

**THE HIGH COURT
FAMILY LAW**

APPROVED

REDACTED
[2021 No. 21 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, B AND C, MINORS
(CHILD ABDUCTION: HABITUAL RESIDENCE)**

BETWEEN:

A.K.

APPLICANT

AND

U.S.

RESPONDENT

Judgment of Ms Justice Mary Rose Gearty delivered on the 14th day of December,

2021

1. Introduction

1.1 In July of 2020, the family at the heart of this case relocated from England to Ireland, due to the effects of the global coronavirus pandemic. As the pandemic and its effects lingered, the family's residence in Ireland was extended from time to time.

By the end of May 2021, the Respondent mother had told her husband that she did not want to move back to England. The Applicant did not want to stay in Ireland.

1.2 The family went back to England a year later, in July of 2021, and the Respondent understood this as a holiday. When the Applicant insisted that the children had now moved home, she brought the children for an outing and they travelled back to Ireland on the 12th of August 2021, where they have remained ever since. The application for the immediate return of the children to England, on the basis that it is their place of habitual residence, was made 6 days later.

1.3 The application is resisted on one ground: that the habitual residence of the children changed to Ireland at some point before the 12th of August 2021. The sole issue therefore is whether or not the Applicant has successfully proven that the habitual residence of all three children remained in England, in which case they must be returned as all other proofs are in order in respect of his application; the Applicant has parental responsibility and his application was made within a year of the date on which the children were brought back to Ireland.

1.4 The case is complicated by the very different stages of development of these children, one of whom has yet to attend school and has spent half her life in Ireland, one who has attended school for the first time here in Ireland, and one who has spent most of his life in England.

2. Purpose of the Hague Convention

2.1 The aim of every application of this nature is to achieve the immediate return of a child who has been abducted, usually by a parent. The Hague Convention of the Civil Aspects of International Child Abduction [the Convention] was created to provide immediate redress in such a situation and to mitigate the damage sustained to the child's relationship with the other parent by returning the child home. There, the courts where the child lives and where her school and medical records are available, can make decisions about her welfare with the best information available and where witnesses are readily available. That is the Applicant's objective here; to seek the immediate return of his children to England, where the courts can decide on their welfare, if their parents cannot agree on where they should live. A further principle underpinning the Convention is that it upholds the rule of law, providing a summary remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially,

from social and familial ties in that jurisdiction and from daily contact with the other parent.

2.3 In order for the summary remedy of Article 12 to be available to the Applicant, he must show that the children remained habitually resident in England up to the date of their removal in August 2021.

3. The meaning of “Habitual Residence”

3.1 The phrase “habitual residence” has been considered in numerous cases, many of which were cited in counsels’ submissions to the Court. The Court of Justice of the European Union has made it clear that “habitual residence”, for the purposes of Regulation 2201/2003/EC, should normally be given an autonomous and uniform interpretation throughout the European Union. This was explicitly stated in *Case C523/07 A. (Reference for a preliminary ruling: Korkein hallinto-oikeus – Finland) [2009] ECR I-02805*, and is in line with EU jurisprudence generally, which gives great prominence to the principles of certainty and uniformity. The same values underlie the proposition that cases in non-member states, which fall to be decided under the Hague Convention only, should also be interpreted in line with the case law of the ECJ, implementing Regulation 2201/03, where possible. These principles were endorsed by Baroness Hale in the UK in *A –v- A and another (Children: Habitual Residence) [2013] UKSC 60*.

3.2 In the *Korkein* case, the Court went on to set out the factors which would determine whether or not a child was habitually resident in a particular country,

meaning that her presence there was not merely temporary or intermittent but reflects integration in a social and family environment. The named factors are duration, regularity, conditions and reasons for the stay in the second country, the nationality, school, linguistic knowledge and relationships of the child herself and, finally, the intention of the parents which may be indicated by tangible steps such as buying or leasing a property. This case did not, however, deal with the potential impact of a long but expressly temporary stay on the concept of habitual residence. More recently, in an Irish decision on the meaning of the phrase, *D.E. -v- E.B [2015] IECA 104*, Finlay Geoghegan J commented that the consent of the other parent is a significant factor in determining habitual residence and that one parent may not be in a position to change the habitual residence of a child if the other parent holds parental authority.

3.3 In *A -v- A (Children: Habitual Residence)*, Baroness Hale pointed out (at paragraph 54) that:

“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...

...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.”

3.4 In *Mercredi –v- Chaffe* (Case C-497/10 PPU) [2010] E.C.R. I-14309, EU:C:2010:829, a two-month old girl was the subject of proceedings in England and France and the key issue was that of her habitual residence. The CJEU considered the test for determination of the habitual residence of a child for the purposes of Articles 8 and 10 of Regulation 2201/2003 noting:

'habitual residence' corresponds to the place which reflects some degree of integration by the child in a social and family environment, such place to be established by the national court;

particular regard should be had to the conditions and reasons for the child's stay in a Member State, and for the child's nationality;

while physical presence of the child is necessary, it must also be clear that such presence is not in any way temporary or intermittent, there being no minimum duration laid down;

the environment fundamental to determination of the child's habitual residence is multi-factorial, and the factors relevant to that of a child of school age are not the same as those for a child who has left school, and not the same as for an infant;

an infant child necessarily shares the social and family environment of his/her primary carer(s) and it is therefore necessary to assess the integration of that carer/those carers in the social and family environment.

