THE HIGH COURT

FAMILY LAW

[2021] IEHC 219

[2020 No. 17 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF A. LE J., (MINOR)

BETWEEN

J. LE J.

APPLICANT

AND

A.T.

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 22nd day of March 2021.

1. Introduction

1.1 The Applicant father seeks the return of his 6-year old son. The Respondent is the mother, who brought her son to Ireland from a non-EU country in August of 2020 (he was then 5 years of age) and began her new job here, in a place where her sister had also recently obtained employment. The child will be known as "A" for the purposes of this judgment. The issue in this case is whether or not the Applicant, who had no legal rights of custody in respect of this child at the time of his removal, could acquire legal rights of custody after removal, such that the retention of the child in Ireland became wrongful. Such an order, assigning custody rights after the removal of a child, is sometimes referred to as a "chasing order". There is Irish authority to the effect that the determining factor in considering the effect of "chasing orders" is the factual question of whether and when the Respondent decided to make a permanent home in Ireland and, if so, whether that decision automatically and immediately changed her son's habitual residence.

2. <u>Background Facts</u>:

2.1 In March of 2009, the Respondent moved to a non-EU country, where the Applicant has lived at all relevant times. The parties began their relationship in 2011 and their son was born in early 2015. In 2017, the Respondent's sister moved into the family home, with the agreement of all parties; she clearly was and continues to be a significant source of financial and emotional support to her sister. In 2018, the relationship between the parties ended and in 2019, the Respondent, her son and her sister were living separately from the Applicant. The Applicant had access visits with

his son but no custody rights as the parties never married and the law in the Applicant's home country did not recognise such rights in respect of unmarried fathers at that time.

2.2 In July of 2020, the Respondent's sister moved to this jurisdiction. There was no previous connection between her family, who are natives of another Member State of the EU, and Ireland.

2.3 On the 18th of August, the Respondent texted the Applicant telling him that she and their son were in Ireland. On the 20th of August, the Applicant issued proceedings and the next day, on 21st August, the local Family Court of his native country [the Family Court] granted the Applicant rights of custody in an *ex parte* application, which order was served by way of email on the Respondent. On the 16th of October, the Respondent filed a document entitled "Narrative Statement" in the Family Court proceedings, the import of which was to contest the order made in respect of custody rights. She did not challenge the jurisdiction of that court. On the 20th of October, notwithstanding her objections, that court ordered that A be returned to that country from Ireland.

2.4 On the 9th of November 2020 these proceedings issued and the Respondent's affidavit was sworn on the 7th of December, less than 2 months after the narrative statement referred to above.

2.5 The Family Court, therefore, has ruled in favour of the Applicant in respect of his application, purporting to grant him legal custody rights from the 21st of August

2020 and ordering the return of the child in October. On the date of removal, the Respondent was entitled to remove A as this occurred on a date before the *ex parte* application.

2.6 The question of whether a return would create a grave risk of harm to the child and an exploration of the views of the child only arise if the Court decides that the retention of the child in Ireland was wrongful.

3. Legal Concepts: Hague, Harmony and "Habitually Resident"

3.1 Articles 1 to 5 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 [the Convention], given force of law in this State by the Child Abduction and Enforcement of Custody Orders Act 1991, provide:-

> "*1. 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.*
>
> *2. 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.*
>
> *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.

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.

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.

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."

3.2 The country from which the child was removed has never been part of the European Union but is a signatory State to the Convention.

3.3 The objectives of the Convention were considered by the Supreme Court in *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110, where Keane J., delivering

the majority decision of the Court pointed out (at p.124) that "*the Convention, being an international treaty to which the State is party, should if possible, be given a construction which accords with its expressed objectives and… the travaux preparatoires which accompanied its adoption may legitimately be used as an aid to its construction*". This comment refers, specifically, to a document interpreting various aspects of the Convention known as the *Pérez-Vera* Explanatory Report.

3.4 Council Regulation (EC) No 2201/2003, also known as the Brussels II bis Regulation [the Regulation] does not apply in this case as the requesting state is not a member of the EU but the relevant cases indicate, and common sense dictates, that domestic law, Regulation and Convention cases should be read in such a way as to promote consistency and harmony, wherever and insofar as it is possible, in the application of Hague Convention principles throughout the signatory states.

3.5 It is well established law that the Applicant in Convention cases bears the burden of proof, that the standard of proof is proof on the balance of probabilities, and the Applicant must establish that he had custody rights under the law of the country from which the child was removed at the relevant time as this is a pre-condition to a factual finding that he has custody rights under the Convention.

3.6 The relevant time is, in most cases, the time of removal. The majority of relevant judgments delivered tend to the view that if a person, even a parent, were to acquire rights of custody *after* a child's removal this would be contrary to the objectives of the Convention which is to protect existing rights of custody. However, there is authority

to the effect that the removal of a child may become an unlawful retention if legal custody rights are acquired after that removal, but only if the child retains his original habitual residence until the date on which those rights are acquired. In such a situation, the legal right of custody is conferred by a court still having jurisdiction over the child. There are a number of relevant cases which must be examined in order to confirm whether this exceptional rule applies to the facts of the instant case. If it does, the case turns on whether or not the child had changed habitual residence before the date on which his father applied for legal custody rights.

3.7 Before considering the facts in more detail, further relevant provisions of the Convention are as follows:

Article 12:

> "*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 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.*

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

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 he 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."

