THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 360

Record No. 2016/450

Ryan P.
Hogan J.
O'Regan J.

BETWEEN/

K.W.

APPLICANT/

APPELLANT

AND

P.W.

RESPONDENT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 25th day of November 2016

1. This is a tragic case which requires the Court to determine the habitual residence of two young boys (who are now aged 5 and 3 respectively) under the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980. Prior to the events giving rise to these proceedings in May and June 2016 the two boys had been born and raised in Australia to an Irish father and an Australian mother. The two boys are now physically located in this State, although the circumstances and precise reasons for their arrival here are at the heart of the present dispute.

2. The Convention is an international treaty containing a set of rules governing the allocation of jurisdiction as between the courts of different countries in child custody disputes. Both Ireland and Australia are parties to this Convention. Section 6(1) of the Child Abduction and Enforcement of Custody Orders Act 1991 ("the 1991 Act") provides that the Hague Convention has the force of law in the State.

3. Article 1 of the Hague Convention provides that its objectives 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.

4. Article 3 of the Convention provides that the removal or retention of a child is 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."

5. Like many cases arising under the 1991 Act, issues of habitual residence and consent to the removal and retention of the two children are at the heart of the present proceedings. It is important to state at the outset that in these proceedings both the High Court and this Court are required to determine *only* the question of habitual residence. The answer to this question will in turn determine in the manner mandated by the Hague Convention which courts (in this instance, whether the Irish or the Australian courts) have jurisdiction to decide the issues of custody which arise in respect of these two boys. I am only too conscious of the fact that this decision involves a painful choice which has serious implications for the parents and the children alike.

6. This, however, is not a case where a threat to the children's immediate safety and welfare is at issue (such as is provided for in Article 13(b) of the Convention). Accordingly, the task of this Court in these Hague Convention proceedings is simply to determine this jurisdictional issue. This essentially requires the Court to determine:-

> (i) the habitual residence of the children, and
>
> (ii) whether there was a wrongful removal or a wrongful retention of the children within the meaning of Article 3 of the Convention.

7. Depending on the resolution of these questions, it will then subsequently fall to the appropriate courts in Ireland or Australia (as the case may be) to determine the substantive custody dispute.

The background to the present proceedings

8. The issue in the present proceedings arises in the following way.

9. The husband was born in Ireland in 1982. While he was raised in Ireland he later emigrated to Australia in 2008. The wife is Australian, although she is also entitled to British citizenship by descent. The couple were married in Melbourne in 2010 and their two

children were born in Australia in July 2011 and September 2013 respectively. The couple seemed to have had a relatively prosperous lifestyle in Australia as they owned two properties. The husband worked as a plumber and the wife was employed as a brand manager for a major Australian dairy company.

10. The husband and his elder son, R., arrived in Ireland from Australia on about the 7th May 2016 and the wife followed with the other child, E., on about 4th June 2016. While the wife may have been reluctant to give her consent to this trip, the evidence suggests that she did in fact give such consent, so that it follows that there was no wrongful removal within the meaning of Article 3 of the Hague Convention of R. from Australia by the husband for this purpose. I will address separately the question of any wrongful retention of the children.

11. The children have accordingly been physically present in the State since those dates. I propose shortly to narrate in a little more detail the circumstances in which the family arrived here from Australia. Unhappy differences between the couple materialised shortly after the wife's arrival in Ireland and the couple appear to have irrevocably separated on 2nd July 2016.

12. On the 8th July 2016 the husband commenced proceedings in the Circuit Court in which he sought sole custody of the children. The wife then commenced these Hague Convention proceedings in the High Court on 13th July 2016. Those latter proceedings culminated in the delivery of a judgment by the High Court (O'Hanlon J.) on 2nd September 2016 in which she held that the children were now habitually resident in this jurisdiction: *see KW v. PW* [2016] IEHC 513. The net effect of that judgment was that the Irish courts – rather than their Australian counterparts – would have jurisdiction to hear the custody proceedings. The mother has now appealed to this Court against that decision.

13. Prior to these disputed events the husband and the wife had booked in August 2015 a family holiday in Ireland for four weeks which was to take place between 2nd June 2016 and 3rd July 2016. The couple had previously had a family holiday in Ireland in 2014 and, by all accounts, this was a happy and successful visit.

