evidence not heretofore scoped, even informally, in her affidavit. In the face of strong opposition I refused to permit this unusual event to take place. I did so because:-

- (a) of the lateness of the application,
- (b) of the fact that she had been on explicit notice of the applicant's averment on this point, since 16th July, 2007,
- (c) of the several opportunities afforded to her to file, and/or to file any further replying, affidavits as she was advised and saw fit to so do,
- (d) of the probable fact that an adjournment would have been required, thereby jeopardising the attainment of a specific objective of the Convention and of the Regulation, namely the speedy resolution of the matter in issue, and finally
- (e) of the injustice and lack of fairness which would have resulted.

Consequently, subject to the cross examination of Mr. G.T., the facts of this case are to be ascertained from the affidavits only together with the exhibits therein referred to.

7. Without oral evidence it is of course impossible to make any final determination as to where both the truth and accuracy lay, relative to the controversial issues between the parties and if this Court was deciding on the respective merits of those issues, this course of action would have had to be undertaken. This Court is not however in that position and for what I have to decide, it is unnecessary to reach any definite conclusion on many of the disputed matters. Therefore I am totally satisfied that wide ranging cross examination was not required in this case.

8. As stated above the jurisdiction of this Court seems to have been invoked under article 15 of the Hague Convention and accordingly its function is quite narrow and strict. What is sought is a decision whether or not the removal or retention of the children is "wrongful" within the meaning of article 3 of the Convention and article 2 of the Regulation. This court is therefore not the court before which the Hague Convention proceedings or the Regulation proceedings stand. That court is the High Court of England and Wales. I am therefore not concerned with the application of the Convention or of the Regulation "*per se*" and should not and indeed cannot make any order about the return, (or not) of the children. Moreover several articles of the Convention such as articles 12, 13 and 20 are of no relevance to this Court. In essence this is not the requested State. Accordingly my sole concern is to answer the questions posed.

These comments equally apply to the Regulations and to the comparable articles thereof.

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9. Technically speaking the relief sought in the Special Summons is a Declaration pursuant to s. 15 of the Child Abduction and Enforcement of Custody Orders Act, 1991, as amended by Regulation 8(d) of the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112 of 2005) that the removal of the children from the State or the retention of the children outside the State is “wrongful” within the meaning of article 3 of the Convention and or article 2 of the Regulation. During the course of the debate some discussion took place about the relationship between the Convention and the Regulation and whether as between Member States the latter has now superseded the Convention. See the amendment to the original s. 15 of the Act of 1991, as inserted by article 8(d) of S.I. 112/2005, and article 60 of the Regulation. Whilst I will address these matters later in this judgment it is my intention to consider the issues under both pieces of legislation and to give an answer to each of the questions posed. In so doing it will become immediately apparent that when treating the issues in this manner there will be a good deal of overlapping material common to both codes. Firstly the Hague Convention application.

**10. The Hague Convention:**

In 1991 the Oireachtas passed the Child Abduction and Enforcement of Custody Orders Act, 1991, for the purposes *inter alia* of giving to the Hague Convention the force of law in this State. In the Preamble the signatories to the Convention declare that “the interests of children are of paramount importance in matters relating to their custody” and that the intention of the Convention is to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence”. Article 1 specifies the objects of the Convention as being

“(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State”.

11. Articles 3, 4 and 5 of the Convention read as follows:-

article 3

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

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

article 5

For the purposes of this Convention:

(a) ‘rights of custody’ shall include rights relating to the care of the person of the child, and, in particular, the right to determine the child’s place of residence

(b) ‘right of access’ shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”

For the reasons above given it is not necessary to set out any further articles of the Convention.

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**12.** As can therefore be seen a removal or retention of a child is considered “wrongful” where:-

- (a) it is in breach of ‘custody rights’, which rights
  - (b) are attributed to a person or institution or other body,
  - (c) arise under the law of the State where the child is habitually resident immediately before the removal or retention and
  - (d) at the relevant time were been actually exercised or would have been but for the removal or retention.
- Article 3 then gives, as an example, three sources from which such ‘rights of custody’ may arise. These are, by operation of law, by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of the State of habitual residence. Finally whilst ‘rights of custody’ are not defined they are stated to include rights “relating to the care of the person of the child and in particular the right to determine the child’s place of residence”. (article 5).

**13.** In order therefore to answer the question posed of this Court under the Hague Convention it is necessary to decide:-

- (a) the extent of the relationship between the applicant and the respondent and in particular the role which the former has played in the lives of his children,
- (b) the place of the children’s habitual residence in January, 2007 and, if Ireland, for how long thereafter did that remain the position,
- (c) whether rights of custody vested in any person, institution or other body within the law of the State of habitual residence immediately before the childrens removal or retention,
- (d) whether those rights were in fact being exercised or would have been exercised but for the childrens removal or retention, and
- (e) whether there was a breach of such rights.

**The Relationship Between the Parties:-**

**14.** With regard to this matter, in respect of which the contents of para. 2 above are relevant, both parties have made mutually uncomplimentary and indeed hostile attacks on each other. They allege and counter allege that one has provided more goods and services to, and earned and contributed more money, for the household than the other: that one worked both within and outside the home more regularly, frequently and intensely than the other, that one assumed more responsibility for, and adopted a more responsible attitude towards, the running of the household than the other, and that one looked after the children in some degree greater than the other. In some of these areas the conflicting evidence is acute whilst in others it much less so. Both parties concentrate on their respective reasons for their parting in January, 2007. Accusations in that regard are made, denied, responded to and repeated.

**15.** The houses in which they lived whilst in this jurisdiction, were described by the respondent as “the family home”, although she complained about the absence of her name on the title deeds. The applicant explains this by stating that on advice from a mortgage broker, he was told that his chances of obtaining a mortgage with an unmarried mother of three children named, on the application form, who had little or no financial information to support an earning capacity, would be greatly lessened than if he himself should apply. Whilst Ms. O. makes complaint of the applicant’s influential, domineering and controlling role over her, all of which is strongly denied it is clear to me from the affidavits that he had, and had demonstrated a commitment to a loving relationship which existed between them at least until the latter part of 2006.

**16.** With regard to the children the real dispute turns on an averment by Mr. G.T. that he was their primary carer. Their mother challenges this but fairly concedes that he did perform duties and did undertake parental responsibilities for their children. He undoubtedly was present at their birth and

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nurtured them at all times thereafter. It is not seriously disputed that most frequently he got the children up in the morning, including J. washed them, dressed them, fed them and took them to the school or to the crèche. He collected them most days. He organised his tutorial responsibilities in college so as to give him maximum flexibility to care for the children. Ms. O. played with her band frequently at the weekends and infrequently during the week. Not unnaturally therefore she may not have been available when otherwise she might have. She also worked fulltime outside the family home for about three months from mid September, 2006. Both parents became concerned about the developmental achievements of one of their children. This necessitated doctor and hospital visits in respect of which the respondent was decisively involved, signing as he did, a necessary consent form for an operative procedure which took place on his son in November, 2006. I do not believe that it could ever be said that he was absent from the children for any length of time. It is true that the respondent alleges that Mr. G.T. preferred one twin over the other and that on occasions he was unkind if not downright harsh with J. but all such allegations have been vehemently denied by him on affidavit.

17. There is some independent evidence supportive of Mr. G.T. The principal of a nearby school confirms that he enrolled both his children at the school for September, 2009. A local doctor, who was the family practitioner for about six months ending in May, 2006 when the family moved district, states that the applicant brought his children to him for their immunisation injections and that he actively sought referrals to deal with his son's hearing difficulty. The crèche in the locality where they lived confirmed that they liaised only with Mr. G.T. and that from August/September, 2006 to December of that year, he was the person who both dropped and called for his children on a daily basis. Whilst I appreciate that these events fall far short of being conclusive nevertheless they tend to confirm my strong view that the applicant acted very much like what he was, namely the father to two children and a person in *locum parentis* to J. I therefore have no hesitation in saying that he was very much involved with his children in all aspects of their development and upbringing and that this commenced at their birth and continued thereafter. Whilst I have little or no evidence of what arrangements were put in place after January, 2007 no point is taken under article 3(b) in respect of this period.

The above therefore constitute my findings on the applicant's role in his relationship with the respondent and their children. I will return later in the judgment to the issue as to whether that role confers on him any 'rights of custody', for Convention purposes.

**Habitual Residence**

18. The expression "habitual residence" which is not defined in either the Convention or the Regulation must be given its ordinary and natural meaning. It is not a term of art but a question of fact, and must be decided by reference to the individual circumstances of each case. It can be taken that if a person leaves Country A "... with a settled intention not to return to it but to take up long term residence in country B instead..." then such a person may be said to have ceased been habitually resident in country A. That person however cannot become habitually resident in country B in a single day an appreciable period of time and a settled intention will be necessary to enable him or her to do so. See in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562. See also McGuinness J. in *C.M. v. Delagacion de Malaga* [1999] 2 I.R. 363 and *Z.S.A. v. S.T.* (Unreported, High Court, Laffoy J., August, 1996). Given the age of the children in this case, their habitual residence after the 2nd January, 2007 will at all times be that of their mother. It is therefore a question of fact as to what their habitual residence was on the dates hereinafter mentioned.

