THE HIGH COURT

[Record No. 2019/7 HLC]

BETWEEN

D.T.

APPLICANT

AND

I.B.

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 1st May, 2019

The nature of the application

1. This is a case in which the applicant seeks a declaration pursuant to Article 15 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Convention") and Section 15(2) of the Child Abduction and Enforcement of Custody Orders Act 1991 ("the 1991 Act") to the effect that his son was wrongfully removed to Belarus within the meaning of Article 3 of the Hague Convention. The child was taken from Ireland to Belarus by his mother who is a national of that country.

2. The application arises in circumstances where: (i) there has been no request from any Belarussian court for a ruling by an Irish court; and (ii) the Belarussian courts have already handed down decisions refusing the father's application for the child's return under the Convention and the applicant's appeal to the Supreme Court in Belarus in respect of those decisions is imminent. He now hopes to obtain the above-described declaration from this Court in order to deploy it in his appeal to the Supreme Court in Belarus.

3. I propose to refuse the grant of the declaration sought for the reasons set out in this judgment. I am not aware of any previous Irish written judgment on Article 15 of the Convention or s. 15 of the Act and have chosen for that reason to write a judgment explaining my understanding of these provisions and how they apply to the present proceedings.

Background to the application

4. This matter first came before me by way of an *ex parte* application on 11th March, 2019 on behalf of the father for an order granting liberty to issue and serve proceedings on the mother outside of the jurisdiction i.e. in Belarus. I granted the order but raised a question about whether the applicant had *locus standi* in view of the wording of Article 15 of the Convention which envisages a request from another jurisdiction before the Court will become seized of such an application. Counsel indicated to me that there would be submissions on that point when the matter came on for hearing before me and that there were English authorities to the effect that under the relevant legislation, such an application could be made by the father unilaterally.

5. The matter was next listed for mention before me on 29th April, 2019. On that date, counsel indicated that the mother had been served but that no response had been forthcoming from her. I was given an affidavit of service dated 15th April, 2019 showing that the respondent mother had been served with the proceedings on 20th March, 2019. Counsel requested that I hear the case that day (the 29th April 2019) as there was (and is) an appeal currently pending before the Supreme Court in Belarus. Given the urgency of the matter, I heard the submissions of counsel on that date, but I reserved judgment for two days in order to study the authorities put before me and because of unusual nature of the application.

The family history and the decisions of the Belarusian courts

Events in Ireland

6. The applicant father is an Irish national, living in Ireland, and the respondent mother is a citizen of Belarus where she currently resides with the child. The parties married on 11th October, 2013 in Belarus and had one child, N. He was born in Ireland and is now four years old. The parties lived together in Ireland until July 2016.

7. The following account was set out in the applicant father's affidavit. He says he became concerned on the 16th July, 2016 that the mother might abscond with the child to Belarus as she had previously spoken about taking a holiday there and had refused the father's offer to look after N while she was away. The father removed N's passport from the family home because of his concern. However, on 26th July, 2016, he returned home from work to find that the mother had taken the child to Belarus without his consent. He immediately attended the local garda station where it was confirmed that the mother had travelled with N on a certificate of return which she had obtained from the Embassy without his participation or knowledge. The father successfully contacted the mother once she arrived in Belarus and she assured him that she would return with N after two weeks. When the mother did not return with N after two weeks, the father contacted the Central Authority in Ireland seeking assistance in securing the child's return through the Central Authority in Belarus. This was on 11th August, 2016.

Events in Belarus

8. It appears that the mother commenced divorce proceedings in Belarus. On 19th September, 2016, the father was told that an application had been made on his behalf under the Convention and transmitted to the Court of Sovetskiy District of Minsk. It appears that a hearing on the father's Hague application took place in Belarus on 3rd October, 2016 but that the father was not informed of the hearing until after it had taken place. He was subsequently told via the Central Authority that the Court had not considered it necessary to call him for questioning at the hearing and that the case was now closed with "no legal grounds to initiate it again".

9. The father sought further clarification from the Central Authority as to how he could bring another application under the Hague Convention. He filed a claim before the Court under Belarusian Civil Procedural law and instructed a second lawyer to act on his behalf. This case was heard by the Court of the Sovetskiy District of Minsk on 10th May, 2017. The application was rejected on the basis that the Court only heard civil matters and child abduction was deemed to be a criminal matter. The father appealed this decision to the Judicial Board for Civil Cases of Minsk which upheld the decision of the Court of the Sovetskiy District of Minsk on 7th July, 2017. The father then appealed the decision of the Judicial Board to the Chief of the Minsk City High Court which upheld the previous decision. On further appeal to the Supreme Court of Belarus (otherwise known as the Presidium of the Minsk City Court) on 14th February 2018, the decisions of the lower courts were overturned, and the matter was referred back to the Court of first instance to determine to the Hague proceedings.