The events of 3rd to 6th May 2016

14. On Tuesday 3rd May 2016 the husband did not go to work at his construction job in Melbourne. According to the wife, the husband said that he was not returning to work and that he wanted to return to Ireland immediately. Indeed, she stated that he feared for his life if he stayed in Melbourne. All this came – she maintained - as a great shock to her. She contended that she agreed with great reluctance to leave Australia and to follow him to Ireland. She did not want to give up her job, her home, her extended family and her friends, but found herself facing the ultimatum to relocate or to separate. In the end, however, she agreed on the basis that her husband had stated that if matters did not work out, they would agree to return to Australia.

15. The husband's case is that he had been unhappy in his work for some time, although he denied that he had ever suggested that his life was in danger. He said that the parties had discussed re-locating to Ireland, especially after their trip to this country in 2014. He said that his wife had frequently mentioned this possibility and was conscious of the family support which his own family provided in this country. He said that they both agreed to move to Ireland in circumstances where he in turn agreed that they would return to Australia if they found they did not enjoy living in Ireland or if things did not work out for them. He maintained, however, that the wife was well aware:

> "that any reference to things not working out referred to a situation where we had spent an appreciable period of time in Ireland [for] at least a year and given it a proper go."

16. The husband changed his flight date and on 6th May 2016 he flew out of Melbourne with his elder son, R., and thereafter arrived in Ireland. R. attended a local pre-school crèche in a part of rural Ireland from May 16th to June 24th. The wife maintained that these arrangements had been made without her knowledge.

The events of June and July 2016

17. On 1st June 2016 the wife left Australia with the younger son, E., and arrived in Ireland. From 1st June 2016 until the 2nd or 3rd July 2016 the family lived in a rural location in separate accommodation provided by the husband's family on their land, which residence they shared with the husband's brother. The residence is a three bedroom bungalow with an extensive garden. The wife's mother and sister subsequently arrived from Australia in Ireland.

18. On 10th June 2016 the couple attended a wedding at a hotel. When the husband came to their room at a later time than the wife there was an altercation between the parties in the middle of the night. There then followed a number of other unpleasant incidents between the couple before matters culminated in the separation of the husband and wife by 2nd July 2016. On that occasion the husband unilaterally took possession of the children's passports following an altercation between the couple. I propose to consider presently the legal implications of this step.

19. On the following day, 3rd July 2016, the wife and her mother left the accommodation which had been provided by the husband's family and they moved into a hotel in a rural town with the children. They later moved to accommodation in Dublin. On 8th July 2016 the husband obtained an ex parte order from the local Circuit Court restraining the wife / mother from removing the children from the jurisdiction.

20. On the 18th July 2016 the High Court made further orders which included taking custody of the children's passports. To this end the Court received undertakings from the husband and the wife not to unilaterally take the children out of the jurisdiction. On that day the Court appointed a clinical psychologist, Dr. Anne Byrne-Lynch, to meet with the elder boy, R., so that the voice of the child might be heard. The wife also gave an undertaking not to proceed or proceed further with an action in the Australian court, presumably pending further orders, hearings and dispositions by the Irish courts.

21. Dr. Byrne-Lynch presented her report concerning the elder boy, R., on 22nd July 2016. This report presents R. as a happy, well-adjusted boy who had a warm supportive relationship with his mother and his grandmother. It appeared from his conversation that Australia is the familiar home which he takes for granted. He reported clearly, when asked, that he is Australian and not Irish and he remarked that he did not know Irish. He reported clearly he wanted to go to school in Australia.

22. Dr. Byrne-Lynch's overall clinical impression was of a 5-year-old whose sense of himself is as a boy who lives in Australia with his mother and brother with his maternal grandmother also at hand. He clearly views his present sojourn in Ireland as a holiday which will end with a return to his normal life. He appeared to expect his father to remain in Ireland, but Dr. Byrne-Lynch considered that his relationship with his father was less easy to ascertain in that he spoke in a conversational way about him in terms of where he lives and meeting with him on occasions (such as a visit to a the zoo) but that he would not be drawn further.