The position under the Regulation is somewhat different in that "the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain that jurisdiction until the child has acquired a habitual residence in another Member State and ..." (article 10). Accordingly in a Regulation case, a child's habitual residence for jurisdictional purposes can only be

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displaced on the acquisition of a new or different habitual place of residence.

**19.** There is no dispute between the parties but that Ireland was the habitual place of residence of both the respondent and the children immediately prior the 2nd January, 2007. Indeed the request to this Court could only have been made on that basis. The issue under the Convention is at what point in time thereafter did Ireland cease to be their place of habitual residence. For this purpose, as I have said, the acquisition of a new habitual residence is not necessary.

At para. 18 of his grounding affidavit Mr. G.T. avers that the respondent only formed an intention of remaining in England on or about or shortly prior to the 13th day of April, 2007, on which date that intention was, albeit inferentially, first communicated to him. That averment has never been denied by the respondent and she has not sought in her replying affidavit to take issue with it or otherwise to specify an alternative date when she formed a settled intention of not returning to this jurisdiction. Indeed I am satisfied from the evidence that this averment of the applicant is largely correct and I am not dissuaded from this view by the later alternative date of the 2nd May, 2007, which has also been suggested by him.

**20.** This conclusion is supported by the following. At para. 43 of her replying affidavit, Ms. O. states that her intention of going to England on 2nd January, 2007, was for the purposes of getting “some respite”. This is confirmed by a letter written by her solicitor dated 16th January in which it is expressly acknowledged that the respondent “is currently temporarily in the United Kingdom”. In addition that letter gives her address as being the family home in Ireland. In that letter she also offers to meet the applicant either in England or in Ireland with a mediator. By way of response dated 25th January Mr. D.P. solicitor, indicates that whilst difficulties had arisen in the relationship, his client the applicant, did not view the circumstances as constituting an irretrievable breakdown of that relationship. On his behalf it was further stated that he would commit himself fully to “retrieve matters” provided Ms. O. returned to this jurisdiction. On 31st January, Messrs A.B. and Company Solicitors, on behalf of the respondent, repeats her offer of returning to this jurisdiction so as to meet with a mediator. On 6th February the same firm of solicitors refers to the efforts made by the respondent to contact the applicant indicating that she had telephoned him each day for the previous six weeks. Moreover they stated that if Mr. G.T. wished to deal directly with the respondent their firm would cease to act for Ms. O. Once again an offer was made of returning to this jurisdiction to meet with the applicant and a mediator so as “to try and seek a resolution to this matter”. It is further stated that “she (the respondent) is not under any circumstances trying to keep your client’s children from him ... (the applicant)” In my view these events are consistent only with Ms. O’s absence from the family home being temporary and that throughout this period she had not formed any settled intention to cease to have her habitual residence in this jurisdiction.

**21.** During the cross examination of Mr. G.T. the position became a little clearer. It was suggested to him that the respondent had prior to the 2nd January cancelled her Irish children’s allowance, gave up her job and soon after arriving in England enrolled her son J. in a local school. These steps it was suggested must have meant to him that Ms. O. had ceased being habitually resident in this jurisdiction either in January or at the latest early February, 2007. If that was indeed true, which the applicant strongly denies, it remains rather surprising why the respondent herself did not so aver on affidavit. In any event the correspondence up to at least the 6th February, 2007, belies this suggestion. Moreover Mr. G.T. said that up to approximately the middle of April the respondent was constantly in communication with him, mostly by text, indicating that she loved him and enquiring from him as to whether he loved her. Questions were frequently raised about whether she could have the house if she returned. Given these communications as well as the matters mentioned above, the applicant firmly believes and so states that at all times Ms. O. had every intention of returning to this jurisdiction so that matters could be resolved between them and their family unit reunited. It was only when, on or about the 13th of April when the Irish proceedings were before the District Court, that he began to realise the respondent may not return. He got this feeling

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or impression when she or someone on her behalf indicated that she would not consent to the applicant being appointed guardian of the children. In fact it would appear that her objections in this regard were communicated by way of letter dated 4th April. In any event Mr. G.T. remained insistent that the first formal notification which he had of Ms. O's intention to remain in England, came only on 2nd May during the course of the English proceedings. Whether that be correct or not, I am quite satisfied that up to then there is nothing in the evidence, in the correspondence or in court documents which gave the impression, that the applicant did not intend to return to this jurisdiction. In fact her conduct as above described is quite inconsistent with the existence of any formed or declared intention of not so doing. Accordingly in these circumstances I am satisfied that she remained habitually resident in this jurisdiction up to at least the beginning of April, 2007. It therefore inevitably follows that the habitual place of residence of the twin boys was also that of this jurisdiction until that time.

Indeed as will become clear later in this judgment the critical date in my view is earlier than April and is in fact the 9th day of March, 2007.

**Meaning of “Wrongful” and “Custody Rights”**

**22.** For a removal or retention to be “wrongful” and therefore unlawful, it must have been in breach of ‘custody rights’ under the laws of the state of habitual residence. A debate has been ongoing for some time as to what constitutes ‘rights of custody’ in this regard, particularly where the natural father has never married the natural mother. In 1990 both the Court of Appeal and the House of Lords in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562 gave judgments on this point. Although describing the way in which the child was removed from Australia by its natural mother as “reprehensible”, Donaldson L.J. in the lower court, at p. 570 of the report said “Since articles 3, 4 and 5 of the Convention are solely concerned with the rights of custody, i.e. rights to care, custody, control or guardianship, and with rights of access – the precise terminology does not matter in any of these categories – and since the father had no such rights, for my part, I do not consider that J.’s removal from Australia, reprehensible though it may have been in the way in which the mother achieved it, could constitute a wrongful removal within the meaning of the Convention”.

**23.** Lord Brandon in the House of Lords at p. 577 continued “I consider first the question whether the removal of J. from Australia to England by the mother was wrongful within the meaning of article 3 of the Convention. Having regard to the terms of article 3 the removal could only be wrongful if it was in breach of rights of custody attributed to, i.e. possessed by the father at the time when it took place. It seems to me however that since s. 35 of the Family Law Act 1975 – 1979, as amended of Western Australia gave the mother alone the custody and guardianship of J., and no order of a court to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J. of which the removal of J., by the mother could be a breach. It is no doubt true that, while the mother and father were living together with J. in their jointly owned home in Western Australia, the *de facto* custody of J. was exercised by them jointly. So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention”.

Accordingly article 3 was premised on established ‘rights of custody’, (the source or origin of which was not an issue in that case), and did not include what might be referred to as *de facto* or inchoate rights. In other words although the father acted as a responsible and caring father relative to all aspects of J.’s welfare, nevertheless because his rights were not established rights, his relationship with J. itself was not considered sufficient to confer on him ‘rights of custody’ within the meaning of the Convention.

**24.** A further significant decision on this issue was given by the Court of Appeal in *Re B (A Minor)*

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(*Abduction*) [1994] 2 F.L.R. 249. Again the facts of that particular case need not detain us though once more, in a dissenting judgment, Peter Gibson LJ described the activities of the mother as “abhorrent”. Having given a broad meaning to the word “custody” Waite L.J. for the majority said “The difficulty lies in fixing the limits of the concept of ‘rights’. Is it to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?”

The answer to that question must, in my judgment, depend upon the circumstances of each case. If before the child’s abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as ‘rights of custody’ within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who had assumed the role of a substitute parent in place of the legal guardian”.

**25.** As can therefore be seen whilst respecting the House of Lords decision in *Re J., (A Minor)* this Court of Appeal was nevertheless satisfied to hold that a person, who had no established rights, but who carried out duties and enjoyed privileges of a custodial or parental character, could, on a case by case basis, have rights which qualified as ‘rights of custody’ within the meaning of article 3. In short these rights have been referred to as inchoate rights. This therefore was a significant development as it undoubtedly made available, as a matter of principle, an additional category of persons who, depending on the individual circumstances of their relationship with the child, could be deemed to have ‘rights of custody’ for the purpose of the Convention. Apparently in *Re J. (A Minor)* (see para. 22 above), was distinguished on the basis that it was a case of “shared parenting” between the father and a grandmother in the absence of the natural mother. Peter Gibson LJ, with considerable regret, could not find a distinguishing feature between that case and *In Re J. (A Minor)* and accordingly held that the natural father did not have recognisable rights under the Convention.

