Neutral Citation Number: [2010] IEHC 303

THE HIGH COURT

FAMILY LAW

2010 11 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION, AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003 AND IN THE MATTER OF K. S. (A MINOR) AND IN THE MATTER OF FOREIGN PROCEEDINGS ENTITLED CASE NO. EY10C00056 IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF K. S. BETWEEN COVENTRY CITY COUNCIL AND F. S. AND A. S. AND M. S.

BETWEEN

COVENTRY CITY COUNCIL

APPLICANT

AND

M. S.

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin dated 27th day of July, 2010.

1. The child at the centre of these proceedings K. S. was born on 19th January, 2010 in Coventry. K.'s mother is F. S.. His father is A. S.. The mother and father are not married to each other. The respondent M. S. is F. S.'s mother. She will be referred to as "the grandmother". K. is now aged six months. After his birth he lived in Coventry with his parents.

2. On 3rd March, 2010, he was admitted to hospital. According to the consultant paediatrician who saw him afterwards he was found to have a 1 cm circular bruise on the right side of his forehead almost in the hairline, which was blue in colour. On his right cheek the reports say he had a scabbed lesion, 1 cm x 0.8 cm, which appeared fresh. He is said to have had a red or purplish linear bruise on his left forearm 0.4 cm long. What was described as an "odd red lesion" was discovered on the palm of his right hand, consisting of two 1 cm long curves in his palm both of which were red, and both on the lateral aspect of the palm just under the index finger. He is said to have had a bruise on his left cheek over the maxilla which was blue, circular and 1 cm in diameter. The medical report says that he had a non-displaced fresh spiral fracture through the left humerus, and a small corner fracture of the right distal femoral metaphyses, tibial metaphyses, the left distal ulna and the left distal tibial and fibular metaphyses. There was no history of trauma. It is said the parents did not give any explanation as to what had occurred. The consultant paediatrician who examined K. concluded that this must be an inflicted injury, that is, one which is non-accidental in nature. The consultant concluded that neither of the type of fractures which K. had sustained could occur as a result of normal handling. At the time of these injuries K. was aged six weeks.

3. As a consequence of what was found the local social services in Coventry were contacted. A meeting took place with the parents and it was agreed that K. would be voluntarily accommodated by the local authority under s. 20 of the United Kingdom Children Act 1989. In view of the fact that there may be criminal charges pending it is necessary to recollect that any accused person is entitled to the presumption of innocence; the possibility of an innocent explanation for these injuries cannot be discounted; it is the respondent's case that these injuries were the consequence of brittle bone syndrome.

4. As these proceedings post-date a series of proceedings in England it will be convenient to summarise from the judgment of McFarlane J. in the High Court of Justice, Family Division. These proceedings were brought by the local authority against the parties. The respondent to these proceedings was a notice party to the English proceedings by that stage. This judgment was dated 21st May, 2010. It outlines the background in great detail.

5. In brief what occurred was this. Section 20 of the United Kingdom Children Act 1989 requires the agreement of parents to a child to be placed with foster parents. It does not provide for a formal care order. Once the child is so accommodated he becomes "looked after" by the local authority. In some circumstances he may in fact be placed with foster parents. In others, the child may be placed with members of an extended family. The social workers were not satisfied for K. to return to his mother and father pending further investigation. K.'s maternal grandmother, M. S., who is a teacher, came from her home in Scotland and moved into the family home in Coventry.

6. The arrangements between the local authority, and the parents were put in writing. There were two "working agreements": one with the parents, a second between Coventry Social Care and the respondent, M. S.. In that second agreement the respondent agreed to look after K. at the family home in Coventry for a period of five weeks, to be reviewed in the third week. The respondent was not to allow the mother or the father unsupervised contact to K.. All contacts were to be supervised by Social Care and this was to be reviewed in future.

7 A similar working agreement was entered into between the social workers and the child's two parents. This was signed by each of them and dated 8th March. The provisions relating to the parents agreement are similar to those relating to the respondent's agreement.

8. It is important to emphasise that this agreement was "voluntary" in the sense that the parents could seek to withdraw from it. However, it was given by the parents in circumstances where, it might readily be inferred, that absent such agreement, the local authority would have applied to a court in England for a formal care order.