The judgment of the High Court
23. In her judgment O'Hanlon J. acknowledged the views which R. had expressed to Dr. Byrne-Lynch regarding his preference for a return to Australia. She felt, however, that, given his age, little weight could be attached to these views. O'Hanlon J. held that the question of settled intention on the part of the parents was at the core of the case. She accordingly concluded thus:

> "… this Court considers that the circumstances of the journey from Australia to Ireland as set out by the [husband] in his affidavit and submissions made are more credible than those of the [wife] and have a consistent logic. It is the view of this Court that the parties had a joint intention to move to Ireland and that they had discussed this plan over a prolonged period of time and that although the final decision to leave Australia was prompt this can be considered in the context of the parties' relationship. This Court considers it logical that the respondent would travel first with the child R. for the purpose of preparing him for primary school and that the applicant would remain in Australia to complete the sale of one of their properties. It is significant that certain tangible steps were made to ensure the integration of the children in their new social environment in Ireland including their enrolment in pre-school and primary school and the party which was held for the child R. for the purpose of bonding with his classmates.
>
> In applying the principles around consent as outlined above from the case of *S.R. v. M.M.R.* [2006] IESC 7, it is the view of this Court that all the factors point to a consent to move the family to Ireland, on the balance of probabilities and that there is clear and cogent evidence of this being a real consent which appears obvious given the steps taken by both parties in effecting this relocation to Ireland. There can be no doubt but that the applicant knew what was planned and had consented to this move. Therefore, it is the view of this Court that these children changed their place of habitual residence to Ireland and there could be no wrongful retention within the meaning of Article 3 of the Hague Convention."

24. It is, perhaps, important to stress that the hearing before the High Court was entirely on affidavit. This was not a case where, for example, the judge heard the parties giving oral evidence and where she made specific findings of fact based on that viva voce evidence. In these circumstances, namely, the absence of oral evidence and cross-examination it was not open to the trial judge to make a factual determination between conflicting accounts contained in the affidavits of the parties which themselves were not based on either undisputed facts or otherwise objectively verifiable evidence. As Hardiman J. stated in *Boliden Tara Mines Ltd. v. Cosgrove* [2010] IESC 62:-

> "It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a notice of intention to cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."

25. So far as findings based entirely on affidavit evidence is concerned, as Charleton J. explained in *Ryanair Ltd. v. Billigfluege de GmbH* [2015] IESC 11:

> "The first task of the trial judge is to isolate the questions of fact that are essential to the decision and to identify such portions of the evidence as support one side or the other. Once that is clear, a trial judge will be aware that he or she is entitled to regard exhibits as part of the factual material. Where correspondence contradicts averments of fact, this should be taken into consideration; where bald allegations are unsupported, that may be important; where exhibits demonstrate that what a witness deposes to is unlikely, that can be significant; where a test result is confirmed by an analytic printout, it can be hard to gainsay; and where a fact is demonstrated through an unbroken chain of circumstances, mere argument will have to give way. What these considerations demonstrate is that sorting out the facts that can be relied on in the context of written material is an evaluative exercise. Such an analysis is one of finding where the probable balance of truth lies. As such, it should be treated with appropriate deference by an appellate court. Thus, an appellant arguing for the reversal of any judgment founded on a rigorous analysis of affidavit evidence as to fact bears a heavy burden in seeking to demonstrate that a trial judge has fallen into such error that the decision made is untenable."

26. Accordingly, in a case such as the present one, where there was such a conflict on the affidavits on a key question such as the existence of a settled intention to leave Australia and where no oral evidence had been given, the task of the court was to examine the affidavit evidence and to draw such inferences from the undisputed facts and the objective evidence as might be thought appropriate and fair.

The undisputed facts and the available objective evidence
27. What, then, are the undisputed facts concerning habitual residence and the couple's intentions regarding their departure from Australia? The starting point, of course, is that the children plainly had an habitual residence in Australia prior to the events giving rise to these proceedings. Quite obviously, if the parents had actually decided permanently to leave Australia and come to Ireland to live, this fact in itself would probably be decisive – at least in most circumstances - of the question of habitual residence. Assuming such a plan was actually put into effect, then in all probability the boys would have acquired habitual residence here even after a relatively short time. The Northern Irish High Court reached exactly this conclusion in a case with similar facts in **C v. C** [1989] N.I. 252, a case to which I shall return.