3.5 *Hampshire County Council –v- E and E [2020] IECA 100*, concerned a case with a complicated history in which children born in England had been brought to Ireland to avoid being taken into care. In the Court of Appeal the issue of the habitual residence of very young and new-born children was dealt with comprehensively. Having reviewed the relevant European, English and Irish cases on the issue, Ms. Justice Whelan identified the relevant factors in determining habitual residence of children at paragraph 70 including, insofar as young children are concerned, that:

“It is the child’s habitual residence which is in question, not the parents’, and it is the child’s level of integration, rather than the parents’, in a social and family environment which must be analysed by the court determining the question...

In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parent or parents who effected the move.

A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for him. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused and fact based.

In circumstances where the social and family environment of a new-born or infant is shared with those on whom he is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.”

3.6 Also at paragraph 70, Whelan J. pointed out that:

“Parental intention is but one relevant factor in the assessment. It is not determinative. Hague Convention decisions which considered parental intention to be of pre-eminent importance are no longer good law. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. The purposes and intentions of the parents are merely one of the relevant factors.”

3.7 The Applicant has also relied on two decisions of the High Court of England and Wales, *JM –v- RM [2021] EWHC 315 (Fam)* and *JC –v- PC [2021] EWHC 2305 (Fam)*, both of which deal with the temporary and unsettled nature of a family relocation which was due to the Covid 19 or coronavirus pandemic. In both cases, children were returned to the countries in which they had resided pre-pandemic.

3.8 In summary, therefore, this Court will look at the conditions of and reasons for the family’s stay in Ireland, the nationality of the children, their integration in both countries, and the parents’ intentions, in determining the issue of habitual residence for each of the three children.

4. Factual Details relevant to Habitual Residence

4.1 The Respondent grew up in Ireland. She married the Applicant, who is British, and they have three children together aged 8, 5 and 2 years. All three children were born in England. The children hold British passports, had always lived in England and went to school in England until July of 2020. They often visited Ireland on holiday as their mum has family in the West of Ireland.

4.2 On the 22nd of July 2020, the Applicant, the Respondent and the three children travelled to Ireland for what was initially planned as a 5-week holiday. With the consent of the Applicant, the family continued to reside in Ireland beyond the previously agreed time frame as they considered that the environment in Ireland was safer for them at that time, having compared the situations in the two jurisdictions in the context of the ongoing pandemic. The family rented a property. The two older children were enrolled in National School and the youngest child was enrolled in a local creche. Both parties considered the situation to be a temporary one, driven by various government restrictions imposed as a result of the pandemic. The family remained in possession of their home in the UK and it was not rented out during this period. The Respondent, who is self-employed, remained resident for tax purposes in the UK, as did the Applicant.

4.3 The Applicant works in the arts and rented a studio in Ireland to facilitate his work. The children integrated well in school and participated in local sporting clubs and societies. In September 2020, the Respondent registered the children with a local doctor in Ireland. The family health insurance, with a British provider, was renewed in December, 2020. In March 2021, the Applicant told the Respondent that he wanted a divorce. In May of 2021, the Applicant travelled to England for a six-week period. The Applicant has stated that his purpose was to organise the family home in England for the family's return. The Applicant also made enquiries with the eldest

child's previous school and enrolled the two older children in this school. Neither of the younger two children had attended school in the UK.

4.4 The children were raised in England with the Applicant's family members playing a role in their lives. They were raised with occasional worship in two different religions and with at least two cultural heritages forming part of their daily lives. The Respondent has relied upon the supporting evidence of two former child-minders, both of whom state that they did not meet members of the Applicant's family while working on a regular and consistent basis with the children. The Applicant rejects the contents of both letters in their entirety on the basis that neither author was in the family home "on a continuous basis".

4.5 It is clear that the children had connections with their family in England and that this is an important aspect of their lives and deserves support. However, in respect of the amount of contact claimed, the Court prefers the account given by the Respondent in this regard. While the Court accepts that their uncles, aunts and cousins in England had good relationships with these children and that this is an extended family which is still available to them there, the Court also accepts that none of these relationships was such as to amount to a very close and dependent one. On the Applicant's own account, the children did not see their grandmother in England more than once a week.

4.6 A child minder who sees children in any family on every working day may not see them on a continuous basis but usually has a good picture of that child's

family life. It is not necessary that she see the child continuously to form such a view and the two letters on which the Respondent relies support her account. This Court is not inclined to find that both child minders have fabricated the contents of their letters. On the balance of probabilities, the ties between the children and their family in England, while important, are not such as would, taken alone, necessitate a finding of such integration as would strongly support their immediate return.

4.7 It is not denied, and the Court accepts, that the Respondent relied in particular on her own mother, who flew regularly to England to support her and who was the main support for the couple when their youngest child was born. Her siblings live close to the family's rented home in Ireland. The close nature of the Respondent's family's relationships with the children was not disputed and there was no cross-examination on this point. While this is only one factor for consideration, the family ties in Ireland appear to be as close as those in England and, certainly in the case of the Respondent herself, there is more dependence on their support, but again, this factor alone is not determinative in such a case.