**26.** There have been several other cases in the courts of England and Wales which have touched, to a greater or lesser extent, on this difficult concept of ‘custody rights’ relative to unmarried fathers for Convention purposes. It is not however necessary for this Court to refer in any detail to such cases. That is because the Supreme Court has considered this issue in depth in a case entitled *In the Matter of the Child Abduction and Enforcement of Custody Orders Act, 1991 and In the Matter of H.I. (A Minor): H.I. v. M.G.* [2000] 1 I.R. 110. It is sufficient to say on the facts of the case, that the petitioning natural father (who was not married to the mother) had no rights of custody under the laws of New York (place of habitual residence) either by operation of law, as he required a declaration of paternity which he had not obtained, or by virtue of an agreement having legal effect in that jurisdiction. In addition whilst there was in existence at the relevant time an order from the New York Court, that order did not require the mother to obtain either the consent of the father or the court’s approval for the removal from the jurisdiction of her child. Given that situation the Irish Court felt that at first glance there might be great difficulty in the father establishing that he was entitled to ‘rights of custody’ under New York law. In addressing that issue, the majority judgment of the court, as given by Keane J. as he then was, can be summarised as follows:-

- (a) As a general point since the Hague Convention has the force of law in this State only by reason of an Act of the Oireachtas, namely the Act of 1991, then its terms must be construed in accordance with “normal rules of statutory construction” and consequently,

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one must “ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context”. The Convention should however, if possible, be given a construction which accords with its expressed objectives.

(b) From the wording of article 3 potential ‘rights of custody’ can arise from sources other than the three specified in that article. The use of the phrase “... may arise in particular ...”, would suggest that the express wording does not constitute an exhaustive statement of the legal origin of such rights. This view is borne out by para. 67 of the explanatory report on the Convention by Madam Elisa Perez-Vera. The issue in the case was whether at the relevant time, the child’s removal was in breach of ‘rights of custody’ of the father or any other institution or body under the laws of New York.

(c) Even when a parent has no such rights but where court proceedings have been instituted by him, the removal of a child, whilst such proceedings are still pending, would, without lawful excuse, be wrongful, and

(d) The same position would apply where there was in existence a court order preventing the child’s removal without either the consent of the dispossessed parent or the approval of the court itself.

(e) In such circumstances the breach would not be that of the father’s rights but rather of the court’s rights as it had retained seisin of the case so as to determine issues of custody relative to the child, including either party’s right to decide where the child should live.

The Supreme Court then went on to consider questions of access, and whether the same should be dealt with under article 21 and not under article 3. A number of other issues were also discussed but none of these are of interest to us in the present case.

In summary therefore circumstances can arise where a removal would be wrongful as being in breach of ‘rights of custody’ vested in the court itself.

**27.** Having made these observations the court was still faced with the argument, first recognised in *Re B. (A Minor)* (see para. 24 above) that persons without established rights, but who preformed a custodial or parental role should be recognised as having ‘rights of custody’ within article 3 of the Convention. That argument was dealt with by Keane J. as follows at pp. 132-133: “It is going significantly further to say, however, that there exists, in addition, an undefined hinterland of ‘inchoate rights’ of custody not attributed in any sense by the law of the requesting state to the party asserting them or to the court itself, but regarded by the court of the requested state as been capable of protection under the terms of the Hague Convention. I am satisfied that the decision of the majority of the English Court of Appeal in *Re B. (A Minor) (Abduction)* [1994] 2 F.L.R. 249 to that effect should not be followed.” Keane J. then cited the case of *In Re O. (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702 as being illuminative of circumstances which in his view could surely never have been within the contemplation of the framers of the Convention. The learned judge in conclusion acknowledged that the rights of unmarried fathers under the Convention created considerable difficulty which difficulty however should properly be resolved through the machinery of Special Commissions in The Hague and not by court decision.

**28.** Barron J. gave a dissenting judgment and agreed with the majority view in *Re B. (A Minor)*, that the Hague Convention should not be confined to established rights. He approached the problem however in a different way to that of Waite LJ in *Re B. (A Minor)* The learned judge was of the view that such rights of custody did not have to be legal rights but rather had to be present rights, the basis of which could be recognised by the law of the state of habitual residence. In his view expressed at p. 140 of the judgment “The reality is that the Hague Convention is not concerned with legal rights under the law of habitual residence but with ‘rights’ which were actually being exercised and to which the courts of that state would not totally disregard as having no legal effect within that state”. He was also of the view that a passage from the judgment of Cazalet J., in *Re O. (Child Abduction:*

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*Custody Rights*) [1997] 2 F.L.R. 702, at 708 was correct in that: “This passage does not rely upon any subsequent confirmation or conferring of legal enforceable rights. In my view, it recognises what is at the heart of the Hague Convention which is the actual exercise of appropriate rights. It then also recognises that the agreement or arrangement under which such rights are exercised need not have the force of law only that it should not be prohibited: should not be contrary to law.” In the circumstances of case before him the learned judge would have held that the natural father had ‘rights of custody’ under the law of New York.

**29.** The case of *In the Matter of H.I. (A Minor): H.I. v. M.G.* [2000] 1 I.R. 110, is of importance to this Court for several reasons but in particular two. Firstly it confirms the proposition that ‘rights of custody’, within the meaning of article 3, may be vested in a court, and if the removal or retention of a child is in breach of the rights so vested, then that removal or retention is wrongful. Secondly, being a decision of the Supreme Court it means of course that I am bound by the majority judgment in its findings, which as a matter of generality can be described as indicating that inchoate rights are not recognisable for Convention purposes. The first matter which I therefore propose to address is whether or not ‘rights of custody’ vested in the District Court and if so on what date or by what event.

**‘Rights of Custody’ vested in the District Court:**

**30.** It will be recalled that the applicant instituted three sets of proceedings all dated 12th day of February, 2007, in which he sought from the District Court, under the Guardianship of Infants Act, 1964 as amended, rights of custody, of guardianship and of access. Those applications were served on some unspecified date but certainly prior to their first return in the District Court. That was the 9th of March. They were then adjourned to the 13th of April and onwards to the 2nd of May when for the reasons above set forth, they were adjourned generally with liberty to re-enter, meaning liberty to apply. As there is no evidence when the necessary documentation was served I cannot be doing any injustice to the respondent if I treat the date of service as coinciding with the first date upon which these applications appeared in the District Court and were moved before the presiding District Court judge. Accordingly I propose to proceed on the basis that the relevant date is the 9th March, 2007.

**31.** The principles of law enunciated by the Supreme Court in *In the Matter of H.I. (A Minor)*, when dealing with this concept of rights of custody vesting in the court, were of necessity and by the facts of that case, general in nature. However both the Court of Appeal and the House of Lords in a Convention case entitled in *Re H., (Child Abduction: Rights of Custody)*: [2000] 1 E.L.R. 201 (Court of Appeal) and [2000] 2 AC 291 (House of Lords) dealt more specifically with the issue. In that case the applicant and the respondent were respectively the unmarried father and mother of a child H., who was born on 3rd April, 1992. About three years later the parents separated and by agreement the father had irregular contact with the child. On the 14th March, 1996 he instituted proceedings in the District Court in Carrigaline, Co. Cork under the Guardianship of Infants Act, 1964, which proceedings were compromised by a consent order which was to remain in place for a specified period of time. After the father’s release from prison in 1997 he had sporadic access to the child for a further period thereafter. On 30th March, 1998 he again applied to the District Court at Carrigaline and made applications under s. 11(1) and s. 11(4) of the Act of 1964, as amended. wherein he sought the court’s directions regarding the custody of the infant and his right of access to her. The application first appeared before the District Court on 14th May, 1998. Again a temporary compromise was reached between the parents and access took place in accordance with that agreement, although the same was not supported by any drawn order of the court. On 23rd June, 1998 the mother without the consent or knowledge of the father went to live in England with their daughter. He then instituted proceedings seeking a return of the child under the provisions of the Hague Convention. Both the Court of Appeal and the House of Lords agreed with him. However what is of interest is their Lordship’s treatment of when and in what circumstances a court can have rights of custody for the purposes of article 3. The speech for the House was given by Lord Mackay who declared

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unequivocally the existence in principle of such a concept. In support he cited the objects of the Convention and referred to previous decision in English and from Ireland, (In the Matter of *H.I. v. M.G.* [2000] 1 I.R. 110), Canada (*Thompson v. Thompson* [1994] 3 SCR 551) and New Zealand (*In Re S. (Abduction: Children Separate Representation)* [1997] 1 F.L.R. 486, all of which either confirmed or recognised this concept. For rights to so vest there must according to Lord Mackay, be an application to the court which raises matters of custody and secondly the jurisdiction of the court only becomes established when the originating document has been served on all relevant parties. Once invoked the court becomes definitively seized of the application and thereafter its jurisdiction continues until such time as the proceedings have been disposed of or determined. The learned law lord then analyses the facts of the case before him and concludes that the District Court in Carrigaline was so seized as and from ‘the date of service’ of the applications made under the Act of 1964. Their lordships decided on the date of service by adopting, as being the relevant date, the applicable provisions of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters “(The Judgments Convention)”. Indeed unless prior to service it was necessary to lodge the initiating document in court, it is difficult to see how the date could be earlier than the date of service but in some circumstances the date might arguably be later, namely the date upon which the application is lodged in court. For the purposes of the instant case however it matters not, as on the facts I am treating the first return date as being the date of service.