4. <u>Custody Rights and Habitual Residence</u>

4.1 The boy, A, was removed from a non-EU country in August of 2020 and the Family Court made an order on the 21st August granting the Respondent formal rights of custody on an *ex parte* basis. The same court made an order on the 20th October requiring the return of the child. These proceedings were instituted on the 9th of November 2020, within a year of the alleged retention, so, if the pre-conditions set out above are proven and there is no successful defence of grave risk, Article 12 applies and the Court is obliged to order the return of the child.

4.2 If legal rights of custody cannot be established, there cannot be an order to return. The question of whether such rights may be acquired, requires a consideration of various cases in which the meaning of "legal rights of custody" has been defined. The most recent relevant authority used the term "habitually resident" in the Convention to reconcile differing precedents in this area. The meaning of both these terms must therefore be examined in more detail.

5. Legal Rights of Custody

5.1 The country from which the child was removed, though not a member state of the EU, is a signatory nation under the Hague Convention. The Convention cases are directly relevant but the CJEU cases are also helpful in that the Regulation contains identical terminology which has been considered in various cases over the years. As was pointed out, in particular by Baroness Hale in *A v A (Children: Habitual Residence)* [2013] UKSC 60 (also referred to below), the purpose of domestic legislation in the UK was to reflect the principles of the Hague Convention and the Regulation and all

relevant laws and terms should be interpreted, insofar as it is possible, so as to be consistent *inter se*.

5.2 The Respondent has submitted that her decision to move to Ireland permanently is set out in her affidavit, is uncontradicted, and that the habitual residence of her son moved, automatically and on the same date, as a result. Thus, it is said, the Applicant had no legal rights of custody at the time of the move and could not acquire them once the Respondent had moved as the courts in a non-EU country had no jurisdiction to grant them, the child no longer being habitually resident there. The affidavits are not, in fact, that straightforward. While the Respondent does aver that she moved to Ireland, there is little to support the proposition that she had a fixed purpose to settle there until after August, 2020 and there is very little in terms of specific dates to assist the Court in determining when her intention first manifested itself.

5.3 The legal position is not straightforward either and the history of relevant cases in that respect, leading to the decision of Ní Raifeartaigh J. in *AM v SMcG* [2017] IEHC 843, explains why this is so.

5.4 In *A.S. v E.H.* [1999] 4 IR 504 Geoghegan J. sitting in the High Court held that the expression 'rights of custody' under the Convention did not extend to the 'inchoate rights' of an unmarried father who had no custody rights unless and until he obtained such rights from a court. This child's mother had died, unexpectedly, and the child's aunt and maternal grandmother took the child to Ireland after the funeral,

unbeknownst to the applicant father. He later applied for custody rights. The courts here and in the UK, where applications had also been made, agreed that the removal of the child in this case was not wrongful, in the sense of being against the law (whatever about the morality of the act). However, as the father then obtained rights of custody in England and the defendant grandmother and aunt had no such legal custody rights at the time of removal, they could not clothe the child with their own habitual residence, to paraphrase Butler-Sloss L.J. in the Court of Appeal, ruling on the same facts, there entitled Re S. (A Minor) (Custody: Habitual Residence) [1997] 1 FLR 958. That Court also held that the maternal relations could not successfully invoke the protection of the Irish courts. The Court of Appeal decision was upheld by the House of Lords on appeal, in Re S. (A Minor) (Custody: Habitual Residence) [1998] A.C. 750, confirming that the father was entitled to custody orders in respect of the child, albeit after removal, on the basis that the child had continued to be habitually resident in England.

5.5 The Irish High Court in *A.S. v E.H.* agreed with this logic, found as a fact that the habitual residence of the child had never been lost, and therefore, that the continued retention of the child in Ireland was wrongful. Had the child been in Ireland somewhat longer without objection, as Geoghegan J. pointed out, the situation might have been different. That case, therefore, is authority in this jurisdiction that the legal rights of custody *may* be acquired after the date of removal, but the facts of the case are significant in that those who purported to change the habitual residence

of the child were not themselves entitled to legal rights of custody at the time of removal. It should also be noted that the child was just one year and two months old at the time of removal.

5.6 In *G.T. v K.O.A.* [2008] 3 I.R. 567 the Supreme Court again considered the issue of rights of custody and wrongful retention within the meaning of the Convention. Here, the children were born in 2004 and the family moved to Ireland in 2005. The respondent mother removed the twin children the subject matter of the application from their home in Ireland and brought them to her parents' home in England in 2007. On a later date, she decided not to return. The parents were not married and the father had no legal rights of custody on the date of the removal of the children in 2007. Shortly thereafter, the applicant father sought rights of custody in the District Court in Ireland and proceedings began in both England and Ireland, seeking orders under the Hague Convention. The Supreme Court held that the retention by the respondent of the children in England was a wrongful retention within the meaning of Article 3 of the Hague Convention as it was in breach of rights of custody *attributed to the District Court*. Further, as the Supreme Court pointed out, the High Court judge had been fully entitled, on the evidence before him, to conclude that the respondent had not abandoned her habitual residence in Ireland at the relevant time. This led to the finding of fact that the children remained resident in Ireland at the time the District Court proceedings in respect of rights of custody began, thus vesting rights of custody in that court.