4.8 While the Applicant was in England, the Respondent sent him an email dated 27th May 2021 in which the following statements appear:

"... I just want to say that I know how hard it was for you to come here and be here for as long as you were. I know all too well what it feels like to be so far from home so thank you for making that effort and for the effort you are making there to upgrade the house.

... I believe that returning here is what is best for us at this time. I can't speak for you of course, but I do believe it is better for me and the children for the following reasons – [she sets out a number of matters including school progress and friends and refers to the children]

... Of course, [A, the eldest] is anxious to come home but I really do believe if we are united in this decision and he thinks you won't be disappointed in him for wanting to be here that he will come around very quickly. A lot of what he is saying about home is hinged around knowing that it is where you want to be.

4.9 Details in respect of the second child, B, are set out, again in terms of his progress in Ireland. Details in respect of the third child, C, are then set out including play dates and progress in creche. The Respondent then lists the matters that make her quality of life in Ireland better, including social and family connections. She describes a job offer which would be a further link to the country albeit not one that requires her to live here long-term, and her appreciation of the cultural benefits of living in Ireland. The email continues:

“You know I have found life in the UK incredibly difficult of late. The house is not suitable for all of us and I know that we will not be in a position to move any time soon.”

4.10 The Respondent refers to a school with which she was not happy and to the potential financial burden of private schooling.

“Brexit has also created an atmosphere which I have really come to dislike and after the trauma of last year and the future still very uncertain, the UK is just not a place where I want to be at this moment in time. I’ve spent ten years living there, away from family and friends and my own culture and I want to spend some time here now.”

4.11 She assures the Applicant that she wants to work together with him on these issues and adds the following:

“My preference is that we can find a way to make it work with my supporting whatever would meet your needs with regards to being wherever you need to be, when you need to be there. That is why I suggested keeping our home there and that you can come and go as you need to, something which I simply cannot realistically do. I would like to come back with the kids at the end of June and spend time there seeing family and being there before returning before the start of the school year. We would all come back to the UK to see family and spend time there at the school holidays 4/5 times over the next year, similar to how I had been doing when there. We’re lucky in that we can keep the house without having to let it out to sustain our life here. Nothing is forever, I realise this place may not be suitable for us long term but I believe it is right for now. I’m really asking for your support at this point, for some faith in me that I know what I need right now to give the best life I can to the kids and the best chance to my career and the family’s financial security.”

She concludes hoping that they can discuss the issues and signs off affectionately.

4.12 The Applicant returned to Ireland on the 18th of June 2021 and helped the Respondent and the children move to another rental property in the same locality, as the rental agreement came to an end in the original house. This move was effected on the 30th of June. The Applicant and Respondent agreed to travel to England in July 2021. The intentions behind this trip are disputed.

4.13 The Applicant and the two older children went to England on the 12th of July 2021. Whilst in England, the children participated in various activities such as coding and karate. The Respondent and the youngest child followed on the 24th of July 2021. She had purchased return flight tickets and parked her car in a short-term carpark in Dublin Airport.

4.14 Upon arriving in England, the Respondent states that she became aware the holiday was a ruse. The Applicant retained the children's passports. The Respondent contacted the Central Authority in Ireland for advice and completed an application for the return of the children to Ireland under the Hague Convention. The application was not served. On the 12th of August 2021, the Respondent informed the Applicant that she was taking the children on an outing. The Respondent travelled to Ireland with the children through Belfast, to avoid having to produce their passports. The Applicant filed this application for the return of the children under the Hague Convention on the 18th of August 2021.

4.15 The Applicant submits that the family were returning to England on a permanent basis, despite the intentions set out by the Respondent in her email above

and her averment that this was a short trip only. The Respondent submits that the Applicant misled her, and it was her belief that the trip to England in July 2021 was a holiday and that there was consensus between the two that the family would return to Ireland in mid-August to allow the children to resume their schooling in Ireland.

4.16 The email of the 27th of May 2021, set out in large part above, supports the view that the Respondent wanted to return to England for a holiday only and then settle longer term in Ireland. The fact that there was no response to this except later (and numerous) text messages in a similar context stating, *"I do not consent"*, supports the Applicant's position that he never consented to a more permanent move to Ireland. The Applicant denies that he ever moderated that view by agreeing to a short visit to England.

4.17 There is support for the Respondent's position that she had his agreement to a short visit in the form of a contemporaneous text to her sister. The Applicant states that this text is not probative. It is. While it emanates from the Respondent herself, it refers to an agreement and is contemporaneous with the events in dispute and written to a third party. This does not appear to be a text written at the time expressly to confuse a later trier of fact in terms of what the parties had said or agreed. This text provides some, albeit relatively weak, evidence that the Respondent's claim is more likely to be correct.

4.18 There is further support for the Respondent's account in the eldest child's assessment, referred to in more detail below, where he mentions his dad having

agreed that they would return to England on holiday and then arguing with the Respondent in the car. This appears to describe an event witnessed by the child and his interpretation of it, rather than a rehearsal of something his mother told him to say. The child saw the Respondent getting upset when told that the children would be staying in England. On the Applicant's account, she knew, or must have known, this as he never agreed to the visit to England being a holiday only but intended them to move back permanently. The Respondent's version of events makes sense of the account given by their son.