Lord Mackay made two further observations which should be noted, namely that such ‘rights of custody’ had to have been exercised immediately before the removal or retention and secondly that although the rights were court’s rights, nevertheless an individual like a natural father could rely upon them to initiate an article 12 application. Whilst their Lordship’s decision in *H.* is not binding upon me, I respectfully adopt it.

**32.** That being so I have no doubt whatsoever but that the proceedings instituted in the local District Court by the applicant in this case involved matters of “custody” within the meaning of articles 3 and 5 of the Convention as by claiming guardianship and custody he was seeking to have a controlling influence in every aspect of his children’s welfare, including the right to physically care for them and the right to decide where they live. Accordingly by a date not later than the 9th day of March, 2007 the court had rights of custody with regard to the twin boys. It matters not whether the presiding judge had doubts about his jurisdiction which in any event was never even tested either by way of evidence or by full submissions. The court as and from that date exercised these rights by reason of the pending application in which it reserved for itself the decision on the children’s welfare and where, when and with whom they would reside. Given this Court’s finding that the children were habitually resident in this jurisdiction up to a date in April, 2007 it must follow that in the absence of lawful excuse, their retention on and after the 9th of March was wrongful within the meaning of article 3 of the Convention. As there is no such excuse the retention is wrongful.

**33.** Counsel on behalf of the respondent relies upon the Court of Appeal’s judgment, of Thorpe LJ in the *H. (A Minor)* case, as refuting this conclusion. In the rather limited report of his Lordship’s judgment which I have, the learned judge is quoted as saying the following:-

“(i). An application that in substance sought only the determination, definition or quantification of contact could not vest rights of custody in the court (see *Re V-B(minors)(abduction: rights of custody)* [1999] 2 F.C.R. 371.

(ii). An application that in its substance seeks the court’s determination on issues of physical care, parental responsibility (to use our current statutory terminology), or the jurisdiction in which the responsibility of physical care will be exercised may or may not suffice to vest rights of custody in the court of issue. To determine whether rights are vested it is necessary to scrutinise the nature of the application, the merits of the

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application and the applicant's commitment to its pursuit. Obviously the mere issue of a hopeless or insincere application vests nothing in the court which at that stage is no more than the tool of the applicant's manipulation. Equally the issue of an arguably meritorious application may be offset if thereafter by inactivity or inconsistent statement the applicant belies his seeming intention to obtain judgment. In the end each case must call for its own evaluation always giving the article its wide and purposive construction."

**34.** It is suggested on behalf of Ms. O. that by not pursuing the District Court proceedings to finality Mr. G.T. has been guilty of the type of inactivity or insincerity referred to by Thorpe LJ. I cannot accept this submission. It seems to me that the proceedings in the District Court were adjourned generally with liberty to re-enter essentially for two main reasons which I have outlined at para. 3 above. Secondly there could be no question of the applicant's inactivity given the institution of the proceedings in the English Courts and given the institution of the current proceedings pending before me. Thirdly from my conclusions on the evidence, the question of insincerity or lack of commitment simply do not arise and finally there is no doubt but that in the District Court proceedings the father sought not simply contact or visitation rights but rights of guardianship and custody. I therefore do not believe that any of the qualifications contained in that Court of Appeal's judgment apply to this case. In any event in dealing with the merits of this submission I should say that I do so without prejudice to the appropriateness or relevance of raising these type of questions on an article 12 application and even less so on the narrower application presently before me: See Lord Mackay on this point at p. 305 the House of Lords Report in the same case.

The conclusion which I would therefore make on this issue is that the retention of the boys in England after the 9th March, 2007, is in breach of the rights of custody vested in the court and accordingly wrongful within the meaning of article 3.

**'Rights of Custody' vested in the Applicant?**

**35.** As is clear from article 3, the 'rights of custody' therein referred to, may vest in a person, institution or other body and may have as their foundation any one or more of the three sources of origin therein mentioned. In the above part of this judgment I have dealt with the custody rights vested in the court. Whilst that might be sufficient to dispose of the Convention point it is not determinative of the Regulation issue, which in its own right must also be addressed. In addition I feel that I should also deal with the other submissions made, as this matter may be reviewed elsewhere and secondly out of due deference to the efforts of counsel in preparing such submissions.

The applicant's, primary submission under the Hague Convention, is that he himself has such 'rights of custody' and that the same have arisen either by operation of law or by an agreement between himself and the respondent; which agreement should be recognised as having legal effect in the law of this State. The third potential source of such rights, in article 3 of the Convention namely judicial or administrative decision does not arise in this case and it is not suggested that any further or other source is in play. Furthermore it is asserted that the establishment of these 'rights of custody' has been significantly aided by the enactment of the European Convention on Human Rights Act, 2003, ("The Act of 2003"). When the relevant rule of law is considered in the context of that Act, it is claimed that the proposition now advanced currently represents what the present law is, in this jurisdiction.

**36.** Prior to the Act of 2003 coming into force, the European Convention on Human Rights did not form part of our domestic law due to Ireland's position as a dualist state. Apart from the fact that the Irish Government was obliged to accept the rulings of the European Court of Human Rights in judgments affecting it, the Convention did not place any direct obligations on any organ of the Irish State to take any particular action; although that is not to say that the Irish courts or the legislature did not take notice of the jurisprudence of the European Court. As part of the Good Friday Agreement, the Houses of the

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Oireachtas enacted the Act of 2003, which gave effect to the Convention in Irish law but did so through the model of indirect or interpretative incorporation at a sub-constitutional level. One of the key provisions of the Act, is section 2 which reads

“2(1) In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

Section 3(1) places an obligation on every organ of the State, subject to any statutory provision or rule of law, to perform its function in a manner so compatible with such obligations. Section 3(2) allows that a person who has suffered injury, loss or damage as a result of a contravention of subsection (1) may seek and be awarded damages. Section 4 of the Act provides that judicial notice is taken of the Convention provisions and when applying this interpretative method of incorporation, the Irish Courts must take account *inter alia* of the judgments of the European Court of Human Rights. In addition under s. 5 of the Act both the High Court and the Supreme Court may grant what is termed “declaration of incompatibility”, in circumstances where it is not possible for the court to interpret and apply a statutory provision or a rule of law in a manner which complies with Ireland’s obligation under the Convention. However such a declaration does not affect the legal validity of the provision or rule of law in question, and any rectifying measure is for the legislature and not the courts. Accordingly as can be seen this Court should apply the provisions of the Convention, in the interpretation and application of any statutory provision or rule of law, insofar as it is possible to so do in accordance with the established canon’s of construction and interpretation.

**37.** At para. 47 of this judgment, when dealing with the application under The Brussels II Regulation (R), I set out both the constitutional and legal position of an unmarried father relative to his child as it presently exists in this jurisdiction. These principles in my view remain valid for Convention purposes notwithstanding the enactment of the Act of 2003. I say this because, as the rights of an unmarried father, including those under the Hague Convention, have been established by the Supreme Court with near certainty, it would not be possible in my opinion to enlarge or re-interpret these rights in accordance with s. 2 of the Act of 2003, so as to reflect any influence which the European Convention on Human Rights may have on such rights. In the absence therefore of making a declaration of incompatibility, (on the appropriateness of which I make no comment whatsoever) which is not sought, I do not believe that the meaning of ‘rights of custody’ in this jurisdiction can be disturbed by any reliance on the European Convention on Human Rights. To do so would be doing violence to the established principles of law which have been set out by the Supreme Court.

The principles so outlined however, do not reflect any changes which may be necessary for the purposes of article 2 of the Regulation, which since the 1st of March, 2005 has been binding in its entirety and directly applicable in each Member State except Denmark. Nor do they take any account of the fact that the interpretative construction of the Regulation, one having generalised effect in all Member States bar one, may be different to that applicable to the Hague Convention which in this jurisdiction has the force of law only by a domestic Act of the Oireachtas. Consequently, it seems to me, that for the purposes of the submission made under article 3 of the Convention, the rights of a natural father, as set out at para. 47, *infra* are the only rights which such a father has.

**38.** Given this conclusion, it appears to me that the submissions made on behalf of the father (see para. 35) cannot succeed on either of the grounds advanced by him. There is no doubt but that, in accordance with the pre-Regulation law of this State, the natural father does not possess any of the rights which have been defined or described as ‘rights of custody’ within the meaning of article 3. In particular ‘inchoate rights’ are not recognised for this purpose. In the absence therefore of a court order granting him such rights, he does not obtain the same by operation of law. Consequently, I have to reject his assertion in this

regard.