9. The local authority conducted a child protection case conference on 17th March, attended by the parents. On 24th March, there was a "core group" meeting attended by health professionals and the parents. At that meeting the parents were actually informed that the local authority were considering issuing care proceedings. The plan at that time was that K. should remain living with the

grandmother. However, the local authority wished to initiate an investigation into the injuries, and if appropriate to pursue that investigation through court.

10. Then and at all times since, the parents did not accept that K.s injuries were non-accidental. They sought a second opinion as to whether there was another, and innocent medical cause for the symptoms described.

11. A short time after the core group meeting on 24th March, 2010 and with the agreement of the parents, the respondent removed K. from the family home on 25th March, 2010, and travelled on the ferry to Ireland. The ferry docked in the early hours of 26th March, 2010. Later that same day, the local authority issued care proceedings in Coventry County Court. It is thought that these proceedings were initiated in the afternoon. The fact that K. had been removed was ascertained only three days later on 29th March.

12. A hearing took place in the Coventry County Court on 31st March, 2010, before District Judge Cottrell. There was a further hearing before a county court judge on 7th April.

13. At the first hearing, on 31st March, the local authority, both parents and the children's guardian were all represented by counsel. The district judge directed that K. was to be placed in the interim care of the local authority and orders were made for his recovery.

14. On 7th April, the county court judge, Judge Bellamy, then sitting as a deputy judge of the High Court heard full argument and made further orders as to receiving of the child and his placement with the local authority.

15. A further hearing took place before McFarlane J. in the English High Court Family Division, on 5th May, 2010 in Birmingham. On that occasion both parents were represented by lawyers but the parents themselves declined to attend, asserting that the court had not jurisdiction. The parents were given the opportunity of setting out any evidence they wished to place before the High Court in England and Wales in relation to jurisdiction and habitual residence and to submit skeleton arguments on the issue. Neither parents nor the grandmother did so.

16. The matter again came before McFarlane J. on 21st May, 2010. But by then, despite having had access to free legal aid, and having instructed solicitors and counsel at previous hearings, the parents dispensed with the services of their lawyers and decided not to attend the hearing. The parties and the grandmother knew that this case was set down to consider their assertion that the English courts lacked jurisdiction to deal with their child.

17. In the absence of submissions from the parents, or the respondent, the judgment of 21st May, 2010, sets out a number of earlier recorded exchanges at the previous hearings between the lawyers representing the various parties in detail. It is necessary only to summarise these for the purposes of this judgment. The following points emerge:

> (1) The child's mother instructed her counsel to say that the removal of the child to Ireland was "the lesser of two evils", because her position was that she had desperately sought the medical professionals involved to carry out certain tests to ascertain whether or not there was any medical conditions that could explain the injuries;
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> (2) the mother perceived that the consultants were not disposed to obtain a second opinion on the issue;
>
> (3) her counsel submitted to the County Court Judge that "in her desperation she felt that the position would be different in Southern Ireland (*sic*), and that the tests would be carried out there. As removal was "the lesser to two evils", the mother gave her consent to the grandmother taking K. to Ireland;
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> (4) the mother's perception was that she was not going to get a "fair hearing" in England;
>
> (5) it was the mother's position before the English courts that there was no court order in place at the time of removal to Ireland; thus there had been no breach of custody rights.
>
> (6) by contrast, the child's father did not instruct his solicitor who was appearing in the proceedings to take any "jurisdictional point". The solicitor conceded that things had happened that "should not have happened";
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> (7) the father's solicitor contended that the decision of the local authority simply to place the child with the grandmother was a "wrong one" and that care proceedings should have been initiated;
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> (8) at the core group meeting of the 24th March, the local authority health professionals indicated that they were issuing care proceedings, that they might apply for an interim care order and that there was even talk at that stage of adoption being a possible "long stop" plan.
>
> (9) the father's solicitor submitted that the parents were faced with a situation where everything seemed to be going against them, including the health professionals, and that those professionals were declining to carry out additional tests in circumstances where the parents and grandmother had researched the internet extensively seeking an explanation for what had happened to K..

18. McFarlane J. pointed out in his judgment that the mother accepted she had breached the written agreement. He found that the reason for the child's departure, as explained by counsel was not to be seen in the sense of some settled pre-planned or well thought out plan for the child to change habitual residence from England and Wales to Ireland; but as an act of desperation on the part of the mother who was frustrated at her inability to obtain a second medical opinion from an alternative doctor, and also felt she was not going to get a fair hearing of the issues.