4.19 Referring to the Applicant's arguments that he says support his version of events, none of these are probative. Various preparations for the children's arrival in England, comments on car tax and on MOT tests reveal nothing about an alleged agreement between the two about the status of this trip to England in July 2021. The Applicant also relies on a WhatsApp message to the Respondent dated 21st May 2021 but this is not of assistance in determining whether or not there was an agreement. If anything, it mitigates against a finding that he had been clear with her about the purpose of the return to England. This WhatsApp message is ambiguous and the phrase he himself uses is that he enrolled the children in school to keep their options open and so that they (the parents) could choose.

4.20 Finally, in this regard, the Respondent offers a detailed account of the conversations that she says led to the agreement, including her reasons for hesitation, at paragraphs 23 and 24 of her affidavit. She points out that he left shoes,

clothes and weights in their home in Ireland. In reply, the Applicant states that he disputes her averments and relies on the WhatsApp messages in which he refused to consent to the move and the descriptions of the older children of their house as being home. The former messages do not refer to the alleged later agreement and the latter sheds no light on any apparent agreement between the two. He goes on to describe an account of what happened in the car which is not only at odds with the Respondent's version, but also with the account given by the eldest child as contained in the Assessor's report.

4.21 From the only contemporary communication with any third party, the text referred to above, from the child's description of the argument he witnessed, and from the very fact that the Respondent travelled to England when she was actively making the case to stay in Ireland, I prefer the account she offers, on the balance of probabilities, as being more likely.

4.22 The facts therefore probably were that the intention of the Respondent was to return to Ireland with the children and she understood that, while the Applicant did not want to live there, he would not thwart their return. This aim was frustrated when the Applicant took possession of the children's passports. The Respondent took matters into her own hands by purporting to take them out and removing the children to Belfast; an admitted act of deceit on her part. Insofar as deceit may influence this Court's view of either party's affidavit, both have engaged in misleading the other in respect of the children's situation. One by pretending the

return to England was a holiday, which he does not admit, the other by pretending to take the children on an outing in order to take them to Ireland, which is admitted.

5. The Cross-examination of the Parties

5.1 The Applicant accepts that he helped the family move to a new rental property on the 30th of June 2021. This too supports the conclusion that he knew that the Respondent's plan was that all three would stay in Ireland. In oral evidence, he referred to being coerced into doing so, but this was not explored further; it was a word he had not used in his affidavit. In any event, his assistance in this regard is not being regarded by the Court as consent to a permanent move to Ireland in the overall circumstances of the case.

5.2 In oral evidence, the Applicant at first suggested that the Respondent agreed that he would register the children in their old school in England. I do not accept his evidence in this regard. The evidence is contradicted by his own evidence later in cross-examination, by the Respondent's evidence on this issue and by the fact that the emails he sent to the school were not copied to her, all of which tend not to support his suggestion. Her replies, to the emails and in evidence, evinced her surprise that the school had been contacted and some of the Applicant's replies do not make sense in the context of the surrounding evidence.

5.3 Asked why he was explaining to the Respondent that he put their names down if this was done with her agreement, my note is that he repeated:

"I was just echoing what the agreement was. I was putting the names down, that's how I saw it."

5.4 This ignores the premise of the question; there could not have been an agreement to enrol them if he had to then explain why he had enrolled them. If he referred to the original agreement i.e. that the move to Ireland was temporary, he was ignoring the change in that agreement outlined in the email of 27th May and his assurance that the return to England would be a short holiday.

5.5 It is clear from all the affidavits and exhibits that one parent wanted to live in England and one in Ireland but the Applicant, ignoring this, gave evidence in which he suggested that the Respondent agreed to enrol them in a school in England. The Respondent has documentary evidence of having enrolled them elsewhere and of having countermanded that enrolment request. It was put to him that his plan to enrol them had been discovered when the Respondent got a request for a password reminder, he ignored the natural inference in the question that the reminder was what first revealed the news to her and answered by saying that the request was an automated email and not one from the school. This response did not address the real issue. He later accepted that the Respondent never consented to this step, having first characterised this as her "*removing his consent*". The Respondent probably never consented and his eventual acknowledgment of this confirms the Court's impression of this evidence.

5.6 When asked, why did the Applicant believe there was an imminent threat of removal when there was an agreement for the children to go back to England permanently, as he had suggested, he replied that there was no agreement for them to go to Ireland permanently. This, again, ignored the point of the question. He eventually agreed that he knew that the Respondent intended to go back to Ireland. He presented a version of events in the car after collecting the Respondent in England on the 24th of July 2021 which directly conflicts not only with the Respondent's version of the same journey but also with their oldest son's version of events. To that event, it is less reliable than that of the Respondent, in that it enjoys no support from any source. There certainly was an argument but there is no support for the suggestion that the children were upset at the notion that they would not live permanently in England.