5.7 In *H.I. v. M.G.* (*Child Abduction: Wrongful Removal*) [2000] 1 I.R. 110, after the *E.H.* decision but before *G.T.*, the Supreme Court had considered whether or not "inchoate rights" may be protected i.e. whether a father in this Applicant's position can rely on the protection of the Convention in circumstances where his legal rights of custody crystallised *after* the removal of the child from the requesting state. The Court drew a distinction between rights of custody and rights of access, reflected in the different procedures set out in the Convention for the two situations. The majority judgment in this respect, delivered by Keane J., and relying on passages from the *Pérez-Vera* Explanatory Report, emphasised that (to paraphrase and summarise) the overriding priority of the Convention is to prevent wrongful removal in breach of custody rights and that breaches of access rights must be seen as belonging to a different category of wrong, and not one to be addressed by the stark and urgent remedy of ordering the immediate return of the child to the requesting state.

5.8 There, the American respondent had taken her 5-year old child to Ireland. The applicant father had no legal right of custody at the time though family proceedings had commenced in New York. There was, according to Keane J., no order requiring the defendant to obtain the consent of the plaintiff or any further order of the court preventing her from removing the child from the State of New York.

5.9 On the issue of inchoate rights, he explained that it was never intended that the Hague Convention should apply to cases in which the rights of custody were obtained post-removal, i.e. 'chasing order' cases, commenting that:

> *"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 an ex post facto custody order of a foreign jurisdiction. He cited in this connection the statement by Madam Pérez-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*."

Considering that the purpose of the Convention could not have been to afford equal protection to those who sought custody rights after a lawful removal of a child, the Court went on to quote from the *Pérez-Vera* Report to the effect that a "*questionable result would have been attained*" had the Convention granted the same degree of protection to those who had access rights and those who had custody rights.

5.10 Keane J. further held that there were cases in which 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*". This case was not one in which the court had acquired such a right.

5.11 Finally, the Supreme Court specifically rejected the concept that there was "*an undefined hinterland of 'inchoate' rights of custody not attributed in any sense by the law of the requesting state to the party asserting 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.*"

5.12 Ní Raifeartaigh J. dealt with a similar issue of whether custody rights were acquired post-removal in the case of *A.M. v S.McG.* [2017] IEHC 843. She also considered the apparently conflicting nature of the authorities set out above. In *A.M.* the father and mother had signed a document called a Voluntary Acknowledgement of Paternity but this was not registered with an Illinois Court. The child concerned was 2 and a half at the time of the hearing but was just over one year old at the time of removal. The child had been brought to Ireland in June, 2016 without the father's consent. On the 28th June, 2016 the father applied, *ex parte,* to the Illinois Courts and was granted emergency temporary orders. The Respondent was served with the papers in July but when the matter came before the Illinois court again, she was not present and did not engage with those proceedings. The Illinois court ordered the return of the child. The Irish High Court decision involved a consideration of the law in Illinois as regards custody rights and a detailed discussion of the factual situation in a case that most nearly approaches the facts of this case in many respects.

5.13 Ní Raifeartaigh J. considered the legal implications of the voluntary acknowledgement of paternity under Illinois law and found as a fact that it could not confer legal custody rights upon that applicant father. It followed that there was no wrongful removal in the circumstances. That court went on to consider the question of whether there was a wrongful retention asking whether custody rights could ever be acquired by a court order made *after* a lawful removal, and if so, were they acquired in that case? That court concluded, after a detailed analysis of the above cases, that the

child's habitual residence at the time of removal and any later court application was key to the question of whether custody rights could be acquired in Illinois and went on to consider the facts insofar as they affected those issues.

5.14 Considering the first question of wrongful retention, Ní Raifeartaigh J. looked at the various authorities governing the question of retention. She noted that the concept most often arose in the context of what might be described as "overholding" and that there were conflicting authorities as to whether retention could ever be wrongful in circumstances where the original removal was lawful (i.e. whether a "chasing order" could be effective). The court considered the cases of *A.S. v E.H.* and *G.T. v K.A.O.*, both referred to above. It is worth setting out her reasoning at paragraph 81 in full as it is germane to the facts of this case:

> *"Accordingly, I find myself in the following slightly difficult situation from the point of view of following precedent. On two occasions, the Irish Courts (AS v. EH, and G.T. v. T.A.O. (sic)) have ordered the return of children to the requesting jurisdiction based upon a finding of unlawful retention in circumstances where the custody rights grounding the application were obtained by means of court application after the lawful removal of the child from the jurisdiction. On the other hand, one Irish decision (that of the Supreme Court in HI v. GM) expresses a strong view, although arguably and probably obiter, that the Hague Convention does not recognise custody rights acquired by the dispossessed parent after there has been a lawful removal. It is somewhat difficult to reconcile the cases with each other. However, one point does stand out. In both cases*

where the return was ordered, the habitual residence had not changed; in AS, the grandmother and aunt of the children did not have the right to decide permanent residence; and in GT v. TAO, the mother, who did have the right to decide place of residence, had not in fact done so at the time of the relevant application by the father to the Irish courts for custody as her intention to settle permanently in England did not fix until one month later, April 2007.