39. Equally so with regard to the suggestion that such rights may have arisen by reason of an agreement between himself and the children's mother which has legal effect in this State. It is conceded on his behalf that to succeed on this point this Court would have to follow the line of reasoning adopted in the minority judgment of Barron J. in *The matter of H.I., (A Minor); H.I. v. M.G.*, [2000] 1 I.R. 110. This I cannot do. Even though I am satisfied beyond question, that from the time of their birth the respondent willingly permitted the applicant to fulfil the role of a caring parent with regard to their children, and that he deferred some of his studies to so do, nevertheless such rights are in the nature of 'inchoate rights' which the majority of the Supreme Court has rejected in that case. If I was not bound by authority on this issue, I would be considerably interested in the submission. However I am. I cannot therefore agree, that any such agreement could, without an intervening order of the court, be enforceable under the laws of this State. Being so bound, I must therefore also reject this submission.

**The Brussels II Regulation (R):**

40. The second question posed to this Court is whether the removal or retention of the children is "wrongful" within the meaning of article 2(11) of the Regulation. The following articles are relevant for the purposes of this issue:

"Article 2.

Definitions

1. ...

2. ...

3. ...

4. the term 'judgment' shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. ...

6. ...

7. the term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child which are given to a natural legal person by judgment, by operation of law or by agreement having legal effect. The term shall include rights of custody and rights of access;

8. ...

9. the term 'rights of custody' shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. ...

11. the term 'wrongful removal or retention' shall mean a child's removal or retention where:-

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

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised either jointly or alone or would have been so exercised but for the

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removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.”

“Article 8

General jurisdiction

1. The courts of Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
2. ...”

“Article 10

Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention, or ...”

“Article 11

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention ... in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.
2. When applying articles 12 and 13 of the Hague Convention it shall be ensured that the child is given the opportunity to be heard ...
3. ...
4. A court cannot refuse to return a child on the basis of article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.
5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.
6. If a court has issued an order on non-return pursuant to article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents ...
7. ...
8. Notwithstanding a judgment of non-return pursuant to article 13 of the 1980 Hague Convention, ...”

“Article 16

Seising of a Court

1. A court shall be deemed to be seised:
  - (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have the service effected on the respondent; or

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(b) if the document has to be served before being lodged with the court, at the time when it was received by the authority responsible for service ... .”

**Relationship between the Regulation and the Convention:**

**41.** The relationship between the Regulation and the Convention is of some importance. Recital 17 of the Regulation expressly states that “In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention ... would continue to apply as complemented by the provisions of this Regulation, in particular article 11”. Recital 18 makes provision for the transmission of information where a court has decided not to return a child under article 13 of the Convention. It is clear, from these recitals, therefore which are available as an aid to interpretation, that the Regulation did not repeal the Convention, or disapply its provisions as between Member States (save Denmark) nor did it create a substitute or alternative code in place of the Convention. Whilst it is undoubtedly true to say that under article 60, the Regulation takes precedence over the Convention insofar as it concerns “matters governed by this Regulation”, this provision in my view must be viewed in the overall context of both the Convention and Regulation applying. It seems to me that the Regulation takes precedence only where there is a direct conflict between any of its provisions and the Convention or where the Regulation deals more extensively with rights or obligations than the Convention. In all other respects the Regulation and the Convention should be seen as complementing each other with the provisions of both instruments being read and applied in a consistent and harmonious way if that is at all possible. On the question of child abduction, it seems to me that the objectives of both the Convention and the Regulation are the same and that the latter was adopted so as to buttress the Convention where that was thought necessary. I therefore believe that their relationship must be looked at in this light.

**42.** This view is well supported by authority including the Commission’s Practice Guide for the application of the new Brussels II Regulation, which has its updated version as of 1st June, 2005. At page 28, for example, it is stated:

“The Hague Convention... which has been ratified by all Member States, will continue to apply in the relations between Member States. However, the 1980 Hague Convention is supplemented by certain provisions of the Regulation which come into play in cases of child abduction between Member States.”

At page 32 when dealing with the prompt return of a child, it is said:

“When a court of a Member State receives a request for the return of a child pursuant to the 1980 Hague Convention it shall apply the rules of the Convention as complemented by article 11(1) to (5) of the Regulation. To this end the judge may find it useful to consult the relevant case law under this Convention ...”

Accordingly, I am entirely satisfied that the method of approach above identified should be followed even where the States concerned are all Member States.

**43.** I do not believe that s. 15 of the Act of 1991, which was inserted by article 8(d) of S.I. 112/2005, is in any way in conflict with this. The revised section reads:

“15(1) The Court may, on an application made for the purposes of article 15 of the Hague Convention by any person appearing to the Court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the State was –

(a) in the case of a removal to or retention in a Member State, a wrongful removal or retention within the meaning of article 2 of the Council Regulation, or

(b) in any case wrongful within the meaning of article 3 of the Hague Convention.”

If there was any conflict then of the course the Regulation would prevail. But in my view, this provision does not prohibit a court from giving a decision under article 3 of the Convention as

well as making a determination under article 2 of the Regulation.

**Regulation definition of Wrongful Removal/Retention:**

44. There are two main differences in wording between the Convention definition of “wrongful removal or retention” and the Regulation definition of that term. The first is that the Convention identifies the legal persons in whom ‘rights of custody’ may accrue, whereas article 2(11) of the Regulation is silent in that regard. Secondly, the Convention gives as one of its examples of the possible sources of custody rights, ‘a judicial or administrative decision’, whereas the Regulation in that regard speaks of a “judgment”. The question therefore arises as to whether this difference in phraseology makes any material difference in the respective definitions of that term. In my view, it does not. When one looks at the definition of the term “judgment”, which is contained in article 2(4) of the Regulation, it is quite clear that its meaning may include a judicial or administrative decision. In any event, this particular source of rights is not being relied upon in this case. Secondly, when ‘rights of custody’ exist they must vest in some person or body. If the intention of the Regulation was to restrict those in whom such rights could vest, it would surely have said so. In my view, the absence of identifying by name, the “possessor” of such rights, may mean if anything, that the Regulation in this regard is broader and more comprehensive than the Convention. It is most definitely in my opinion not more restrictive and no such interpretation should be given to it. This view is borne out by the opening lines of article 11 of the Regulation which reads “Where a person, institution or other body having rights of custody applies ...”. This is precisely the same language as used in article 3(a) of the Convention. Accordingly, I am satisfied that this difference in wording between the Convention and the Regulation is not material for either article 3 or article 2 purposes.

45. This means that, like the Convention, ‘rights of custody’ can vest *inter alia* in a court or in a natural father. Given my conclusion under the Hague Convention on the court having ‘rights of custody’, it must logically follow that the retention is also wrongful under article 2(11) of the Regulation. Indeed, that conclusion is reinforced in two specific ways by the Regulation itself. Firstly, unlike the Convention, the courts of habitual residence retain their jurisdiction until such time as the child has acquired a new habitual residence in another Member State (article 10). And secondly, article 16 expressly confirms that a court is seised of the proceedings when the instituting document is lodged with that court. Accordingly, as I have already found that the children were habitually resident in Ireland on 9th March, 2007, it must inevitably follow that no new place of habitual residence could have been acquired by the respondent or the children prior to that date. It therefore seems to me, that a similar conclusion must be reached on this point as it has been under the Convention.

**‘Rights of Custody’ vested in the Father under the Regulation:**

46. The applicant’s principal submission under this heading is that when considering whether or not he has ‘rights of custody’ under the Regulation, this Court must disregard all existing jurisprudence under the Hague Convention as well as the case law on the domestic rights of natural fathers: (see paras. 47 – 50 inclusive). This submission is based on the fact that unlike the Convention, the Regulation is a European instrument and must be applied with uniformity and a single meaning throughout all Member States (save Denmark). It is also essential to construe a person’s ‘rights of custody’ under article 2 in a manner consistent with the European Convention on Human Rights. Under article 8 of that Convention it is asserted that the applicant’s relationship with the respondent and their children constitute family life within the meaning of that article, and accordingly thereunder, due respect must be afforded to both the applicant and his children. Article 14 of the European Convention on Human Rights is also relevant in this regard. This being the situation and notwithstanding the primacy which Irish law, both constitutionally and legally, affords to a family unit based on marriage, it is claimed that this Court under the Regulation, must reach a conclusion different to that which the Supreme Court did under the Convention. It is therefore forcibly asserted by counsel that there is but one answer to this Regulation

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question.

47. At present the following principles would appear to represent what the domestic law is, in the context of the issue under consideration:

1(a). A family based on the institution of marriage is the only family entity recognised by and entitled to the protection of Article 41 (The Family) and Article 42 (Education) of Bunreacht na hÉireann, the Irish Constitution. No other family unit, howsoever established, functioning or stable, is within these provisions. This is held by the Supreme Court in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567.

(b) It follows that neither the natural mother or the natural father have any rights to their non-marital child under either of these Articles.

2. An unmarried mother has however, certain natural rights *inter alia* to the custody and care of her child under Article 40.3 (Personal Rights) of the Constitution. This right is considered a number of cases including: *The State (Nicolaou); G. v. An Bord Uchtála* [1980] I.R. 32, *M. O.C. v. Sacred Heart Adoption Society* [1996] 1. ILRM 297 and *Northern Area Health Board v. An Bord Uchtála* [2002] 4 I.R. 252.