28. The period here is very short and is in dispute. In her affidavits the wife does not agree that she and her husband had decided to move to Ireland on this permanent basis. Her case is that she reluctantly agreed to move based on her husband's agreement that "we would return to Australia if we found that we did not enjoy living in Ireland". In her judgment O'Hanlon J. dealt with the evidence of the husband by observing:

> "The respondent [husband] accepted that he did reassure the applicant upon their move to Ireland that they may return to Australia, however he stated that was referable only to a holiday. He stated that the agreement between the parties was that they would give it a go and live in Ireland for at least a year."

29. O'Hanlon J. thus found in the circumstances that the children had changed their place of habitual residence to Ireland and there could consequently be no wrongful retention within the meaning of Article 3 of the Hague Convention. The judge said that it would make no sense to invoke any inherent jurisdiction because that would be contrary to the Convention and to the Guardianship of Infants Act 1964. The appeal to this Court has focussed solely on the issue of habitual residence.

30. The children have been living in Ireland for an extremely short period of time. When they arrived separately with their parents, the

father's case is that this was on foot of a decision to change habitual residence of all the family from Australia to Ireland. He acknowledges however that the mother's consent was conditional, at least to some degree.

31. All of this is borne out - in some respects, at least - by the text messages which the couple exchanged by mobile phone between 6th May 2016 and 14th May 2016 and which were exhibited in evidence. The wife complained that she had been placed under "unbelievable" stress and that she was "scared" that she was "sacrificing everything I have here." The husband apologised "for putting her through this". On 14th May 2016 the husband then sent the wife a lengthy text saying that he had supported her through various difficulties her family had endured and that he wanted her to "give it a go as a family" as otherwise the boys would "have no father to grow up with."

32. Accordingly, even taking the husband's case at its height, the evidence falls short of establishing that there was a settled and mutual decision to effect a change of habitual residence. It is, moreover, implicit in any agreement of this kind that the proposal is for a provisional change in family circumstances which may indeed become permanent should there be an ultimate agreement that the change was a satisfactory one.

The prior case-law on habitual residence

33. It is clear from the case law that the concept of habitual residence under the Hague Convention is not fixed and probably eludes precise definition. As Fennelly J. said in *PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306, 316:

> "The Convention deliberately left the notion of habitual residence undefined. The courts of the contracting states have to be free to apply to it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable."

34. The starting point, of course, is that immediately prior to the events giving rise to the present application the two children plainly had an habitual residence in Australia, as this was the country in which they had been born and reared. In what circumstances, therefore, can it be said that the children lost their habitual residence in Australia?

35. The authorities establish that young children can lose their habitual residence where the family makes a settled decision to leave one country (in this instance, Australia) in order to take up residence in another country (in this case, Ireland) and do in fact take up residence in that other country: see*, e.g.,* in *re B (Minors: Abduction) (No.2)* [1993] 1 F.L.R. 993; PAS v. AFS [2004] IESC 95, [2005] 1 I.L.R.M. 306 and *AS v. CS (Child Abduction)* [2009] IESC 77, [2010] 1 I.R. 370. On the other hand, it is clear from the judgment of this Court in *DE v. EB* [2015] IECA 137 that a unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence.

36. The starting point, of course, is that immediately prior to the events giving rise to the present application the two children plainly had an habitual residence in Australia, as this was the country in which they had been born and reared in a very settled environment. In what circumstances, therefore, can it be said that the children lost their habitual residence in Australia?

37. The facts of *AS v. CS* are very similar to the present case. In that case an Irish citizen travelled to Australia where she met Mr. S., an Australian citizen, in June 2007. The couple married in December 2007 and they had a child in April 2008. The family travelled to Ireland in mid-December 2008, but the relationship between the parties then broke down. The husband returned alone to Australia in early January 2009 where he resumed his employment. He was a teacher and had arranged for extended leave in his job to travel to Ireland.