82. Accordingly… it seems to me that under the Irish authorities which I am of course bound to follow, the view is ***not*** *taken that "chasing orders" can never be recognised for Hague purposes, but that the outcome may depend upon the relationship between the chasing order and the issue of habitual residence, namely whether the habitual residence has remained unchanged or not at the time the chasing order is obtained. Accordingly, it seems to me that I should proceed to* ***consider the question of habitual residence, and whether and when it changed****, in the present case."* [emphasis added]

5.15 In that case, the Court then set out and considered the facts of the case, including detailed evidence as to travel and work arrangements, and reached the conclusion that the Respondent mother had a firm intention to settle in Ireland when she left Illinois and that her son, then only one year old, had as a matter of practical reality, also changed his habitual residence at that time. The Applicant having had no custody rights on the date of departure, could not acquire them in an Illinois court

thereafter as the Illinois courts no longer had jurisdiction over the Respondent or her child; both were now habitually resident in Ireland.

5.16 The decision in *A.M. v S.McG.* is persuasive and its reasoning is compelling. The judgment is not only sensitive to the Convention cases and all relevant definitions but, importantly, it is harmonious with the main objective of the Convention which is to ensure a consistent and rigorous application of Convention principles across all signatory states and to discourage the abduction of children from those who enjoy rights of custody. The case clearly sets out the distinctions between apparently conflicting cases and explains how the cases may be interpreted so as to be consistent, each with the other. I gratefully adopt her reasoning and, using the logic set out in *A.M. v S.McG.,* the issue of habitual residence must must now be considered on the facts of this case.

5.17 The Respondent relied on a letter from a lawyer in the relevant non-EU country to the effect that the Applicant did not have custody rights at the time of the child's removal but this letter does not address the issue which now arises, namely, whether A's habitual residence also changed at that time. If it did not, and A remained resident there until the 21st August 2020, the Family Court was entitled to make orders granting the Applicant parental responsibilities which amount to legal rights of custody and the Applicant, or at the very least the Family Court (following the reasoning in *G.T. v K.A.O.*) is seised of legal custody rights from that date. Looking at the letter exhibited in the case from a Mr. H in respect of the relevant law, it is more likely that the correct

position is that once the Family Court granted parental responsibility to the Applicant on the 21st of August, if the child was habitually resident there at that time, this order was effective in granting legal rights of custody to the Applicant for the purposes of the Convention.

6. Habitual Residence

6.1 The term "habitual residence" was considered in In *P.A.S. v A.F.S.* [2004] IESC 95, [2005] 1 ILRM 306. The child in question was born in Ireland to married parents, living in Canada, and was later removed from his home in Canada to Ireland when still under the age of 6 months, and without the consent of the applicant father. The child was held to have been habitually resident in Canada at the time of his removal, Fennelly J. commenting;

> "*The Convention deliberately left the notion of habitual residence undefined... Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a new-born child is incapable of making its own choices as to residence or anything else. What the courts have to look at is the situation of the parents and their choices. Where the child has, for a substantial period, been resident in one country with both its parents while there are in a stable relationship particularly if they are of the same nationality, the answer will usually be fairly obvious.*"

Fennelly J. went on to quote, with approval, from the judgment of Waite J. in *Re B (Minors: Abduction) (No.2)* [1993] I FLR 993 and in particular, this passage from paragraph 995:

> *"1. The habitual residence of young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.*
>
> *2. Habitual residence is a term of referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or of long duration.*
>
> *3. All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.*
>
> *4. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention… Logic would suggest that provided the purpose is settled the period of habitation need not be long"*

6.2 The terms "settled purpose" and "sufficient degree of continuity" have been used in various cases to determine whether or not a child habitually resided in the

requesting state, at the relevant time, in a number of different cases. The kind of factor which indicate such a settled or fixed purpose have included purchasing a home, opening a bank account or enrolling a child in school.

6.3 The separate consideration of the child and the parent was not necessary on the facts of *P.A.S.*, given that the child was only 6 months old, but has arisen in other cases. The courts are quicker to attribute immediate change of habitual residence when a parent exhibits a fixed intention that the move is permanent and, the younger the child, the more likely the move automatically changes his habitual residence.

6.4 In *Mercredi v Chaffe* Case C-497-10 PPU (22nd December, 2010) the First Chamber Court made the following observations at paragraphs 54 and 56:

> *"[a]s a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."*

> *"…To that end where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State…."*

6.5 The relationship between CJEU cases and domestic cases where the Convention applies but the Regulation does not was considered in *A v A (Children: Habitual Residence)* [2013] UKSC 60 by the Supreme Court of the U.K. and Baroness Hale concluded, at paragraph 54;

> *"Drawing the threads together, therefore:*
>
> *i. All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*
>
> *ii. It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.*
>
> *iii. The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*
>
> *iv. It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.*

v. In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors...

vi. The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

vii. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii. ... it is possible that a child may have no country of habitual residence at a particular point in time"

6.6 It should also be noted that both parties relied on CJEU cases in this respect and there was no issue taken with the proposition that such cases were helpful in assisting in the clarification of certain phrases and ensuring the consistent interpretation of Convention terminology.

7. Communications, Contemporaneous Messages and Intentions

7.1 It is important to look at the facts provided in the affidavits and exhibits in this case in order to establish, as best one can, what the intentions of the Respondent were at the relevant times in terms of the purpose of the move and what effect, if any, this had on A's habitual residence. As there does not appear to have been any significant issue in terms of access to the boy, there was no formal legal process around the separation of the couple or their settling into two different households. Both parents are recorded on the birth certificate of this child, A. This does not assist in resolving the issue, as the legal situation at the relevant time was similar to that which pertained in Ireland until 2015: the Applicant had no formal rights of custody, even as father of the child, as the couple was not married. The legal position changed shortly after the birth of the child.