19. The judge emphasised that the father did not even seek to argue any jurisdiction point and that through his solicitor; he had accepted that the local authority were plainly wrong not to have sought a care order.

20. A number of other findings from McFarlane J.'s judgment are material. First, he states the county court judge found that the child was habitually resident in England and Wales until the 25th March, 2010, the date of removal. Thus the case was "an English case" to be determined by an English court.

21. Second, the judge applied legal principles in England to the facts. He considered the law relating to habitual residence in England and Wales. He recited the long standing authority of Lord Brandon in the case of *Re: J.* on the question of habitual residence to this effect:

> "There is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it *with a settled intention not to return to it but to take up long term in country B instead.* Such a person cannot however become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B. The fourth point is that, where a child of J.'s age (J. was just over one year) is in the sole lawful custody of the mother his situation with regard to habitual residence will necessarily be the same as hers."

22. Third, in his judgment McFarlane J. pointed out that K. had always lived in England. Both parents had lived there for many years. (In fact in the proceedings in Ireland the mother accepted that she had left Ireland when she was one year old and had thereafter lived in various places in the United Kingdom first with her mother then singly, and ultimately with A. S.. There is no evidence she ever permanently resided in Ireland).

23. At the time of McFarlane J.'s judgment the parents had not left the jurisdiction of England and Wales. In fact both were on police bail as a result of the police investigation into K.'s injuries. Thus the question arose as to whether the child's habitual residence could have changed in circumstances where the parents were unable to leave the jurisdiction of England and Wales where the child had travelled with the grandmother. The English court pointed out that at no stage in the English proceedings before any of the courts were the parents recorded as either saying definitively or even asserting that they had a long term settled plan to go and live in Ireland once the difficulties were over.

24. In response to the parents contention, made in the earlier proceedings, that they were still the sole holders of parental responsibility, and therefore had the capacity to send K. out of the jurisdiction, McFarlane J. found that in analysing the concept of habitual residence the wider context had to be looked at, including the fact that the child was subject to child protection procedures and subject to the agreement which, though not binding, was a formal and important document and required the child to reside only in the family home.

25. In considering the concept the judge also referred to the decision of the European Court of Justice in *Re: A (Area of Freedom Security and Justice)* [C523/07] [2009] 2 F.L.R. There the European Court of Justice looked at various questions in relation to habitual residence applying many of the same criteria as in *Re J.* The European Court of Justice expressed itself in this way (at para. 44 of the judgment):

> "Therefore the answer to the second question is that the concept of 'habitual residence' under Article 8 (1) of the 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 relationship of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child taking into account all the circumstances specific to each individual case."

26. Having outlined the circumstances, and in particular those giving rise to the child's removal, McFarlane J. rhetorically asked (at para. 25 of his judgment):

> "…Is it at all tenable to contemplate parents being able to alter the habitual residence of the child who is thus contained and protected within those arrangements? My answer to that question would be 'No' with the result – given the umbrella of protection that the Local Authority had round the child and given that the parents actually knew that proceedings were to be issued within a very short time, giving the court jurisdiction in relation to K., it was not actually open to them unilaterally to change his habitual residence. They were already in the child protection system with certain constraints on their actual and real ability to change his habitual residence."

27. The judge concluded:

> "27. There is no doubt that K.'s parents were and are habitually resident in England and Wales. There is no doubt that he was habitually resident in England and Wales from the moment of his birth in the hospital in Coventry. The question is did he lose that habitual residence by his departure to Dublin? No evidence that this court has before it leads me to conclude that he did. All the evidence, such as it is, including the submissions of the parent's lawyers, points the other way. I have also concluded that it was not open to these parents in the circumstances in which he was and in which they acted to, as a matter of fact, change his habitual residence in this case. He therefore has not lost his habitual residence, certainly had not lost it some hours after his arrival in Dublin when these care proceedings were issued and since that time this court has been making orders for his return … this court had, has and retains jurisdiction in relation to K. because of his habitual residence in this jurisdiction and because, as Judge Bellamy said … 'this is an English case where this English child was injured in England by parents who were still in England. He requires a return to this jurisdiction so that his welfare can be protected by the English authorities and so that the parents can engage in the process that will be conducted by the English court.'"