10. Following this remittal, by Order dated 5th April, 2018, the Court of the Sovetskiy District of Minsk refused to order the return of the child to Ireland, finding that the removal from Ireland was not wrongful. It appears that the father's case was put before the Court, namely that the child was taken secretly out of Ireland and that the father had not signed any documents authorising his travel. The mother disputed his claim although details are not given in the judgment which has been exhibited before me as to what her case was. The judgment reaching a conclusion adverse to the father simply says:

> *"Following the result of hearing both of the parties, examining written case materials, having reviewed the civil case of the Sovetskiy district court of the city of Minsk, the Court believes that the claim is not subject to satisfaction, which is in according with articles 3, 5, 13, 17 of Civil Aspects of International Child Abduction.*
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> Based on the above and in accordance with art. 302 of the Code of Civil Procedure of the Republic of Belarus, the court [decided to] dismiss the claim of [D.T.] against [I.B.] on a child return."

11. The father appealed this decision to both the Judicial Board for Civil Cases of Minsk (Minsk City Court) and the Chief of the Minsk City High Court, both of whom upheld the decisions of the lower court. In the judgment of the Minsk City Court shown to me, it said that no evidence had been provided which suggested that the removal or retention of the child was unlawful. The Court further found that in the absence of any evidence to the contrary, it had accepted the mother's submission that the father assisted her in obtaining the necessary paperwork for her to travel to work with the child. The judgment states in the relevant part: -

> "So, from the defendant's explanations it follows that her departure with the child to the Republic of Belarus was made with the consent and knowledge of the plaintiff who helped her to make the documents for leaving the Republic of Belarus and who gave her written consent for this.
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> The plaintiff did not present to the court any evidence that would refute the aforementioned explanations of the respondent.
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> The fact that the plaintiff applied to the Irish law enforcement authorities on the issue of the child's return does not prove the fact of kidnapping of the child by the defendant and his unlawful retention in the Republic of Belarus."

The judgment is brief and, surprisingly, as the above extract suggests, the court appears to have placed the burden of proof on the father to disprove consent contrary to what is required under the Convention and then found that he failed to disprove consent on the evidence.

12. I note that a Supreme Court appeal is imminent in Belarus and I was shown an email from the applicant's lawyer who advised that as there is a direct conflict of fact as to whether the father gave consent for the removal of N to Belarus, the "provision of evidence, including declarations confirming the wrongful removal of the child [N], is of the essence for the solution of the case". The lawyer further recommended that the father obtain, if possible, "a document from the Irish court confirming the wrongful removal or retention of your child for further submission to the court of the Republic of Belarus." Hence the present application on behalf of the applicant father.

13. It is important that I note at this point that it does not appear to have been in dispute in the Belarussian proceedings that the applicant has custody rights under Irish law with regard to the child. This is, of course, the situation by reason of s. 6 of the Guardianship of Infants Act, 1964. The sole issue appears to have been whether or not he consented to the removal of the child, which is a factual issue. There appears to be neither any question as to what Irish law says about his custody rights or how Irish law should be applied to his situation.

Convention concepts and domestic issues of law

14. It is well established that Convention concepts are autonomous concepts in the sense that they are separate from domestic legal concepts and should be interpreted harmoniously across all Contracting States as far as possible. It is also well established that the issue of whether a person or body has custody rights within the meaning of Article 3 of the Convention depends, in part, upon the question of whether the person or body has custody rights under the law of the State in which the child was habitually resident immediately before the removal or retention. Thus, while issues relating to custody rights may involve a mixture of factual and legal issues, the legal issues in turn are informed by domestic law concepts as well as Convention law concepts.