7.2 Much as occurred in *A.M. v S.McG.,* the Applicant father here took an active part in his child's life. There is direct conflict as to how active his role was and the issue of whether he contributed any, or any adequate, financial support to the child is also disputed. As is often the case in such applications, it is not necessary for this Court to resolve such disputes. Suffice to say that the Court notes the factual disputes but finds as facts that:

(a) the Applicant was named on the birth certificate of the child;

(b) had A been born a few months later, the Applicant would have had automatic custody rights;

(c) he had and was exercising rights of access; and

(d) he made an application to the Family Court after his child was removed to obtain legal custody rights.

These facts combine to persuade this Court that, on the balance of probabilities, he did *not* have legal custody rights at the time of the removal of the child.

7.3 The Respondent left their then home at a time when she was pretending that she and her son were self-isolating after a visit to the UK. It is not clear when the child was taken to Ireland and her affidavit is silent on this issue. The Applicant's understanding is that she left on the 4th of August, with A, and was due to return on the 15th of August. This is not denied and can be relied upon as likely to be true, therefore.

7.4 On the 18th of August, the Respondent texted the Applicant telling him:

> *"Hi,* [J], *I have been offered a job in Ireland and we are now heading to Ireland. I trust you to organise our stuff that we had to leave behind and have it stored until we think of a way of retrieving it. We will be under quarantine for the next 14 days after which I will be able to tell you more. It would be nice if you could organise yourself so you and* [C the dog] *can join us. Will be in touch soon. [emoji, blowing a kiss]*
>
> *The car in the harbour car park until [3.46pm on 19th August] with the key on the spring (right front wheel)*
>
> *The house key is in the white tall cupboard in a white plastic box next to the bags with food for* [C the dog].

Sorry for the mess we left behind We hope to catch up soon [emoji, smilie jazz hands]"

The Respondent relies on this, and on her main affidavit, to support the proposition that she had decided by the 18th of August to move, permanently, to Ireland. In his main affidavit, the Applicant exhibits, at Exhibit JLJ 3, his August affidavit sworn for the *ex parte* proceedings in the Family Court. In that document, the Applicant exhibits his summary of events at exhibit 1. Here, he states that A had shared his time between both parents by agreement and that the Respondent had texted on the 18th of August to say that she had relocated to Ireland. He says that he did not believe this and pointed out that she could be anywhere as she was from another country and had contacts in the UK.

7.5 The Applicant obtained an order granting him parental responsibility with leave to the Respondent to apply to discharge the order. This *ex parte* order, dated 16th October, was served on the Respondent by email and she responded by filing a narrative statement with the Family Court.

7.6 In that statement, she outlines how she realised that the Respondent may have been more involved in drug taking than she had realised as she found some papers while packing for her sister. The Respondent phoned her sister, who was still in quarantine in Ireland having just moved there herself, and then decided to go to the UK "*to get away for a while and clear my head*." The Respondent states that she did go to the UK but did not make contact with a friend there as planned but, instead, flew to Ireland. She continued at para 20 as follows: *"I asked my sister if we could stay in Ireland.*

She spoke with her HR manager and I was offered a full time job... I flew to [her then country of residence]*… we packed some of our things and went back to Ireland. I texted* [J] *to say where we were going and that we were waiting for him to take* [C the dog] *and the things we'd left at the house and join us…"*

7.7 There is no date given for most of the events in this narrative. The majority of the factual matters set out in the Respondent's affidavit refer to the shortcomings of the Applicant as a father in terms of access and financial support. There is also a substantial section dealing with the history of the Applicant in the context of historical drug-taking and her suspicions that he was involved in drug-dealing. The issues in a Convention case are usually very narrow; here, the only question is whether or not the Applicant had legal rights of custody and, in order to determine that, the Court must decide if the child's residence changed in August of 2020. There is relatively little material in the Respondent's affidavit that addresses this question directly. The most relevant paragraphs are 24 and 25:

> *"24. I initially planned to go on a holiday to visit A's Godfather in Peterborough but he was called away at the last moment and I then had to change plans. The applicant was aware of these holiday plans. It was a very fluid situation and I then decided to visit my sister in [*a town in the Midlands in Ireland*] both for a holiday and to assess what we should do in the long term. We first flew to Heathrow and then to Dublin. Thereafter we had to self-isolate due to covid19 restrictions. Following our period of self-isolation I felt that I was free of the controlling behaviour of the applicant and that*

this was an opportunity to settle in a better environment for A where he would not be exposed to harm or placed in an intolerable situation.

25. I then decided that [A] *and I would stay in [*a town in Ireland*] as this was in his best interests. At the time I did this I was entitled to do so according to the laws of* [the non-EU country]."

This last paragraph contains a statement of fact with no date and a conclusion of law, not of fact, which is the crux of what must now be decided.

7.8 The Court has no assistance by way of dates of the job offer, commencement of employment, school placement or even dates on which the Respondent and the child travelled or self-isolated. In the exhibits, some more information can be gleaned: the child is enrolled in a school in County Westmeath. A letter from the principal establishes that this occurred in September 2020. No specific date in September is given. A letter from the Respondent's employer states that she "*joined the team … as a permanent member of staff in August of this year*…" Again, no specific date is given.