28. The Irish High Court proceedings now before me were initiated on 28th May 2010. In them, the local authority sought a range of reliefs against the respondent, the maternal grandmother. The proceedings recite that on 31st March, 2010, orders were made in the County Court in Coventry placing K. in the care of Coventry City Council. The respondent grandmother was made a party to the proceedings as a fourth respondent and the matter was listed for hearing on 7th April before the County Court Judge then sitting as a Deputy Judge of the High Court Family Division. The respondent to these proceedings, M. S., was directed to attend what were by then the High Court proceedings on 7th April 2010 and was served with orders on 3rd April 2010.

29. The proceedings recite that by order of the High Court of Justice in England on 7th April, 2010, K. S. was placed in the interim care of the local authority until 26th May, 2010, together with a Recovery Order and the respondent grandmother was directed to return the infant to the jurisdiction of England and Wales on Monday 12th April, 2010 or within 48 hours of the service of the order.

30. The proceedings also state that, pursuant to Article 39 of Council Regulation EC 2201/2003 the English High Court issued a certificate relating to the judgment on parental responsibility confirming that the order of 7th April 2010 was enforceable in the jurisdiction of the courts of England and Wales.

31. The matter having been processed by the central authorities, on the 2nd June, 2010, Finlay Geoghegan J. granted orders *ex parte*

restraining the respondent herein from removing the child out of the jurisdiction, so informing members of An Garda Síochána, and identifying a return date of 9th June, 2010. Thereafter in procedural hearings the respondent was given time to file her replying affidavit. Her first such affidavit was sworn on 18th June, 2010.

32. In the course of this affidavit the respondent states that she has resided in the United Kingdom since May 1979. She confirms her daughter left Ireland when she was one year old. The respondent outlines the background circumstances and the manner in which she learned of K.'s injuries from her daughter. She asserts that she removed K. with the full permission of his parents and that it was her intention at the time that Ireland be a permanent residence for her and her grandson. She states that on 29th March, 2010, she presented herself to the Department of Foreign Affairs in Dublin and met with an official in that department. She states she also presented herself to An Garda Síochána at C. Garda Station and remained in the station for a period of four hours, during which time she was interviewed by the gardaí and thereafter by members of the Health Service Executive. The respondent contends that as she was not within the jurisdiction of the United Kingdom, and that because her permanent residence was Ireland, she had no legal obligation to act on foot of the court orders made by the English courts. She asserts she has taken early retirement from her teaching work in Scotland and had put her home on the market there. She states that if K. is returned to the United Kingdom an order will ultimately be made for his adoption without the consent of his parents.

33. The solicitors acting for the respondent have also filed an affidavit of David Vavrecka, barrister as to the laws of England and Wales, but the affidavit does not focus on the issues most germane to the Court now *viz* the question of habitual residence.

34. In a further affidavit sworn in the proceedings the respondent asserts that both she and K.'s parents had sought an independent assessment of the child in relation to the bone fractures as it was their firm belief that the initial diagnosis of non-accidental injury did not take account of the potential for an underlying condition. The respondent states her belief that K. may have suffered from a brittle bone condition related to a vitamin D deficiency which K.'s mother manifested in blood tests, and which was transmitted during the pregnancy and during breast feeding. The respondent expresses her concern that as a result of having been informed by the applicant a number of Dublin hospitals had refused to carry out any independent assessment of the child.

35. In the intervening period between the judgment of 21st May, 2010 and this hearing there have been a number of other developments. In an affidavit, sworn on 15th July, 2010, the respondent states that both K. and her mother are Irish citizens. She states they have a large extended family in this country. She deposes that her brother R. and his wife A., live in Dublin and that they have a close relationship with F. and now with K.. She states that she feels in a supportive environment here. I infer she is staying with relatives. Neither she nor her daughter claim they own any permanent residence here.

36. This affidavit also sets out other material relevant to these proceedings. First, it is asserted that the child's parents are taking practical steps in pursuit of the move to Ireland, but that up to the 15th July they had been precluded from leaving the United Kingdom. Second, the respondent states that the police authorities in Coventry had confirmed that they do not intend to prosecute her daughter F. and that F. had arranged to travel to Dublin and thereafter intends to reside permanently in Ireland. Third, she states that her daughter considered coaching opportunities here. Fourth, she also states that K.'s father, A. had met her brother R. and her sister M. and had got on very well with all her Irish relatives. It appears however that the child's father is still the subject of investigation and pending charges by the Coventry police authorities.