38. After his return to Australia, the husband commenced Hague Convention proceedings in February 2009 and he sought an order that the child be returned to the jurisdiction of the Australian courts. In his judgment in the High Court MacMenamin J. found that:

> "The total period of time that the parties lived together in Ireland was less than one month, *i.e.*, between 18th December, 2008 to 3rd January, 2009.
>
> The evidence undoubtedly establishes that the parties' intention was to reside outside Australia for a significant period. It was the intention that one or other or both of the parties would obtain employment in Ireland.
>
> On balance, I find the evidence does not establish that at any time both the parties established an intention to reside in Ireland on a long term continuous basis. Insofar as there was a formed common intention, I think it was that the parties would reside in Ireland for approximately one year."

39. MacMenamin J. also also found that the time spent in Ireland was "certainly not appreciable". The issue which the Court had to determine was, he said, whether there existed a "joint settled intention" that the child should not return to Australia, at least in the foreseeable future, and instead should take up residence in Ireland. The judge found that the evidence had not established "even this", stating:

> "The unilateral intent of one parent does not establish a joint settled intention. There is evidence that the hope and aspiration of the respondent was that she would return to Ireland. She may well have hoped that the applicant would join her in this intention. But looked at objectively, I think the evidence only establishes that the applicant was simply prepared, in the colloquial sense to "give it a go" in Ireland, but that at no time did he abandon his long term intention to reside in Australia. He did not break his ties with that country. He did not give up his job completely or resign from it. Both parties retained some at least of their household goods in Australia, although they bought others here. Insofar as there was a joint common intention, the parties may have agreed that they would not live in Australia for a significant period, but this does not establish that they intended to set up a joint residence in Ireland on a continuous basis. Certainly the material does not establish that they resided here in such a manner as to be "settled"."

40. This decision was affirmed by the Supreme Court where, following a comprehensive review of the authorities, Macken J. asked herself whether – adopting the test which had been proposed by Waite J. in *Re B minors* - it could be said that the parties had been "adopted voluntarily and for settled purposes" as the country where the "parties would live as part of the regular order of their lives for the time being, whether of long or short duration"? She concluded that the trial judge had sufficient evidence ([2010] 1 I.R. 370, 397):

> "upon which he could properly conclude that, while parties intended to come to Ireland, it was only to 'give it a go', even up to one year if matters developed and that the evidence did not go so far as to suggest that they had a joint settled opinion in doing so."

41. She added that the parties' sojourn in Ireland over the extended Christmas period did not have a sufficient degree of continuity about it to be settled. Macken J. then continued ([2010] 1 I.R. 370, 398):

> "…..there was no habitual residence in the present case, conditional upon future events. What is clear from the evidence and the findings of fact is that the parties' intentions were instead of an entirely speculative nature, which in turn depended upon an unresearched and unprepared visit, which both parties genuinely but naively thought might lead to the of chance of one or both of them possibly obtaining work. That is quite different to the true condition which underlay the decision to move to Germany in *Re R.* which was an identified settled purpose, even if the condition attaching to it was subsequently not met."

42. Macken J. went on to refer to *Re R (Abduction: Habitual Residence)* [2004] 1 F.L.R. 216. In that case the parties had been born in the United Kingdom and Australia respectively. They had married and lived in London and had one very young child. As part of his employment, the father was sent to Germany, where the parents rented accommodation, having put their belongings, including personal items, in storage in London. The father's contract of employment in Germany was subject to English law, his salary was paid in sterling and holidays included English bank holidays. The mother of the child, with the father's consent, travelled to Australia and was due to return within a short time on the 6th March 2003 but the mother sought to stay until the 17th March 2003 for the birthday party of a relative. The father refused to agree to this extension and instructed lawyers to write to the mother seeking the child's return. The mother and child did not return from Australia to London until the 22nd March 2003, and the father applied for orders for the child's return to Germany pursuant to the Hague Convention.

43. Against that factual background the English High Court found that the child was habitually resident in Germany. In her judgment in *AS*, Macken J. approved the following summary contained in the headnote of the report of *Re R*:

> "The test for habitual residence is whether the residence was for a settled purpose, which might be either a purpose of short duration or conditional upon future events. The test is not 'that one does not lose one's habitual residence in a particular country absent a settled intention not to return there.' This comes perilously close to confusing the question of habitual residence with the question of domicile and is contrary to the authorities."