5.7 The Applicant describes an assessment with an occupational therapist as having been arranged to support the Respondent's claim to stay in Ireland and having been arranged in April or May with this in mind. Pressed on this, he accepted the contents of the report but repeated that the timing was arranged *to create a way to stay in Ireland*, as he put it. The report is detailed, based on an assessment on the 1st of May and provides very helpful advice as to how this child can be supported in school. It is improbable that it was sought with the cynical aim of creating an argument to stay, as the Applicant suggests, and I do not consider this likely. The assessment was carried out over 3 weeks before the Respondent first

emailed the Applicant asking that he consider whether the children would be better off staying in Ireland. It is more likely that the report was one of the factors that prompted the request rather than that it was engineered for a pre-planned request.

5.8 The Applicant appeared to accept the proposition that all three children were happy in Ireland, albeit by saying that the Respondent has said certain things and he cannot refute them as he was not there, then interpreting the youngest child's playdates and enjoyment of her life as being an extended holiday.

5.9 The Respondent agreed that she continually referred to the Applicant's place of habitual residence as England in her draft application (never lodged) to the Central Authority. She said that she considered that the family had relocated to Ireland and that in or around March of 2021, that sense changed in that the Applicant made it clear that he had not relocated but she maintained that she and the children had. She agreed that the children had homes in both countries.

5.10 Pressed by counsel to agree that she had decided it was preferable to relocate with the children, she replied:

"I formed the belief that it was in the children's interests and my own ... I wanted him to understand that I had a financial burden and was the primary carer and believed that Ireland was the best place for us."

5.11 To that extent, it is clear that this was, essentially, a unilateral decision made by the Respondent. She tried to convince the Applicant as to its wisdom but he,

though ostensibly agreeing to the extent that they could have a holiday in England and return to Ireland, never agreed to anything longer term than this. There is evidence to support the Respondent's contention that she wanted dialogue on these issues but that the Applicant was adamant that the family would be returning to England and did not encourage any such discussion. The Respondent agreed that up to May of 2021, the reversal of their prior arrangement, as counsel put it, was up for discussion. Also, she agreed that the parties had been in England for over 10 years before this extended stay in Ireland.

5.12 There was evidence of a reference by the Respondent to being nomadic in a professional context and to a twitter handle which referred to escaping the pandemic, none of which advances the case either way and appears linked to professional branding rather than signals as to where the children had their habitual residence. This was not of probative value once teased out in oral evidence.

5.13 Overall, the responses of the Respondent were more inclined to accommodate and consider the questions posed and the opposing view than those of the Applicant which, even when contradicted by documents or other evidence, were expressed with the same confidence. This made the Respondent's evidence more persuasive on the whole and the most relevant portions have been set out, above, in detail.

5.14 The oral and affidavit evidence, taken together, confirms the Court's view that the parties did not reach any real agreement on where they would live, long term, and that neither party acted appropriately. Both parties acted unilaterally: he,

in purporting to agree to a holiday in England and then retaining the children's passports to prevent their return and she in removing the children to Ireland after she realised his intentions. There are rule of law issues with the conduct of both parties in the context of an international agreement with the aim of ensuring that children are not removed from their homes by the unilateral decision of one parent, in the teeth of the rights and objections of the other.

5.15 The Applicant argues that, given that Covid-19 restrictions were in force and it was accepted they had a bearing on this family's arrangements, a settled intention on the part of the Respondent could not be shown. Certainly, there was no joint intention by the parents and only an intention on the part of the Respondent of a relatively recent date, in late May of 2021 at the very earliest. The difficulty with this submission is that the intention that she had by July 2021 combines with a factual situation in which the children had been residing in Ireland for a year. In those circumstances, a unilateral settled intention can more easily become one that changes habitual residence as the facts of this case demonstrate. However, intention is only one factor and it is a combination of factors which determine habitual residence. The combination must be considered in respect of all three children.

6. The Interests of the Children

6.1 The Respondent submits that she and the children have a stronger and wider support network in Ireland, in particular she notes that her mother and her siblings live nearby and are available and willing to support the family. The Applicant's

family live in close proximity to their home in England and he refutes the suggestion that his family ties are not as close as those in Ireland.

6.2 Both parties put forward various reasons as to why their choice of home is better for the children, but it is not the function of the Court to make a welfare decision as to which is the better home. This judgment can consider only those factors which make one or the other country the habitual residence of the children. While this may include facilities and friends, for instance, in this case the older two children clearly have friends and relations in both countries given the length of time they have now spent in each one and the fact that they have a shared language made it easy for these happy and well-adjusted children to assimilate in a new place when they moved in 2020 and, again, when they were brought back to England in 2021.

6.3 The Respondent relies on her employment prospects as a further reason to find that the habitual residence of the family has changed but the Applicant avers that this type of work, while involving some time in Ireland, is such that she does not have to reside here. The Respondent was cross-examined on this issue and the Court accepts that while she would not necessarily have to move here to accept the job, it will involve lengthier periods in Ireland than the kind of writing work she used to do, which comparator was used by the Applicant. This being the case, it is likely that the Respondent will be in Ireland for a relatively long period during the coming year no matter what the result of this application.