37. Prior to this hearing on 22nd and 23rd July, the mother did not file a replying affidavit. It is claimed that she was reluctant to do so because of her concern that if a notice of cross-examine were served she would not be available. I do not regard this as a satisfactory explanation. On the day of the hearing, counsel on behalf of the respondent applied to file an affidavit on behalf of the mother. However, in the light of the delay which had occurred, I expressed concern that the filing of such affidavit might delay the hearing or alter the parameters of evidence. Ultimately counsel withdrew the application. Later, during the course of his submissions on behalf of the respondent, counsel indicated that the mother then wished to testify orally. I was reluctant to permit this for the same reason. However I permitted the mother to make a submission to the Court outlining the range of her concerns. I do not believe that any of the issues outlined by the mother were different from matters already dealt with in the respondent's affidavits. I adopted this approach because I considered it would be invidious that the mother of the child would not be permitted to have her voice heard in proceedings which, after all, concerned her own child K.. A. S., the child's father has not filed any affidavit. He is still apparently the subject matter of investigation and charges in England.

38. At the hearing, counsel on behalf of the respondent did not object to the production of the order made by McFarlane J., but rather objected to the admissibility of the judgment. I considered this submission to be without foundation. In my view the Hague Convention and Brussels IIR are now to be seen as part of the same integrated code with Brussels IIR as the final word in any case of conflict (Art. 60 Brussels IIR). By virtue of s. 5 of the Child Abduction and Enforcement of Custody Orders 1991 it is provided that for the purposes of Article 14 of the Hague Convention, a document duly authenticated, which purports to be a copy of a decision or determination of a judicial or administrative authority of a contracting state other than this state should, without further proof, be deemed to be a true copy of the decision and determination unless the contrary was shown. The term used at s. 5 (1) of the 1991 Act is a "decision or determination". It does not say merely "Court Order". Furthermore s. 5 (2) of the same Act, provides that, for the purposes of Article 14 and Article 30 of the Convention, the original, or a copy of such document as is mentioned in Article 8 of the Convention should be admissible:

> "… (a) insofar as it consists of a statement of fact as evidence of that fact and
>
> (b) insofar as it consists of a statement of opinion as evidence of that opinion."

A court order does not have such characteristics as statements of fact and opinion which could be used as evidence.

39. Article 8 of the Hague Convention provides that any application for the return of the child may be accompanied or supplemented by:

> "…(e) an authenticated copy of any relevant decision or agreement. (See also Article 14 and 30)

Clearly the May judgment comes within the rubric of being both a decision and a determination. Moreover the judgment itself is in the nature of being a document of public record. The duly authenticated judgment and order are interdependent. They are admissible as evidence of fact and opinion. The judgment also clearly identifies the English law as to habitual residence insofar as it applies to the child.

40. Moving to the legal issues, I turn first to the question of habitual residence. By the orders made on 31st March, 2010, 7th April, 2010 and 21st May 2010, the English courts at various levels have declared K. to be habitually resident in the jurisdiction of England

and Wales on 26th March 2010 and that he remained habitually resident there. The child's parents took part in the preponderance of these proceedings. They argued that K. was not habitually resident. None of these orders have been the subject of an appeal. The English decisions are clear on the matter as English law. The jurisdiction of the English Court is already an established fact as identified in the judgment of 21st May 2010.

41. I turn then to seisin of the case. Article 16 of Brussels IIR provides that:

> "1. A court shall be deemed to be seised:
>
> > (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court provided that the applicant has not subsequently failed to take the steps he is required to have service effected on the respondent …"

As has been indicated all relevant documents were served on the respondent. No issue has been raised on service.

42. The issue of seisin is closely connected to "parental responsibility". By virtue of Article 19.2 Brussels IIR, where proceedings relating to such responsibility relating to the same child and involving the same cause of action are brought before courts of different member states the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. But by virtue of Article 19.3 it is provided that:

> "3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court."