44. The Supreme Court accordingly upheld the decision of the High Court that the children had not lost their habitual residence in Australia, precisely because of the conditionality of the move and the fact that the stay in Ireland of the couple prior to their separation was of short duration. The reasoning in AS has obvious clear parallels for the present case.

45. Another case with obvious similarities to the present one is *W. v. F.* [2007] EWHC 779 (Fam), a case involving an American husband and British wife. The parties had originally lived in the U.K. with their seven year old son, S.. The husband wanted to return to the U.S., but, as Singer J. put it, "the mother was reluctant [and] she went to save her marriage." Although there was a settled intention on the part of both parties to move permanently to and to remain in the U.S., this evaporated within a day or two of her arrival. The mother and S. returned to the U.K. about 8 days after they had first left for the U.S.. Singer J. held that S. had not acquired habitual residence in the U.S. after the seven day period. He continued:

> "I am wrong about that, and it is possible for a period of 7 days to be sufficient, then I hold it is not sufficient in the circumstances of this case. The mother changed her mind about the move very shortly after arrival. She never settled in the United States. She had gone to save the marriage. It took her only a day or so to realise that, as far as she was concerned, it was not possible. Given that S's habitual residence was dependent on hers, there was a settled intention but no habitual residence.
>
> He had, with the mother, lost his habitual residence when the mother left the U.K. with the settled intention of residing in the United States. He had not by 8 September acquired a new one. Mr Jarman argues that to leave a child without an habitual residence is undesirable for the purposes of the Hague Convention. I see the force of that submission but I cannot let it prevail in the circumstances of this case.
>
> Their new residence had not become settled nor habitual. There were doubts from the beginning. Those were not resolved in favour of remaining. A longer period was needed….. Quite the contrary, they led to the mother's decision to return. To hold other wise would deprive the words of their natural and commonsense meaning. I am not satisfied that on 3 September 2006, S was habitually resident in the United States."

46. While I would not, with respect, share the views of Singer J. regarding his conclusion that S. no longer had any habitual residence after his return to the U.K., his most critical finding was that the mother and S. had not acquired a U.S. habitual residence. This is very much in point so far as the present case is concerned.. In both instances the agreement was given reluctantly and was done in order to save the marriage. In both instances the wife changed her mind within a short time of arrival in the new country.

47. It is true that the period at issue in *W.* was even shorter than in the present case, but as against that Singer J. had found that the intention to move permanently was mutual and settled on the part of the husband and wife, something which even on the husband's own case cannot be said in the present case.

48. Another decision with resonances to the present case is *C v. C.* [1989] N.I. 252. In that case the mother, who was Australian, came to Northern Ireland in 1983 to live with her relatives. She met the father (who was Northern Irish) and they had two children. They married in 1987. In July 1989 they decided to emigrate to Australia. The family lived with various relatives and the father commenced work as a tiler. In September 1989 after some 45 days in Australia the father told the mother than the marriage was over. The father then brought the two children back to Northern Ireland without the consent of the mother.

49. The mother then commenced Hague Convention proceedings in Northern Ireland seeking the return of the two children to Australia. The husband argued that neither child was habitually resident in Australia immediately before their removal.

50. Higgins J. rejected the argument that the children were habitually resident in Northern Ireland, saying ([1989] N.I. 252, 260) that although counsel for the husband:

> "…could point to the shortness of the time which they had spent there, and to the lack of an established home. But at that stage it was still the intention of both parents to remain in Australia, a factor to which I attach much weight, and I consider that their stay there was more than casual or transient and that the children then had an habitual residence in that country…."

51. Counsel for the husband, Ms. Jackson S.C., naturally points to the decision in *C* as an authority for the proposition that the children at the centre of the present proceedings had acquired habitual residence in this country by mid-July 2016. While the facts of the present case have at one level striking parallels to those of *C*, there are also critical differences which must not be overlooked. Fundamental to the reasoning in *C* was the fact that the husband and wife had both freely and mutually elected to leave Northern Ireland permanently with their children with the purpose of making a new life in Australia. As Higgins J. noted, the parties were in agreement that their decision was "a joint one and was primarily [designed] to give us a new start as well as for employment reasons."