3. An unmarried natural father has no such natural rights to his child which attract the protection of Article 40.3 of the Constitution or any other Article. See *In re S.W., an Infant, J.K. v. V.W.* [1990] 2 I.R. 437 and *W.O.R. v. E.H.* [1996] 2 I.R. 248.

4. A non-marital child enjoys the same constitutional rights as children born within marriage. This was held in *G. v. An Bord Uchtála (supra)*. Discrimination between such children born within marriage was abolished by the Status of Children Act, 1987, harmonising Irish law with the European Convention on Human Rights.

5. The mother and father of a child, who are married to each other, are the joint guardians of their child: (s. 6 (1) of the Guardianship of Infants Act, 1964). On the death of either, the survivor, if any, together with any other guardian appointed by the deceased, shall be the guardians of such a child (s. 6(2)).

These and all other statutory rights are in addition to the constitutional rights above identified.

6. Both male and female adopters, under an adoption order, are treated as having exactly the same statutory rights as those above mentioned.

7. Every such guardian shall be the guardian of both the person and the estate of the child unless the deed of appointment or will or order of the court provide otherwise. Subject to any such restriction, every guardian shall be entitled, as against all other persons save for his joint or co-guardian, to the custody of his child (s.10(2)(a) of the Act of 1964).

8. An unmarried mother of a child, whilst living, is entitled to the sole guardianship of her child unless there is in existence a s. 6A order, or the mother and father have made a statutory declaration conferring upon the latter the status of guardian, or any other person has been so appointed under the Act of 1964. This is so provided in s. 6(4) of the Act of 1964 as inserted by s. 11 of the Status of Children Act 1987.

9. Under s. 6A of the Act of 1964, as inserted by s. 12 of the Act of 1987, the court, on application by the natural father, may appoint him to be the guardian of the child.

10. Any guardian may apply to the court for its directions on any question affecting the welfare of the child. This is provided by s. 11(1) of the Act of 1964. "Welfare" includes the religious, moral, intellectual, physical and social welfare of the child. Section 11(4) of the Act of 1964, as inserted by s. 13 of the Act of 1987 provides a natural unmarried father who is not a guardian may use this section to seek directions with regard to the custody and/or rights of access to his child.

11. Section 3 of the Act of 1964 states that in any proceedings before the court, touching upon *inter alia* the custody, guardianship, upbringing of a child, the welfare of that child

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shall be the first and paramount consideration.

12. For the purposes of article 3 of the Hague Convention, an unmarried father, by reason only of that status, does not have any ‘rights of custody’ in respect of his child. ‘Inchoate Rights’ are not recognised in this jurisdiction as decided by the Supreme Court *H.I. v. M.G.* [2000] 1 I.R. 110.

**48.** From the relevant case law, which has established and confirmed the position of an unmarried father in this jurisdiction, there are two decisions in particular, to which I wish to refer. The first is *In the matter of S.W., an infant, J.K. v. V.W.* [1990] 2 I.R. 437. In 1987 s. 12 of the Status of Children Act was enacted which added a new s. 6A to the Guardianship of Infants Act, 1964. The section reads:

“6A-(1) Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant.”

When hearing a Circuit Court appeal, Barron J., then a High Court judge, held that the legal effect of this section was that a natural father had a right to be guardian, which right however was defeasible, if he was not a fit person for that role and/or if the welfare of the child so demanded it. Because of its importance the learned judge stated a case for the opinion of the Supreme Court, whose majority judgment was given by Finlay C.J. The court held that the section did not confer any natural or constitutional rights on an unmarried father, although they “may be rights of interest or concern arising from the blood link between the father and child”. (emphasis added). It also held that the High Court was incorrect in that s. 6A did not, even *prima facie*, confer guardianship rights on an unmarried father. What the Act of 1964 as amended, did, was to grant to him the ‘right to apply’ for guardianship but no more. At p. 447 the Chief Justice then said:

“This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed.”

McCarthy J. gave a dissenting judgment, essentially agreeing with the High Court and in the process at p. 449 of the report said:

“I find it difficult to accept that a loving father, who with the mother wanted to have a child, has no natural right to the society of the child.”

**49.** In *W.O.R. v E.H.*, [1996] 2 I.R. 248, the same issue arose and counsel on behalf of the unmarried father made virtually an identical submission to that which had been made in the *S.W. (an infant)* case. In the Supreme Court, counsel argued that his client had both constitutional and statutory rights in respect of his child. The majority of that court reaffirmed the view taken in the *S.W. (an infant)* case. In addition, however, the Supreme Court characterised the phrase used by Finlay C.J., in *S.W.*, which is emphasised at

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para. 48 above, as being no more than a factor or factors which a court would take into account when dealing with the welfare of a child. Once more there was a strong dissenting judgment from Barrington J., who expressed a view that the reasoning in *The State (Nicolaou)* (see para. 47 (1)(a) *supra*) was fundamentally flawed and therefore was wrongly decided. The learned judge reached this conclusion, essentially on the basis of the court's failure to distinguish between natural fathers who had no interest in their children and those who devoted their entire existence to them. At p. 280 of the report he said that,

“The logical flaw in the argument [conferring no rights] can more easily be seen if one reduces it to a syllogism:-

1. Many natural fathers show no interest in their offspring and the State may properly exclude them from all say in their children's welfare.
2. The prosecutor is a natural father.
3. Therefore the State may properly exclude him from all say in his child's welfare.”

He felt that such a generalised approach could not be correct much less just.

**50.** For my part I am of course bound by the majority judgments of the Supreme Court in both of the above cases. Without in any way questioning that principle, I would like however to make some very brief observations, of my own, on the issue. The vast majority of people might readily agree, that parenthood, by itself and no more, may give very little rights, if any, to an unmarried father. Examples of circumstances at this end of the spectrum are numerous and very definitely include, casual encounters, rape, incest, etc. But what about a person who fathers a child within an established relationship, and who from the moment of birth, nurtures, protects and safeguards his child; sometimes to a standard which all too frequently married fathers fail to live up to. As Murphy J. said in *O.R.* [1996] 2 I.R. 248 at 286:

“For better or for worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted.”

Indeed could I say that even in the past decade, such relationships have multiplied and continued to so do. In any event, where the above described circumstances exist, could anyone possibly object to what Finlay C.J. said in *S.W.* where he described such a situation as “... bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed”? If as I respectfully suggest, that our society, which is governed by a Constitution which declares the principles of prudence, justice, charity and human dignity, might in its maturity so agree, should there not be a greater recognition of the type of father whom I mention? At a minimum should there not be a means readily available so that such a father, whose children had been removed without forewarning or knowledge, can assert and vindicate his rights? I strongly believe that there should be.

**51.** Even however within the existing structure, is it altogether accurate to say that a caring and devoted father has only, in respect of his child, a right to apply? Putting it in that way, gives the impression that the court seised, is the creator of whatever rights the father might ultimately obtain on an application under the Act of 1964. That, in my view, is not correct. Any rights which a father may have are founded upon, and evolve and develop by reason of, his relationship with his child, and if it exists, with the child's mother. Such rights are alive and present before any court hearing and do not merely spring into existence on the application date. In my view, what the court does is to declare such rights rather than even confirming them, much less creating them. It declares them essentially, or in substantial part, on evidence which is largely historical with of course a prospective and future element to govern an orderly and beneficial relationship into the future. Admittedly it is the declaration which presently renders such rights lawfully enforceable, but as a matter of fact their existence has been created prior to any court hearing. I therefore feel that a father fulfilling a parenting role of the type which I have described, should be recognised as having rights referable to his child, even if such rights are contingent on a declaratory order. Whether such rights may also be described, as ‘inchoate rights’ is a matter of choice and is largely inconsequential unless put in context.

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Could I add that the institution of marriage may have little, if anything, to fear from this approach. In fact one might strongly argue that Society, as a 'general rule' should encourage non marital fathers to act responsibly towards their children and of course towards their children's mother. To acknowledge only a 'right to apply' could hardly be seen as dynamic in this regard.

**The European Convention of Human Rights in European Law:**

**52.** Notwithstanding the status of an unmarried father within Irish domestic law it is submitted that in considering whether or not there is a wrongful retention or removal under the regulation, this court must arrive at a construction compatible with E.U. law, which takes due cognisance of the European Convention on Human Rights. In particular articles 8 and 14.

**“Article 8**

Rights to respect for private and family life

1. Everyone has the right to respect for his private and family, his home and his correspondence.  
2. There shall be no interference by a public authority which the exercise of this right accepts such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

**53.** Article 14 secures to all persons an entitlement to enjoy the rights of the Convention “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. It is claimed that the unit which was established in early 2004 and which continued to January, 2007, constitutes a “family” within the meaning of article 8 of the European Court on Human Rights and as a result both the applicant and his children are entitled to the protection thereof. This it is submitted can be achieved by giving a purposeful interpretation to the phrase ‘rights of custody’ in article 2 of the Regulation.