43. I consider Article 19.3 governs the situation here. The jurisdiction of the English court has been established. The obligation in this Court is to decline jurisdiction in favour of that court. I consider that this Court is bound by the finding of the English court (being the court first seised) as to K.'s habitual residence. (See *Wermuth v. Wermuth* [2003] EWCA Civ 50; see also *P.M. v. Judge March Devins* (Abbott J., 2nd July, 2007). I consider that the respondent, having participated in all parts of the court proceedings other than the final hearing is bound by the English judgment and estopped from arguing to the contrary,

44. Moreover, even were this Court itself to investigate and determine the habitual residence of K. as of 26th March, 2010, such determination would now be in accordance with the established case law, most recently in *Case A* referred to earlier in this judgment. In the judgment the Court of Justice observed that the need for uniform application of Community law renders it necessary that the issue of habitual residence be given an autonomous and uniform interpretation throughout the European Community (para. 34). The ECJ observed that in addition to the physical presence of the child in a member state other facts must be chosen which are capable of showing that the presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. (para. 38).

45. At paragraph 39 the Court of Justice stated:

> "39.In particular *the duration regularity conditions and reasons for the stay on the territory of the member state and the family' 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 the child in that state must be taken into consideration."

Other indicators identified by the court at paragraph 40 are whether there are certain tangible steps such as the purchase of a lease or residence in the host state or an application for social housing.

46. It is true that this child has now been resident in the State since 26th March 2010. This in total is four months in the life of a six month old child. However, as of the relevant date, the 26th March 2010, K. had been in Ireland only for a matter of hours. There was then no social or family integration of any description in Ireland. His parents were still residing in England. This court therefore must have particular regard to the terms "duration regularity conditions and reasons for the stay". These have been fully described earlier in this judgment. The respondent removed the child to this jurisdiction because of the perception which she, her daughter and the father of the child had in relation to the proceedings and procedures in England. But it is useful to ask whether there is any evidence before this Court that, prior to 8th March 2010 either the parents, the respondent or anyone else had evinced *any* intention to reside other than in the United Kingdom?. There is no such evidence. The trigger for this entire series of unfortunate events was what happened after K. was admitted to hospital with the injuries and the investigation which followed. I cannot conceive that the decision made in desperation, in the circumstances, could constitute a "settled intention" on the part of the mother. These observations apply a *fortiori* in the context of the father, in particular having regard to the submissions which were made on his behalf to the courts in England. He took no jurisdictional point. What had happened "should not have happened". The father has three children from a previous relationship, all of whom live in England.

47. As the Court of Justice makes clear in *Case A,* it is only in exceptional circumstances that a child will have no habitual residence. I do not think this is such a case.

48. Similar statements of our national courts in relation to the meaning of habitual residence within the meaning of the Hague Convention are to be found in the case of *A.S. v. C.S.* [2009] IESC 77 and *P.A.S. v. A.F.S.* [2005] 2 ILRM 306.

49. In *P.A.S.* Fennelly J. observed that it was:

> "…an obvious fact that a newborn child is incapable of making its own case as to residence or anything else. What the courts have to look at is a situation of the parents and their choices."

50. The judge approved the dicta of Waite J. in the English case of *Re: B.* [1993] 1 FLR 993 at 995 where, among the criteria to be considered in the context of (married) parents living together, was whether they had adopted an abode in a particular place, voluntarily, and for settled purposes, as part of the regular order of their life for the time being, whether it is of short or long duration. I think that statement is applicable here.

51. It cannot be said that any choice made by the parents or the respondent in the instant case was part of their regular order of their life, or that their choice was adopted voluntarily or for a settled purpose. The duration of K.'s residence in this jurisdiction could not be such as to have allowed him to acquire a habitual residence here.

52. I do not consider that the issue is affected by the fact that there was no actual court order in being at the time of the child's

removal. In that regard, the facts of the instant case bear a strong resemblance to those in *G.T. v. K.A.O.* [2007] 3 I.R. 567 where the mother took twin boys from Ireland to her parents place of residence in England without the consent of the natural father who was the applicant. At some point thereafter the mother made a decision not to return to the family home. The applicant instituted proceedings in the courts of Ireland and the courts of England. Although these proceedings post dated the children's departure, the High Court (McKechnie J.) granted a declaration that the retention of the children in England was wrongful under the Hague Convention and that their removal from the jurisdiction was wrongful under Brussels IIR. He considered that circumstances could arise where a removal or retention would be wrongful as having been in breach of rights of custody vested in the court itself. He found that for rights to so vest there must have been an application to the Court which raised matters of custody, that the jurisdiction of the court only became established when the originating document had been served (as it had been) on all relevant parties; and once invoked the District Court became definitively seised of the application and thereafter its jurisdiction continued until such time as the proceedings had been disposed of or determined. In *G.T.* it was held that the District Court, by a date no longer than the first return date of the proceedings initiated thereby held rights of custody with regard to the children the subject matter of those proceedings. He held that the court had, from that date, exercised its rights by reason of the pending application in which it reserved for itself the decision of the children's welfare and where, when and with whom they would reside.