52. That, however, is not the position here. For a start the circumstances in which the couple to Ireland are in dispute. But even taking the husband's case at its very highest, the move to Ireland did not involve the same irrevocable sundering of ties with Australia as the similar move in reverse had occasioned in C. The wife's move to Ireland was both a reluctant and a provisional one. It is true that the couple had agreed to sell their principal family home prior to the move to Ireland and, certainly, this fact *taken on its own* is suggestive of an intention to abandon an existing habitual residence. As the Court of Justice explained in the very similar context of Council Regulation (EC) No. 2201/2003 ("the Brussels II Regulation") (dealing with the allocation of jurisdiction between the courts of the Member State of the European Union in intra-EU custody disputes) in Case C-523/07 *Proceedings brought by A* EU:C:2009: 225, [2009] E.C.R. I-2805:

> "….the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.
>
> By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State."

53. While this is true so far as the present case is concerned, the couple still, however, own another property in Australia close to the maternal grandmother of the children to whom they are very attached. The couple still have functioning bank accounts in Australia and the wife is apparently free to return to her existing job..

54. It is also clear that the husband's decision in early May to return to Ireland was a sudden and abrupt one, involving a last minute change to his flight arrangements and suddenly terminating his employment. The wife appears to have been confused – even bewildered – by the sudden turn in events. Insofar as she agreed to travel to Ireland, it seems to have been on a reluctant and entirely provisional basis, prompted in part by an understandable wish to be with her husband and to re-unite and to be with her two young children.

55. Irrespective of what the parties may (or may not) have said to each other about such a move (which is, in any event, the subject of an irreconcilable conflict on the affidavits), there is little objective evidence to show that there was any mutual pre-planning of even a medium-term move to Ireland. The husband changed the ticket the day before departure. No advance arrangements appear to have been made with either schools (whether in Ireland or Australia) or health professionals to inform such third parties of the family's intended departure. Nor had any appropriate arrangements been made for the accommodation of the family in Ireland. It is true that they stayed in separate accommodation in a three bed room bungalow (shared with the husband's brother) on the husband's family's farm, but coming as they did from a background of owning a family home and another property in Australia, one might have expected that at least separate rented accommodation which was suitable for the family would have been put in place.

56. Had there been such a genuine mutual understanding that the family a move to Ireland for even a temporary (if appreciable period), one would have expected that such arrangements would have been put in place.

57. Viewing this matter through the prism of the children, it is manifest that their prior schooling (in the case of R.) and caring (in the case of both R. and E.) had all been in Australia. As Dr. Byrne-Lynch's report makes clear, R. plainly identified himself as Australian and that he was simply here on holiday. These are important considerations, for, as the CJEU stated in Proceedings against A (admittedly in the context of the Brussels II Regulation as distinct from the Hague Convention):

> "The concept of 'habitual residence' under Article 8(1) of [the Brussels Regulation] must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of that child must be taken into consideration."

58. Here it is clear that the duration of the stay was short and it cannot be said that it was altogether regular, in that the husband brought R. more or less at the last minute, leaving the wife and the younger son to travel separately some three or four weeks later. Both R. and E. are Australian and the preponderance of the objective evidence does not support the contention that there was a joint agreement to move the children to Ireland on anything other than a transient or temporary basis. While the children have extended family in Ireland, their maternal grandmother (to whom they are attached) remains in Australia.

59. There are, admittedly, some factors which point in the opposite direction. The wife did – however reluctantly – agree to move to Ireland on what best be described as a temporary or provisional basis. In addition, the family home in Australia was sold, the father had arranged for R. to be enrolled in school here (albeit only after his arrival here) and both parents had attended an open day for this purpose. A birthday party had been arranged to which all of R.'s prospective classmates had been invited for the purpose of helping him to socialise in the new environment. Nevertheless, the degree of social integration of the children in the new State envisaged by the CJEU in *Proceedings against A* as necessary to effect a change of habitual residence does not appear to have been established.