**54.** The European Court of Human Rights addressed article 8 in *Johnston and Others v. Ireland*, [1987] 9 EHRR 203. At para. 55 the court said:

“The principles which emerge from the Court’s case law on Article 8 include the following:-

- (a) By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family.
- (b) Article 8 applies to the “family life” of the ‘illegitimate’ family as well as to that of the ‘legitimate’ family,
- (c) Although the essential object of Article 8 is to protect the individual against arbitrary interference by a public authority, there may in addition be positive obligations inherent in an effective ‘respect’ for family life. However, especially as far as those positive obligations are concerned, the notion of ‘respect’ is not clear cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case. Accordingly, this is an area in which the contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

In the present case it is clear that the applicants, the first and second of whom have lived together for some fifteen years, constitute a “family” for the purpose of Article 8. There are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage.”

**55.** In *Keegan v. Ireland* [1994] 18 EHRR 342 the court said very much the same thing. In paras 44 and 45 it stated as follows:-

“44. The Court recalls that the notion of the ‘family’ in this provision is

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not confined solely to marriage based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso jure* part of that 'family' unit, from the moment of his birth and by the very fact of it. Thus there exists between the child and his parents a bond amounting to family life, even if at the time of his or her birth the parents are no longer cohabitating or if their relationship has then ended.

45. In the present case the relationship between the applicant and the child's mother lasted two years during one of which they cohabitated. Moreover the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time has thus the hallmark of family life for the purpose of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

And finally at para. 50 the court contained:-

"50. According to the principles set out by the Court in its caselaw where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment at birth the child's integration into his family. In this context reference may be made to the principles laid down in Article 7 of the United Nations Convention on the Rights of the Child... that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down."

**56.** One of the most recent cases from the court dealing with Article 8 is *Lebbink v. The Netherlands* (2005) 40 E.H.R.R. 18 at p. 417. The conclusions which it reached in that case can be summarised as follows:-

- (a) The views previously expressed that the notion of a "family" may include what has been referred to as a non-marital *de facto* family were reaffirmed,
- (b) A child born out of such a relationship is *ipso jure* part of that family unit,
- (c) Cohabitation is generally a requirement for the recognition of such a *de facto* relationship but exceptionally other factors may exist which demonstrate a sufficient commitment to create such a *de facto* family ties.
- (d) The existence or non-existence of "family life" for the purpose of article 8 is a question of fact "depending upon the real existence in practice of close personal ties".
- (e) In the instant case the father never sought to recognise his daughter and had never cohabitated with her and her mother.
- (f) The court rejected the view that mere biological kinship without more should be regarded as sufficient to come within article 8.
- (g) However the daughter in question was born from a genuine relationship between the applicant and her mother which lasted for about three years and ended only when the daughter was about seven months old.
- (h) Whilst the court noted that the father had not so cohabitated with both as a unit, he was nevertheless present at the child's birth and did visit her mother at specified regular intervals. In addition but quite sparingly, he babysat for his daughter and changed her nappy and finally he liaised with the mother about

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the child's impaired hearing.

(i) In such circumstances the court was satisfied that the father was entitled to protection under article 8.

**57.** When dealing with whether a non-marital relationship can be said to amount to family life, a number of factors may be relevant, including whether the couple lived together, the length of their relationship and how and by what means they demonstrated their commitment to each other. See *Kroon and Others v. The Netherlands* (1995) 19 E.H.R.R. 263. These must have existed in practice close personal ties between the parties. In my view there can be no doubt but that under article 8 of the European Court on Human Rights the applicant and the respondent through their relationship, which included co-habiting with each other for almost three years in a number of different jurisdictions, their engagement, and the birth of their boys who were conceived out of a loving commitment which each parent had for the other, constituted, at all relevant times a *de facto* family within the meaning of that article. As a result there exists "... between the child and his parents a bond amounting to family life ... [and] the Court further recalls that the immediate enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down ...". See para. 43 of the judgment of the European Court of Human Rights in *Elscholz v. Germany* (2002) 34 E.H.R.R. 1412. Accordingly it is beyond argument but that the applicant and his children are entitled to respect for their family life within the meaning of article 8.

**58.** In deciding whether or not there has been a breach of article 8, the European Court of Human Rights has on several occasions set out what the correct approach to this question is. In addition to protecting an individual against arbitrary action by a public authority, a State under the article may also have positive obligations which are inherent in having effective respect for family life. In this regard the State must strike a fair balance between the competing interests of an individual and of the community as a whole, and when so doing the State enjoys a margin of appreciation see *X, Y, and Z v. U.K.* [1997] 2 FLR 892. In *Marckx v. Belgium* (1979-80) 2 EHRR 330, the court said that a domestic system of law which regulates the ties between an unmarried mother and her child, must allow that unit to lead a normal family life. The court said at para. 31 "As envisaged by article 8, respect for family life implies, in particular ... the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. In this connection the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of article 8 without there being any cause to examine it under paragraph 2".

**59.** In *Re. W: Re. B: (Child Abduction: Unmarried Fathers)*: [1998] 2 FLR 146. Hale J., looked at article 8 and article 14 in the context of the Hague Convention The learned judge identified the key question before her as being "... whether our law is required automatically to afford completely equal parental responsibility and authority to the parents or whether the opportunities of developing their relationship given to the father by English law are a sufficient safeguard of their family life, having regard to the wide margin of appreciation which is recognised in this context ... The cases so far do not indicate that Contracting States are required to do this, so long as there are sufficient opportunities of developing the relationship between father and child. They all concern laws which are undoubtedly more defective than ours now is in this respect". On the facts of the case the judge concluded that there was no breach of article 8 and that the difference in treatment between unmarried fathers and married fathers in English law was not tantamount to discrimination under article 14, as it had an objective and reasonable basis of justification.

**60.** As can be seen the decision of Hale J. was reached on the basis that English law afforded an unmarried father a reasonable opportunity of developing a relationship with his child and as a result the statutory provisions in question were a sufficient safeguard of family life under article 8. This very statement however highlights the acute difficulty which an unmarried father faces in a child abduction

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case. At the outset let me immediately acknowledge, that notwithstanding the views expressed above, the policy of Irish domestic law and to some extent that of the European Court of Human Rights (see *B. v. U.K.* [2000] 1 FLR 1), is in general to allow for a distinction between the rights of a married father and those of an unmarried father with regard to their children. So much so that no case under the European Convention on Human Rights Convention has to date abolished all differences between both fathers. Such a view may be justified in the generality of a child's relationship with his parents. This discrimination however causes particular difficulty for the unmarried father especially in cases involving the Hague Convention or the Regulations. These difficulties, which are self evident and which have been acknowledged in this jurisdiction by the Supreme Court in *H.I. v. M.G.*, have not been addressed in the manner hoped for by Keane J. in that case at p. 133. Many might argue that in a purely domestic context the 'right to apply' under the Guardianship of Infants Act, 1964 may be considered as a sufficient vindication of the position of an unmarried father, particularly given the varying circumstances which may surround a child's conception, as well as the wide variation in the frequency of contact and quality of the father and child relationship.

**61.** However for an unmarried father access to a court with competent jurisdiction, which incidentally is a constitutionally protected right in Ireland, is an essential pre-condition to obtaining any legally enforceable influence over his child. Unless such an application is made when the child is habitually resident in this jurisdiction the opportunity therefor maybe lost forever. In many of the Convention cases the father has been denied any relief because of this. Moreover such a process simply encourages mothers to behave in "abhorrent" and "reprehensible" ways, as is demonstrated in some of the cases above mentioned. As the Convention was not designed to apply to what has been described as *ex post facto* orders or "chasing orders" (see *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551, this problem of fleeing mothers who furtively remove children from their place of habitual residence, without the knowledge consent or approval of their father, is most acute. If this anomaly could be addressed it would go a significant way in removing the objection which presently exists in this regard. In my view it would also very much strengthen the enforceability of the objects of both the Convention and the Regulation. Is there any way therefore that this Court can, without usurping its function, lawfully address this issue, for in truth that is where the major problem lies. Given the fact that no declaration of incompatibility is sought in respect of any provision of the Guardianship of Infants Act, 1964 no relief can follow from what is included or not included in that Act. However the applicant argues that by virtue of his relationship with his (emphasis added) children, the phrase 'wrongful removal or retention' should for Regulation purposes be so construed in a manner which vindicates his article 8 rights. If this can be done he must therefore be deemed to have 'rights of custody' within the meaning of article 2 of the Regulation.

**62.** The cases which I have cited above deal with articles 8 and 14 of the European Convention on Human Rights in the context of domestic measures from individual Member States. There is as well, the case of *Re. W: Re. B: A Minor: unmarried fathers*) [1998] 2 FLR 146, which deals with the Hague Convention. None of them however deal with the Regulation and what influence the European Convention on Human Rights might have on that instrument via its position in EU law.

Article 6 of the Treaty of the European Union (TEU) provides as follows:-

“(2) The Union shall protect fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the constitutional principles common to the Member States, as general principles of Community law”.