7.9 Other information is presented in a report prepared by the Family Court Advisory Service for the court proceedings there [the FCAS Report]. The document, exhibited at 2LJL1 of the supplemental affidavit of the Applicant, comprises the second part of that lengthy exhibit. At paragraph 3.14, an interview with the Respondent is summarised by the author, Ms. Green, who is an officer of the Family Court Advisory Service. The author notes that the Respondent denies that she took A to Ireland without informing the Applicant. She also states that the Respondent felt

that "*given [his] interest in moving away from* [a non-EU country] *in the past it would not be a significant issue for him*" that she chose to move, and that he might simply follow. This reported statement appears to this Court to be inconsistent with her other averments in respect of the Applicant constituting a grave risk to the child in terms of his past behaviour and connections and her references to his controlling behaviour as the reason for her decision to move to Ireland permanently. If she is also hoping that he will follow (as suggested also in her texts, referring also to the family dog) this is internally inconsistent to a troubling degree.

7.10 When asked why she had not discussed moving to Ireland with the Applicant, the Respondent told Ms. Green that it was because whenever they tried to talk about serious issues, he would state that he did not have time, or start shouting. Again, this is inconsistent with her averments that her decision to go to the UK was, in the first place, a decision to go on holiday and later a decision to stay in Ireland which was made without much pre-meditation on her part. There is no support anywhere in her affidavits or in the supporting documentation for the proposition that she had considered leaving the country before and had tried to talk to the Applicant about this. The impression created by all the Respondent's representations to this Court is that of a decision made in what she herself described as a "*very fluid situation*." Further, even in her text of the 18th of August she tells the Applicant that they will be under quarantine for 14 days "*after which I will be able to tell you more*." This suggests that she herself did not know exactly what the plan was.

7.11 This Court accepts that it is unsatisfactory to make findings of fact on affidavit evidence alone, especially when some averments are so strongly and repeatedly refuted but this is why contemporaneous exhibits are of such value in a case like this one. In a Convention case, the urgency is such that almost all cases are heard on affidavit alone and the Court must do its best to weigh the evidence and to be fair to all parties. In this case, the Respondent's affidavits are internally inconsistent, particularly when compared with the exhibits. The Applicant's affidavits are less inconsistent and he is candid in accepting drug taking and associations with drug dealers in his past. This does not amount to a finding that the Court accepts the averments of the Applicant in terms of financial and other support, merely that when the Respondent states that she intended to move to Ireland, it is difficult to find evidence that supports the proposition that she had reached a fixed decision to move permanently by the 18th of August and her texts to the Applicant on that date do not read as though she had left permanently, and some of her own averments expressly contradict this conclusion.

7.12 The Respondent told Ms. Green, as set out in the FCAS Report, that she had kept the Applicant informed in respect of her relocation and thought that he would not take a strong view. Ms Green reported that "*the next thing she knew, rather than talking to her, he had gone to the police. She was upset and hurt by this and felt it unnecessary*." She told Ms. Green that she would have contacted him earlier but it took some time to get the internet sorted. The officer commented that she was uncertain as

to how this fits in with other messages implying that A was self-isolating at home when, in reality, he was in Ireland. As far as this Court is concerned, the safest and most likely conclusion is simply that the Respondent has not shown the kind of settled intention to abandon her country of residence and move permanently to Ireland that one would expect to see in the circumstances. There is no exhibit which suggests such a decision, certainly none that pre-dates the 21st of August 2020.

7.13 At paragraph 3.17 of the FCAS Report, the Respondent is reporting as describing her plans, while in Ireland, to return to the non-EU country. It was a message from the Applicant's step-father, regarding her accommodation in that country, which she says prompted her to decide to stay with her sister. Thereafter, she states that she found employment and enrolled A in school and rented a house. Again, no dates are offered for any of these events.

7.14 In contrast to those cases in which babies were removed from their homes by their primary carers, here a 5-year old child was moved from the country in which he had lived since birth. His extended family still lives there. There is no evidence that his school was informed, before the 21st of August, that he was moving away.

7.15 The Respondent herself describes the way in which the decision was taken as being prompted by (depending on which paragraph or document is read):

1) her sister's move;
2) the Applicant's past behaviour, recently discovered;

3) the threat that she would no longer have accommodation at her erstwhile residence;

4) the coincidence of being offered work in Ireland; and

5) her discovery that she liked Ireland and A was happy there.

Any or all of these may have been factors but none occurred prior to July of 2020 and most occurred in or after August on a date which is not apparent from the papers. If it was after the date on which the Applicant applied for formal orders in respect of his parental responsibility, there is clear evidence that the child was still habitually resident in that non-EU country. Even in the absence of determinative dates, the evidence strongly suggests a fluid situation rather than a permanent decision taken on a specific date.

7.16 It is impossible to allocate a date to the decision of the Respondent to move to Ireland other than to say that it appears to have occurred in August of 2020 but it may or may not have been before the 21st of August. The welfare assessment by the Family Court was undertaken in October of 2020, much closer to that time, and still no date can be gleaned from its contents. The decision of that court, not to discharge the parental responsibility order, was informed by the FCAS Report referred to above, in which serious concerns were expressed by the author as to the limitations of the Respondent's understanding of what this move had meant to A and his relationship with his father.

7.17 Ms. Green had an opportunity to speak to A and to observe him with the Applicant. Her conclusions are at paragraphs 5.2 to 5.9 and they are relevant to the issue of habitual residence. In particular, at 5.7 she concludes that while he "*seems happy and superficially enjoying life in Ireland, it is not possible for him to have a particular attachment to a place in the short time he has been there, but rather, I sense, he is giving positive views because that is what he feels is expected from his mother and aunt*."