6.4 At paragraphs 42 and 43 of his second affidavit, the Applicant avers that the oldest child is unhappy in Ireland and does not want to remain here. He relies on two exhibits. One is an exchange between him and his brother in law, the Respondent's brother, K. In this exchange, K passes on the suggestion that, because the child is upset that his parents are not speaking, the Respondent might come online for a few moments during the Applicant's call in order to reassure him. Rather than agree to that suggestion, the Applicant instead points out by way of reply that he does not want to mislead his son. His words, in Exhibit 18, are:

"I don't want to confuse him by further pretending, he is an intelligent boy and he will see through it... "

He concludes:

"in my limited face time with the children I'd rather stay child focused and I will reassure them that everything will be ok."

6.5 Rather than exhibiting a child-focused approach, the Applicant is mis-using this phrase. Rather than showing an 8-year old child that his parents are able to set aside their differences for his sake, he refuses to exchange civilities, when the lack of communication is what the child finds stressful. If the child was unhappy, the fact that his parents were not communicating seems a likely source of that unhappiness.

6.6 The second exhibit relied upon is one which, the Applicant says, is a text message after a conversation with the same son in which the boy asks why he cannot

call his dad and that he is bored and misses his home and family. The text exhibited says none of these things and, without careful examination, the paragraph would be misleading. The text says only: *goodnight daddy*. Everything else reported by the Applicant in this paragraph and in paragraph 53 about the child being angry with the situation in which he finds himself is in direct conflict with the report given by the child himself to the expert assessor.

6.7 Finally, the Applicant points to a letter from a friend of his, a psychologist, in which he repeats a conversation the author had with the boy. Just as I am not relying on the professional views of a child psychologist to whom the Respondent refers, or the views of the child's uncle, neither am I relying on the views expressed by this family friend. In any event, the conversation reported goes no further than to report that the child is looking forward to returning to school in England. This letter contains no comment on his views in relation to school, or anything else, in Ireland.

6.8 The Court has a report by an independent expert in which the expert finds that the child had not been influenced by either parent and was expressing views the expert found to be the child's own views. This boy would be happy living in either jurisdiction, it appears.

7. The Habitual Residence of the Three Children

7.1 The onus is on the Applicant to establish, on the balance of probabilities, that all three children had their habitual residence in the United Kingdom on the 12th of August 2021. There is no single determinative factor in this case. The relevant

factors have been set out above and include the duration, context and nature of their residence in the relevant countries, the intention of their parents and the integration of the children in the relevant countries, in particular their social and familial ties.

7.2 Both parties agree that the initial move was one which was prompted by the pandemic. The decision was taken to move, on a temporary basis, to Ireland. This stay was extended and it was in an email in May 2021 when the Respondent first made it clear to the Applicant that she wanted to remain in Ireland. Until that point, the 27th May 2021, at the very earliest, there was no question of any change of habitual residence as both parents understood the situation to be temporary, albeit of longer duration than expected.

7.3 That email cannot be characterised as a decision made on behalf of the family, as it appears to have been an attempt to open the discussion. The Applicant, insofar as he replied which was not directly, can be taken to have refused to agree to this. But whether he replied in May or not, by early June the Applicant had, several times, texted to say that he did not consent to relocating to Ireland.

7.4 This Court has found as a fact that the Applicant did make an agreement, expressed to the Respondent and reflected in her text to her sister and in an argument in front of their eldest child, to go on holiday to England in July of 2021. Perhaps this was pending a decision about their long-term future but whatever its nature, the Respondent understood she would be taking the children back to Ireland.

It is clear from his affidavit, his texts and his conduct that whatever assurance he had given her, the Applicant did not, in fact agree to the children returning to Ireland.

7.5 Knowing that they would be in England in June or July, the Applicant enrolled the older children in various classes and in a school, the latter without the knowledge of the Respondent and he removed their names from the school they attended in Ireland. The Applicant avers that he was involved in setting up all kinds of social and sporting activities in the past for his children. There was an issue in respect of the number of activities in which the children were enrolled before 2020 but it is not necessary to decide that issue as it does not assist the Court in concluding where they habitually resided in August of 2021.

7.6 It appears that the Applicant knew the Respondent wanted the children to stay only for a holiday in England but that he did not. He relies in his affidavits on the assertion, and the legal advice he states he had obtained, that the children retained their habitual residence in England and Wales throughout this time and that any removal to Ireland would, therefore, be wrongful. If this was his view and his preference, it was one he ought to have expressed to the Respondent rather than misleading her about his intentions.

7.7 The eldest child, A, was assessed and his impression was that they were returning to Ireland to live after a short holiday in England. His description of life in Ireland is very positive but he also has happy memories of living in England and I

accept what the Applicant avers in respect of his friends and, especially one young cousin to whom he is especially close. A said to the assessor:

“we came to Ireland in May or June 2020 ... we came here because of Covid, the numbers were quite high in England. We packed our bags and moved here.”

And later:

“The Covid numbers were high, but now the reason we’re here is ‘cos we have loads of friends, a good environment, a great school, we walk to school.”

“My Daddy said he would take me and my brother on holiday to England, Mummy said ‘Ok, that’s fine’. Then when my Mummy and sister came, they (reference to mother and father) were arguing in the car and my Daddy said ‘we’re staying here now’ and that made Mummy really upset.”