53. These findings were upheld by the Supreme Court who declared that the retention by the respondent of the children was a wrongful retention within the meaning of Article 3 of the Hague Convention as it was in breach of rights of custody attributed to the District Court.

54. I consider that the circumstances of this case are precisely analogous albeit in the reverse situation, where here it is the jurisdiction of the English courts which have been invoked and have prior seisin, in circumstances where the respondent and all other relevant parties have had notice of the proceedings and, to large degree participated in them. In such circumstance I am of the view that it is simply not open to the respondent to argue otherwise and therefore I consider that the applicant must succeed on this ground also.

55. I should add Article 16 of Brussels IIR provides that the member state court becomes seised once proceedings are issued, or in the event that the initiating document needs to be served first, on the date that document was served. While I do not consider that the removal of the children can be considered as wrongful as Irish law, once the English courts were seised of the application on 26th March, and certainly by the time they made the first order on 31st March, 2010, they were vested with rights of custody. The respondent and the parents were on notice of all these proceedings. On these grounds I consider that the applicant's claim must succeed. The true issue in this case is not whether there has been, a wrongful removal (there was not) but whether there was a wrongful retention. Clearly in this case there was.

56. Moreover, were it necessary I would hold that the situation in this case is governed by Article 42 Brussels IIR which provides:

> "1. The return of a child referred to in Article 40 (1) (b) entailed by an enforceable judgment given in a member state shall be recognised and enforceable in another member state without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the member state or origin in accordance with paragraph 2.
>
> Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of a child mentioned in Article 11 (b) (8) the court of origin may declare the judgment enforceable."

If warranted this Court would make such a declaration and abridge the time for so doing.

57. I turn then to deal with two issues of concern raised by the respondent. The first related to whether or not the respondent, or her daughter will be entitled to obtain a second opinion. In my view there appears to be a misunderstanding of this issue. The English *courts* have merely indicated that the issue of the appointment of expert witnesses should be regulated by those courts. There has been no preclusion of the obtaining of a second opinion; but rather that such procedure should take place under the aegis of those courts.

58. A second concern expressed by the respondent was that K. might be placed for adoption. This possibility was mooted in the case conference but only as a "long stop". It is not suggested that such a radical step is within the immediate contemplation of the local authority. It will be recollected that the English police authorities have decided not to charge the mother.

59. I should conclude by stating that the steps which were taken by the parents and the grandmother to an extent may have been driven by misunderstanding, misapprehension and misconception. Those steps taken were profoundly misguided. The entire philosophy behind the Hague and Brussels instruments is to prevent child abduction. What is necessary now is that there should be an order for the return of the child to England and a re-engagement by the parties with the English court proceedings.

60. I will make a declaration that the respondent has wrongfully retained the minor from the jurisdiction of the courts of England and Wales since 1st April, 2010 (the date when the respondent was informed of the outcome of the court hearing) and the orders made on 31st March 2010; and also thereafter from 9th April, 2010 when the respondent was served with the order of the High Court Family Division whereby K. was to be placed in the interim care of the applicant and the respondent was directed to return the infant to the jurisdiction of the courts and thereafter be placed on notice of the order of 21st May. Were it necessary to do so I will also note that pursuant to Article 39 of Council Regulation EC 2201/2003 the High Court of Justice, Family Division, Coventry, issued a certificate relating to the judgment on parental responsibility. I will also note the issue of the certificate pursuant to the order of McFarlane J. of 21st May, 2010, dated 24th May, 2010. Insofar as concerns the mother, I will join F. S., as a notice party. The orders of the Court will be binding on the respondent, the mother F. S., the father A. S., (who I also join as a notice party) and all other persons having notice of the making of the order, including the relatives with whom the respondent and the child are staying or any person acting on their behalf or direction. I have already directed the respondent to surrender her passport. The mother has informed the Court she has surrendered her passport and has none. I will extend all the other restraining orders save for the purpose of giving effect to the orders herein. There will be liberty to apply.