7.18 Exhibit 2 AT2 of her replying affidavit is the Respondent's statement for the Family Court, responding to the above report. She avers that its contents are true and that it sets out clearly the factual situation which led to her leaving. It does not add to the matters set out in the first affidavit in this respect. No dates are offered here either. As is the case in both parties' affidavits, most of the matters set out would more properly be the subject of family law proceedings and there is little that is directly relevant to the issues that this Court must decide. When all such matters are refuted, as is done in most cases and as has been done here, there is nothing to be gained by the Court listing the allegations and refutations of the parties. Only matters of fact that are directly relevant to the question of habitual residence are those that are set out in this judgment.

7.19 The social and family connections between this mother and her child with Ireland are confined to one, created in July 2020: her sister, the aunt of the child began to work in the midlands. The connections existing for an Irish national would be very different. The job and school links did not arise until August and September,

respectively, and there is no indication as to when a house was rented by the Respondent. At the earliest, she decided to stay in Ireland at some point in August of 2020. Again, this statement for the Family Court does not refer to a single date or to a fixed decision to move permanently to Ireland. While there was a decision to accept a job in August, given the factors which led to her move and the way in which it was achieved, it is difficult to describe it as a move with a fixed and settled purpose. One is left with the strong impression that if the Respondent's sister was to move again, the Respondent would move also, bringing her son with her. While the Court reiterates that there is clearly a very strong and affectionate bond in this particular maternal family relationship, it is not sufficient, alone, to justify the rapid relocation to another country before any plan was made to reside there and to severe the links with the previous habitual residence within a matter of days.

7.20 More fundamentally, due to his age and maturity, this Court finds that his mother's choice of habitual residence, while a weighty factor, cannot be the only factor in such a case. Here, the child had extended family, school friends and a pet. Most significantly, he also had a strong attachment to his father. To use the words of Butler-Sloss L.J., the mother could not clothe a child of this age in her habitual residence quite so completely or quickly as she argues for in the particular circumstances of this case.

7.21 In light of these factors, coupled with the manner in which his mother found herself in Ireland and decided to accept a job offer there, this Court finds as a matter of probability that even if the Respondent decided that she would stay in Ireland with

her sister, that decision did not have the fixed and permanent quality of that shown by the Respondent in the case of *A.M. v S.McG.* or in *P.A.S*. The description of how residence may change by Fennelly J. in *P.A.S.* can usefully be recalled in the light of the facts of this case:

> "*Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention……Logic would suggest that provided the purpose is settled the period of habitation need not be long*"

7.22 Here, there is scant evidence of departure with no intention of returning. At most, the Respondent decides to accept a job in Ireland – this appears to have been on some date in August but she tells the Applicant on the 18th of August that she is isolating in Ireland but in 14 days will be able to tell him more. By September, her decision may have been made, as suggested by the school enrolment, but the surrounding circumstances suggest that habitual residence, if it had changed at all in August, had changed only for her and not for her child. While it is not absolutely necessary to determine whether or not her residence had changed, the additional features of A's attachment to and integration in a non-EU country combine to persuade the Court that the Respondent's actions in moving belongings to Ireland in August of 2020 and asking that others be stored until they were retrieved, were not sufficient to establish an intention never to return or to change the child's habitual residence, within a matter of weeks, to Ireland, where neither of them had any

connections until July of the same year. While the burden remains on the Applicant to prove legal rights of custody, in this respect, his submissions on the evidence satisfy the Court, on the balance of probabilities, that there is insufficient evidence to justify a conclusion that the habitual residence of A had changed and the Applicant has satisfied the Court that A's habitual residence remained the same throughout August of 2020.

7.23 I was invited to conclude that the Respondent had a fixed intention to settle in Ireland because she had averred this. There is no specific averment to this effect and her words (that she travelled on holiday to the UK, and then on a visit to her sister in Ireland, that the situation was very fluid) are quoted in the judgment above as they formed part of the reasoning that led the Court to these conclusions.

7.24 This Court does not doubt for a moment that the Respondent has been a devoted carer to her son and that she and her sister love the child very much. It will be a matter for another court to decide what kind of access the Applicant may have or whether and how much maintenance should be paid by him. The Respondent has made various claims about her motivation in moving to Ireland but the Court is bound by the law, as set out in all of the cases cited and interpreted as best it can. It does not seem to this Court that a parent, no matter how devoted, can change the habitual residence of a child (even a child of only 5 years) without some degree of planning and an opportunity for that child to settle into his new environment. There was no apparent plan in this case and no opportunity for any attachment to form before the

Applicant sought to obtain custody rights in the courts of the child's habitual residence. While the Court may consider the Respondent a better and more consistent parent in many ways, it is still bound to apply the law and, as it currently stands, it seems to this Court to require the return of the child to the relevant non-EU country.

7.25 The affidavits make it clear that the Applicant did enjoy access to his son and exercised that right of access. While the Respondent points out that his access was not as regular as he suggests, she does accept that he spent time with the child. More significantly, this conclusion is borne out by reliable evidence that the child (who is now only 6 years old) has an excellent relationship with his father. The evidence in question is comprised of responses to two independent professionals: the psychologist who interviewed him in Ireland in January of 2021, many months after he had left and Ms. Green who spoke to him in October of 2020. In his responses to both, his conclusion is that he would like the family to live together and it is clear that he misses his father. It is obvious that although the child is very dependent on, and loves, his mother and his aunt, A also loves his father and wants the Applicant to be part of his life.