60. It is possible that the wife would, over time, have settled down in Ireland and, at least, acquiesce in the husband's urgings – even insistence – that the family move here for an appreciable time. If that had occurred, then the habitual residence of the children for the purposes of the Hague Convention would very probably have changed from Australia to Ireland. But that is not what happened. It is clear that the relationship between the couple broke down within days of her arrival in the State and she has evinced no desire at all to stay here with the children.

Whether there was a wrongful removal or a wrongful retention of the children in this State for the purposes of Article 3 of the Hague Convention

61. I turn next to the question of whether there was a wrongful removal or a wrongful retention of the children in this State, contrary to Article 3 of the Hague Convention. It is clear that there was no wrongful removal of the children by either party. The parties had agreed (if only reluctantly on the part of the wife) that R. would travel with the husband on 5th/7th May 2016 and, equally, that E. would travel with his mother when she arrived on about 4th June 2016.

62. As I have already found, the wife's agreement to travel to Ireland was a conditional and provisional one. It was necessarily implicit in such an arrangement or tacit understanding between the parties that the wife would be free to return to Australia with the children if her trip to Ireland did not, in fact, work out. It was, unfortunately, clear within days of her arrival that matters were not, in fact, going to work out and that the wife wished to return home.

63. The consequence of this implicit understanding was that the wife had the entitlement – should she so wish – to return to Australia with the children. Although both husband and wife had joint custody in respect of the children, that implicit understanding between the parties meant that the wife was entitled to bring the children home on 3rd July 2016 if she wished to do so. Put another way, the wife was entitled pursuant to that understanding on that day to refuse to give any further consent for the children to remain in Ireland, so that the failure to permit the children to return to Australia amounted to wrongful retention in the manner envisaged by Finlay Geoghegan J. in *DE v. EB* [2015] IECA 104.

64. In these circumstances, the act of the father in taking the children's passports on 2nd July 2016 – which had the effect of stopping the mother taking the children with her to Australia – constituted unilateral action taken by him to which the mother had never consented. It served to frustrate her from acting on foot of the implicit understanding regarding her return to Australia with the children should she so wish. As such, it amounted to a breach of the rights of custody which the mother was entitled to exercise in respect of the children.

65. I find myself accordingly obliged to conclude in the circumstances of this case that the father's actions on 2nd July 2016 in taking the children's passports amounted to a wrongful retention of the children within the meaning of Article 3 of the Convention.

Conclusions

66. Viewing, therefore, the totality of the available evidence, I am driven to the conclusion that the trial judge's conclusions based on her analysis of the affidavit evidence regarding the habitual residence of the children cannot be sustained. In circumstances where (as here) there is a conflict on affidavit between the couple as to the nature of the understanding regarding the move to Ireland, the undisputed facts and the available objective evidence regarding the events of May and June 2016 must carry considerable weight.

67. As I have already indicated, the move to Ireland on the part of the husband was sudden and abrupt. The very rapidity of the decision both surprised and bewildered the wife. If there had indeed been such an agreement between the couple to move here on anything other than a purely transient and provisional basis, one would have expected a far higher degree of advance planning regarding the schooling and accommodation needs of the children. To this may be added the fact that the relationship between the couple broke down within days of the wife's arrival, so that she never in fact ultimately acquiesced in the husband's suggestion of a medium to long-term move from Australia to Ireland. All of this suggests that the duration of the physical presence in Ireland of the children prior to the start of July 2016 did not have a sufficiently settled character or degree of social integration into their surroundings such as would warrant the conclusion that a change in their Australian habitual residence had been thereby effected.

68. Furthermore, for the reasons already stated, I believe that the father's actions in taking the passports of the children on 2nd July 2016 amounted to a wrongful retention of the children within the meaning of Article 3 of the Hague Convention.

69. In these circumstances, I believe that the appeal must be allowed. I would propose that this Court should determine:-

> (i) that habitual residence of the children for the purpose of Article 3 of the Hague Convention remains that of Australia, and
>
> (ii) that the actions of the husband in unilaterally taking possession of the children's passports on 2nd July 2016 amounted to a wrongful retention of the children, R. and E., for the purposes of Article 3 of the Hague Convention.

70. I should add that I have had an opportunity of reading in draft the judgment which Ryan P. has just delivered and I agree with it.