“We went back to England on holiday, we’d all be coming back to Ireland for school. I was back in England for two months, planning to come back (to Ireland) to go to school, we’d all be coming back to school.”

7.8 When asked of his circumstances in Ireland as of September 2021, A was expecting to stay in Ireland, resuming schooling in Ireland and expecting to go to England on holidays. He feels like he lives in both places. He loves his family in England and in Ireland very much and loves them all the same amount. He does not wish to, and should not be asked to, decide where the family should live.

7.9 Once in England, the Respondent referred to the house in text messages as their home, the two older children referred to the house as such also (at least it appears so from text exchanges). Throughout exhibit AK 13, the WhatsApp messages about the return of the older children in July, both parents refer to the children being home and the Respondent appears to be laughing at how they are not missing her. It is a warm exchange but also it supports the Applicant's argument that the children had not, even in July 2021, moved their centre of interests to Ireland. However, it does not affect the youngest child, a 2-year old, who remained with, and travelled with, her mum when she returned a few days later.

7.10 The two younger children, at 5 and 2 years, were too young to be assessed. The middle child has spent over a year in Ireland which is one fifth of his life. The youngest has spent nearly half of her life here. It is not disputed that both parents cared for the older children and that the Respondent is the primary carer for the youngest child, who is not yet at school.

7.11 The children have medical insurance in both countries now, the older children have schools in both countries, they have family and friends in both countries. The parents remain tax resident in the UK, this is where the family home is situated (even if there is an intention to sell that particular house) and where the car is registered. The Applicant argues that if the children can become habitually resident elsewhere within a year, that this defeats the purpose of the Convention but this is not correct as all the authorities indicate that the question is primarily one of fact and

cannot be determined by duration alone. Further, the context of this case is that the children had been in Ireland for more than a year before these issues arose.

7.12 The Applicant points out that the Respondent accepts that the proposed move to Ireland may not work in the long term. The law does not require that a habitual residence must be a long-term residence although duration, while not determinative, is a factor. Looking at the evidence as regards imminent school needs, this Court is clearly concerned with a period of at least the next 2 years and, given the ages of these children, if there is a settled purpose to remain for that period without commitment as to where the family would then live, that may be sufficient evidence of their having acquired a new habitual residence.

8. Conclusions

8.1 The older children are in the fortunate position that they will be happy in either country, it seems to me; they have a home in both countries and a loving parent in both countries. However, what is most conducive to their happiness is to maintain their relationship with both parents. Better again if their parents can keep any disagreements away from the eyes and ears of these young children. Insofar as this is possible, they should bear this in mind.

8.2 A Return Order under the Hague Convention is a blunt, emergency instrument to make sure that the relevant court decides welfare issues in the best interests of these children. In this case, the children had been in England for all their lives until a trip to Ireland in 2020 became a longer term stay, by necessity rather

than by choice, to a large extent. By May of 2021, the Respondent had made it clear to the Applicant that she wanted to stay in Ireland and that she wanted to discuss this option with him. He refused his consent to such a proposal. Though the family travelled to England in 2021, the Respondent did not intend to return there and, when the Applicant took the children's passports, she took the three children back to Ireland.

8.3 The two older children, taking into account the following factors: the duration of their stay in Ireland relative to their age, the fact that their stay (although lengthy) was expressed to be temporary until the end of May of 2021, that it was the latest in a long history of holidays in Ireland, the reasons for their stay, the rented home, the fact that their purchased home, medical, familial and longer social history is in England, all combine to persuade this Court that the stay in Ireland for the older children was one that did not displace their country of habitual residence, which remained England.

8.4 The intentions of the parents were in opposition, one to the other (from at least June of 2021) and their stated intentions do not assist the Court in determining, as a matter of fact, where each child resided at the relevant time. Both older children have close family and social ties in England and in Ireland and have medical and school histories in both places too. The courts in this jurisdiction would not struggle to deal with the case as the factual position is relatively finely balanced and indeed the relevant witnesses as to their daily lives are now in Ireland but due to the

nationality of the children and their longer period in England in a place which they continued to refer to as home, the facts combine to prove, albeit marginally, that their habitual residence is probably England and, to that extent, the Applicant has made out a case for the return of the older children. I have considered in particular the persuasive effects of the English case law in this regard but ultimately, it is a question of fact and the indeterminate nature of the children's lives in Ireland until May or June of 2021 is the most significant factor weighing against the Respondent's argument in this regard.

8.5 The position of the younger child is different. She left home in the care of her mother who is her primary care giver. There has been no question of this child returning to the Applicant's care without the Respondent. The parties agree that the children should not be separated. Indeed, such a separation would be contrary to all jurisprudence on this issue and clearly would harm their relationships with each other. It would, had either party argued for such a result, almost certainly amount to an intolerable situation for all of the children.

8.6 The youngest child has no social ties to England that compare with those of her brothers. She has never attended school. The Applicant has of course cared for her, but he does not refer to her activities in any detail in his affidavit and concedes that the Respondent is her primary care giver. The child who left England at the age of one was habitually resident in England at that time and for as long as her parents resided temporarily with her in Ireland. From the point at which her mother began

to argue for a longer term stay here, this position was less clear. From the time she was brought by the Respondent to England on the 24th of July 2021, relying on the promise that they could return freely to Ireland but without any long term agreement in place, the Applicant offers no evidence as to the status of this child in England.