Whilst it is overstating the situation to say that this article effectively renders the Convention part of the ECJ case law nevertheless there is no doubt but that it has a pre-eminent role in community law. In *Nold v. Commission Case 4/73*, [1974] ECR 491, the ECJ identified the Convention as one of the primary sources of fundamental rights whose observance is guaranteed in the community legal order. Takis

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Tridimas, in *The General Principles of EC Law* (Oxford, 1999) at p. 237 states:

“The case law acknowledged the ‘special significance’ of the Convention, the underlying principles of which ‘must be taken into consideration in Community law. Reference to its provisions have been made in numerous cases. Amongst the most oft-quoted articles are article 6 and 13, 8 and 10. Reference are also made in numerous Community documents and measures of secondary law. Given the special status of the Convention, it would be unthinkable for the Court not to recognise as fundamental a right enshrined in its provisions. Although the Community is not formally bound by it, leading commentators accept that ‘the Convention has the same effect as if the Community was formally bound’. This view is countenanced by Article 6(2) of the TEU which commits the Union to respect fundamental rights ‘as guaranteed by the European Convention’ ... It seems therefore that the Community is bound to respect, as a minimum, the standards of the Convention which form an integral of Community law”.

**63.** Accordingly I am satisfied that in both the interpretation and application of this Community instrument, this Court is entitled to have regard to the European Convention which in the particular circumstances of the case equates with article 8 thereof. I say article 8 only because I do not think it is necessary to treat the issue separately under article 14. In truth the net point, at this juncture is not a discriminatory one but rather an interpretative one.

**64.** In the more usual type of case, involving the European Convention, the court, at this point in its judgment, would be considering whether or not a particular domestic measure, either based on statute, or court or administrative decision, so hindered the enjoyment of a Convention article that the applicant’s rights had been infringed. Any such interference however may also have to be looked at under the saving provisions of article 8(2). That provision reads “8(2) There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. In addition to prohibiting arbitrary interference however it should be noted that article 8 also places positive obligations on the State, subject to a margin of appreciation, to have in force measures which will enable parents to be reunited with their child, who has been wrongfully removed or retained see *Iglesias Gil v. Spain* (2005) 1 FLR 190.

**65.** In this case the situation is somewhat different. As I have said it is not the applicant’s primary approach to identify a provision of the Act of 1964, and to suggest that his article 8 rights have been infringed by reason of that provision’s existence or operation. Rather, as I understand the submission, it is that in the context of article 8 a broader definition is called for in respect of the phrase ‘rights of custody’ ... acquired by operation of law under article 2 of the Regulation. In other words there is nothing in principle to prevent a court from leaving untouched the existing jurisprudence under article 3 of the Convention, whilst at the same time giving a more comprehensive meaning to this phrase for Regulation purposes.

**66.** It is submitted by Mr. James Connolly S.C. on behalf of the notice party and supported by Miss Inge Clissman S.C. on behalf of the respondent, that the Act of 1991, as amended by S.I. 112/2005 adequately transpose and give effect to the Regulation in this jurisdiction and that as a result all parties have had their private and family lives respected in accordance with articles 8 and 14 of the European Convention. Keane J. in *A.C.W. & N.C.W. v. Ireland and the Attorney General* [1994] 3 I.R. 232 was cited as supportive of this submission. Moreover it is said that the difference in treatment between a married and

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unmarried father has been found to be compatible with the European Convention on Human Rights, in *B. v. U.K.* [2000] 1 FLR 1 and in *Re. W: Re B.* [1998] 2 FLR 146. Therefore article 2 of the Regulation should be given the same meaning as article 3 of the Hague Convention.

**67.** It seems to me that the phrase ‘rights of custody ... required by operation of law’ as used in article 2(11)(a) of the Regulation, must be given a meaning independent of Irish law seeing as it is, part of an autonomous legal order. That order also includes the European Convention of Human Rights. Therefore in keeping with the express objectives and general policy of the Regulation and following long established precedent in giving to it a purposive interpretation, I should endeavour to construe the above phrase in a manner consistent with the objects, purpose and intent of both the Regulations and the European Convention on Human Rights. In this regard I do not believe that the decision in *A.C.W. & N.C.W. v. Ireland and the Attorney General* [1994] 3 I.R. 232 is really on point, as the true challenge in that case was focused on the Hague Convention. Moreover the case pre-dated both the Act of 2003 and the Regulation.

**68.** The facts of the instant case are such that, at least up to the latter part of 2006, the applicant was part of a stable relationship ‘indistinguishable from the conventional family-based unit’, (See *B. v. United Kingdom* [2001] FLR 1) or to the use the words of Finlay C.J. in the case of *S.W. An Infant*, (see para. 49 above), as part of a family unit “bearing nearly all of the characteristics of a constitutionally protected family”. As a matter of probability therefore if the applicant had had an opportunity of pursuing his District Court application, he most likely would have been declared to be entitled to substantial rights in respect of his children. It is with such a father whom I am dealing and not with one, whose rights, if any, reside at quite the opposite end of the spectrum.

**69.** In these circumstances the applicant unquestionably enjoyed article 8 rights in January, 2007. The question is whether, given the legal nature of the Regulation, its policy and objectives when dealing with child abduction and the influence which as a matter of EU law the European Convention on Human Rights has on that instrument, the phrase ‘rights of custody’ contained in article 2(11) can be construed in such a way as to apply to the applicant in these circumstances? There has never been a difficulty in giving a broad connotation to the word “custody”. That was so acknowledged in several Convention cases including *In C. v. C. (Abduction: Rights of Custody)* [1989] 1 W.L.R. 654 and *In Re. B: (A Minor) (Abduction)* [1994] 2 FLR 249. The difficulty has been with the word ‘rights’. In my opinion such difficulties which have existed in that regard under the Convention should no longer apply under the Regulation. The only possible construction, to give full effect to the matters which I have presently identified, is one which recognises that the applicant’s role within the family unit confers upon him ‘rights of custody’ under article 2 of the Regulation. Any other interpretation would in itself amount to an interference with article 8. That of course should be avoided if possible. I therefore believe that as of January, 2007 the applicant had such rights, that such rights were been exercised by him and that the removal of the children from this jurisdiction without his knowledge, consent or approval was a breach of those rights. In such circumstances that removal in my view is wrongful within the meaning of article 2 of the Regulations.

**70.** At first glance this finding of ‘wrongful removal’ might appear to be inconsistent with the earlier finding of ‘wrongful retention’. One might point to a difficulty in this regard given the existing case law on the correct meaning of and on the relationship between the words ‘removal’ and ‘retention’. See for example *In Re. J. (A Minor) (Abduction): (Custody Rights)* [1990] 2 A.C. 562, 571. And indeed that may very well be the situation if the recipient of both such findings was the same person. However that is not the situation in this case. Whilst I have not been referred to any decision in which a ‘wrongful removal’ and ‘a wrongful retention’ was found to jointly exist, nevertheless the distinguishing point in the instant case is that rights of custody vested in different legal persons at different times. In any event, it is important to bear in mind the limited role of this Court under an article 15 request. Whilst I therefore realise the existence of some awkwardness in this conclusion I do believe that in the particular circumstances it is justified.

**71.** Finally could I say with respect, that the question before me is not the same as Hale J. posed in *Re. W.*

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Unlike what the learned judge said in that case, the key question before this Court is not whether all differences between married and unmarried fathers should be removed. It is much narrower than that. It is whether an unmarried father, who has performed duties and accepted responsibilities in relation to his child - which are indistinguishable from those carried out by a married father, should be recognised for the purposes of article 2 of the Regulation as having 'rights of custody' in respect of that child. As I have said I believe that for the reasons above mentioned, such a father is the father, has acted as a father and should be recognised as a father. He therefore in my view has those rights.

**72. Miscellaneous Matters**

Lastly there are a number of miscellaneous points which should be briefly dealt with.

(a) The applicant wished to argue that the *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 was wrongly decided. Counsel on his behalf agreed that until reviewed by the Supreme Court I was bound by that decision,

(b) No submissions were advanced that the applicant had acquired 'rights of custody' under article 2, by way of agreement legally enforceable under the laws of this State,

(c) The applicant also made submissions under the Protection of Children (Hague Convention) Act, 2000 but in fact that Act has not as yet been brought into force in this jurisdiction,

(d) In the pleadings Mr. G.T. sought to argue that his designation as father on the childrens birth certificates conferred on him rights of 'parental responsibility'. That submission was not pursued during this case.

(e) There were no submissions made to this Court on what the common law position might be in respect of an unmarried father, and

(f) Given the ages of the children there was no question of this Court usefully interviewing or otherwise hearing from them.

**73.** In conclusion I have held firstly that the removal of the children from this jurisdiction in January 2007 is wrongful under article 2 of the Regulation as constituting a breach of the applicant's 'rights of custody', and secondly that their retention in England after the 9th of March, 2007 is also wrongful under article 3 of the Hague Convention as been in breach of the 'rights of custody' then vested in the District Court.