8. Grave Risk

8.1 It is argued that to return the child to his father would be to return him to a situation in which he would be at grave risk of harm or one which the child himself would find intolerable. This argument can be dealt with swiftly: once a wrongful retention is established by the Applicant, the burden of proof moves to the

Respondent to establish a defence. It is well established that the kind of risk contemplated by the Convention is usually one that leads directly to the removal of the child and that it must constitute a real risk of serious harm. It is self-evident from the findings of fact above that the height of the Respondent's case in this respect is that there was a history of involvement with drug taking or even drug dealing but that it dates back some years. Insofar as it could be said to have led to this move, it was finding papers some years later which is said to be one of the catalysts for the move away from the Respondent's erstwhile home. This Court has already found as a fact that this is unlikely to have been the main or even a probable reason for the move, given the Respondent's statements that she considered the Applicant might join them in Ireland.

8.2 There is no evidence to support the suggestion in the affidavits, strongly refuted, that this Respondent would not leave her child in the care of the Applicant due to any fear for his wellbeing. Any such suggestion that is made is more appropriately considered in an application in the courts of habitual residence of the child, which courts can make a detailed and comprehensive enquiry into the wellbeing of the child and make orders in respect of access and supervision, should the need arise.

8.3 The findings below, in respect of the views of the child, are also instructive on this issue in that, far from being in any way wary of, or a stranger to, his father, A

seems to be extremely happy to speak to him, even on a screen, and is missing his company.

9. <u>The Views of the Child</u>

9.1 A was interviewed by a child psychologist for the purposes of these proceedings. The child's only stated objection to returning is based on one consideration: that the town in which he lives now "*has more shops*". The assessor observes at page 7 that "*A is likely to make his choices based on his immediate feelings rather than being able to weigh up all the information presented to him by a particular situation or set of situations.*" The report also concludes that A wants his mother and father to live together irrespective of any negative portrayals he may have received from one parent about the other. In addition, he expresses a wish for his father to come and join him (and his mother) in Ireland rather than for him to join his father where he lives.

9.3 There is no element of the child's view in this case that counters the imperative of fulfilling the Convention aims: preventing the abduction of children from their homes. While the Respondent in this case may have come to a decision to move, it was done in such a way as showed little regard for her son's attachment to his father and wider family in the country of his birth. There is no question but that she loves her son and wants him with her, equally her sister appears to have been a hugely positive influence in A's life and the Court will seek reassurances from the Applicant as to the support he is willing to offer to the Respondent and to A, but the child has links with that country which were probably not, in the view of this Court, severed

before the Applicant made his application to the Family Court for parental responsibility rights.

9.4 That being the case, that Court was entitled to make the orders it made in August and in October of 2020. While submissions to the effect that the Respondent did not contest the jurisdiction of the court were made, and this provides some support for the conclusion that the Respondent had not, even then, finally decided to cut her ties with that country, the more weighty factors in this Court's view are the contemporaneous and established facts, seen in the light of habitual residence arguments, namely: a review of contemporaneous messages and correspondence, later narratives and averments, links between the child and his home and the more tenuous and much more recent connection with Ireland.

10. Undertakings

10.1 In the Supreme Court decision of *P. v B.* [1994] 3 IR 507 Denham J. quoted from Butler-Sloss L.J. to the following effect (at p. 520):

> "*undertakings are crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home*" and concluded: "*I am satisfied that undertakings may be given by a party to proceedings under the Act of 1991 and accepted by the Court. They are entirely consistent with the Act of 1991 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.*"

10.2 Given various factual averments as to the tenuous nature of the Respondent's position, this Applicant must furnish undertakings as to what he can provide for the Respondent if she is to return, safely, with A to the non-EU country in question and the Court will hear counsel in this respect.

11. <u>Conclusions</u>

11.1 The Applicant did not have legal rights of custody on the date that the Respondent left the non-EU country. However, the Court finds as a fact that he sought them from the Family Court at a time when his son was still habitually resident there. The orders granting the Applicant parental responsibility on the 21st of August were made at that time and constitute the rights of custody required to ground an application under the Convention.

11.2 The evidence before the Court suggests that Respondent probably took an ad hoc decision in August of 2020 to go to Ireland with her son. It was a very fluid situation. When she was offered a job there, she took that offer and decided to stay on in Ireland. This decision did not have the settled and permanent character required of a decision to change habitual residence. Further, the child, A, having been habitually resident in a non-EU country for all his life, having extended family there and having established links there in terms of school friends, is old enough to have these factors taken into account in determining where his habitual residence was in August of 2020 and it probably remained in his home country for at least the initial months of his stay in Ireland, bearing in mind his integration and extended family, his

age, his responses described in the FCAS Report and his abiding affection for his father even after a separation of several more months. It is not necessary to ascribe a date on which he changed habitual residence as it was not, in this Court's view, before the 21st of August when his father applied to the Family Court for parental responsibility. His mother is undoubtedly the primary carer of A, and there is no doubt about her ability to look after her son; this decision addresses only the rights of the Applicant at a specific point in time.

11.3 Without deciding on the many conflicts of fact in the affidavits, as it is not necessary for this decision, the Court does not consider any of the matters raised sufficient to establish a risk of grave harm to this child as defined in the relevant case law under the Convention.

11.4 The case is one in which undertakings must be sought from the Applicant before the order to return the child is made.