8.7 The Respondent had, by then, the requisite intention to change her habitual residence to Ireland. The child was in a creche and seeing her mother's family regularly. She is integrated into a social and family environment in Ireland, family ties which are of long duration, very close and very important to the Respondent. This last is a factor to be considered as noted by Whelan J. in *Hampshire v. E.* While the child visited the Applicant's family during her 2-week stay in England, this stay was not sufficient to re-establish her original habitual residence. Further, her mother is likely to be working in Ireland for a considerable time in the immediate future.

8.8 The Applicant has submitted in this regard that the Respondent's intentions are not sufficiently clear as to amount to a settled intention to reside in Ireland. This does not appear to be correct. The Respondent has made her intention clear in writing and this was the Court's impression of her evidence as a whole: she intends to stay in Ireland and does not intend to return to England. She has moved to a rented property which is available to her in the medium term. She has arranged school and medical care for the family, including health insurance, in Ireland. There is abundant evidence of a settled purpose insofar as this is required to show an

intention to move to a new habitual residence. The Respondent's social and familial circumstances are also such as to suggest she and her youngest child, have a new habitual residence. This little girl has begun to move out into the world, walking to creche and spending time with friends and relations, in Ireland rather than in England. And, finally, the child has known no other primary carer. Her habitual residence is where her mother resides and that is now Ireland. The older children have enough integration in their own world as to maintain stronger links to England such that the mother's unilateral choice is not sufficient to break those ties in order to forge a new habitual residence as it has done in the case of the youngest child.

8.9 The submission was made that neither side raised this proposition. That may be so but in a case under the Hague Convention the Court has a duty to consider the best interests of each child in such an application and there appears to the Court to be a significant and determinative difference between the respective children taking into account how finely balanced a case it is and the various tests laid down in Irish and EU cases as set out above. Acclimatisation and integration, similar concepts, are put forward by both sides, together with a settled intention by the parents, as the factual basis for any claim of habitual residence. The intention of the Respondent, in this case, combines with the very young age of the child who had not yet forged links in England as a baby and who resided wherever her mother was. There is no cynical use of the courts' processes as presented in the *Hampshire v E.* case, quoted at some length above. That authority confirms that this Court must consider each child

individually and make the orders that vindicate the best interests of the children.

There is a further observation that is of value in this context although the two situations are very different: the remedies available under the Hague Convention are not intended to punish transgressions. The focus of the Convention is on the child and insofar as parental behaviour may be ostensibly punished, this is only so far as is necessary to deter other parents from unilateral action, to encourage communication and agreement or to reinstate the rights of a parent or guardian.

8.10 In the youngest child's case, all the factors combine to displace the habitual residence she enjoyed until May of 2021 and the Applicant has failed to prove that she remained habitually resident in England as of the 12th of August 2021. On the contrary, it seems more likely that her habitual residence is Ireland and I so find, which means that a return order must be refused in respect of this child as a matter of law. If she is not habitually resident in England, there is no basis for a return order in her case. That being so, the question arises as to whether it is appropriate to make different orders in respect of these children. As noted above, nobody is arguing for such a result. Counsel agree that such orders would not be appropriate, but each argued for a different order governing all children and none addressed this particular potential outcome.

8.11 Looking again at the Hampshire case in which the children of E and E, the Respondents in the appeal, were of different ages, in that case the youngest was an infant and the duration of the stay in Ireland was a matter of days, some of which

the child spent in care. There, the Court of Appeal upheld the decision of the trial judge that the habitual residence of a baby did not change when his parents moved for the sole reason of avoiding the authorities in England and Wales. The intention of the parents in that case was insufficient to change habitual residence. By contrast, here the move took place over a year ago and the intention followed much later. But here, at all material times, the three children have lived in Ireland and the habitual residence of the youngest child changed as her mother's intentions crystallised.

8.12 This Court finds that the interests of the children, and all of them, are best served by declining to separate them and refusing to return them due to the lengthy period during which they have now lived in Ireland. For a period of nearly 12 months before this action commenced, comprising nearly half the life of the youngest child, the family has lived in this jurisdiction. By the end of July of 2021, that child was habitually resident in Ireland where almost the whole of her interests remain and where her mother lives and intends to remain, with her extended family. It is not in the youngest child's interests to be returned to England in circumstances where it is clear that the Respondent will continue to be her primary carer. It is not in the interests of any of the children to separate them. As set out above, both older children are happy and have strong family and social ties in Ireland.

8.13 The Court has considered the rule of law implications of refusing to return children who were removed in circumstances of subterfuge but, exceptionally, and taking into consideration the youth of the third child and findings of fact set out,

which involve some measure of deceit on the part of the Applicant also, but primarily because of the length of their stay here and the measure of their integration into their new lives, the balance of the factors combine, as set out, to persuade the Court to refuse the orders sought.

8.14 This is the child-centred view of these facts that recommends itself to the Court and the application to return the three children is refused.