Authorities and commentary concerning Article 15 of the Convention

15. Article 15 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 provides: -

> "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

16. In the accompanying Explanatory Report on the Convention, Prof. Pérez-Vera commented as follows on Article 15:

> "120. This article answers to the difficulties which the competent authorities of the requested State might experience in reaching a decision on an application for the return of a child *through being uncertain of how the law of the child's habitual residence will apply in a particular case*. Where this is so, the authorities concerned can request 'that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination'. Only two comments will be made here. The first concerns the voluntary nature of the request, in the sense that the return of the child cannot be made conditional upon such decision or other determination being provided. This conclusion arises in fact as much from the actual terms of the article (which speaks of 'requesting' and not 'requiring') as from the fact acknowledged in the same provision, that it may be impossible to obtain the requested documents in the State of the child's residence. Now, with regard to this last point, the duty which the article places upon Central Authorities to help the applicant obtain the decision or determination must make his task easier, since the Central Authority can provide a certificate concerning its relevant law in terms of article 8(3)(f). Secondly, the contents of the decision or certificate must have a bearing upon the wrongful nature, in the Convention sense, of the removal or retention. This means, in our opinion, that one or the other will have to contain a decision on the two elements in article 3, and thus establish that the removal was in breach of custody rights which, prima facie, were being exercised legitimately *and in actual fact, in terms of the law of the child's habitual residence."* (emphasis added)

My overriding impression from this comment is that the purpose of Article 15 is to enable a court such as an Irish court to assist the court of another country in its understanding of some aspect of Irish law, classically, whether the applicant has custody rights in respect of the child under Irish law.

17. Section 15(1) of the Child Abduction and Enforcement of Custody Orders Act 1991 clearly reflects Article 15 of the Convention, but it is not in identical terms: -

> "15. — (1) The Court may, on an application made for the purposes of Article 15 of the Hague *Convention by any person appearing to the Court to have an interest in the matter*, make a declaration that the removal of any child from, or his retention outside, the State was —
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> (a) in the case of a removal to or retention in a Member State, a wrongful removal or retention within the meaning of Article 2 of the Council Regulation, or
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> (b) in any other case, wrongful within the meaning of Article 3 of the Hague Convention." (emphasis added).

Thus, on its face, this statutory provision does not require a request from the non-Irish court as a precondition to an individual applying to the Court for this type of order. The English authorities discussed below confirm that this is the position under the equivalent English statutory provision, which provision is similarly silent about this precondition.

18. In *Re P (Abduction: Declaration)* [1995] 1 FLR 831, the Court of Appeal held that s. 8 of the English Act clearly contemplated applications by persons appearing to the Court to have an interest even where there was no request from another court as contemplated by Article 15 of the Convention. The Court had little difficulty in reaching that conclusion on the basis of the plain wording of s. 8 of the English legislation. The greater part of the judgment on the Article 15 issue addressed a different question, namely, whether it was appropriate for the Court to engage in an exercise in the course of which it might make factual determinations which might properly be within the province of the American court ultimately deciding the Convention application. The Court held that s. 8 presupposed that a requested court might, in the course of considering an issue properly within its area of concern, have to "tread the path which will also be trodden" by the Court of the other State. However, I also note that the Court characterised the issue "properly the concern" of the requested State as "whether an applicant parent had rights of custody according to English law". In the *P* case, a child born in England to an American mother and English father was removed to the United States of America. Prior to this removal, two events of significance had taken place; first, the President of the Family Division in the UK had made a residence order in favour of the mother with leave to remove the child to the United States; secondly, the mother had returned to live with the father for a further 18 months after that order was made. The American court was disinclined to accept the father's subsequent application under the Hague Convention after the mother returned to America with the child, by reason of the English court order giving the mother the right to determine residence. The father then made an application to the English courts for a declaration that the removal of the child had been wrongful, on the ground that the order had ceased to have effect under English law since the parents had resumed cohabitation for more than 6 months and that the child had been habitually resident in England immediately prior to her removal. The declaration was granted and an appeal to the Court of Appeal was dismissed. One can readily see, therefore, that the key legal issue before the requested court in that case was whether the father had custody rights (specifically the right to determine residence) under English law (which feeds in turn into the question of Convention custody rights). The issue of fact which the Court had to determine was relevant to the issue of English law under consideration.

19. In the course of her judgment, Butler-Sloss L.J., responding to the submission that the Court should not trespass upon the task of the American court, said:

> "Should such a declaration be made? Section 8 presupposes that this court will tread the path which will also be trodden by the Californian court and we would not presume to do so unless asked. The purpose of Article 15 goes to the obligation of the State to comply with the request. In a situation falling directly within Article 15 the requested State may have made a firm or provisional finding or made an assumption that the habitual residence is English. In the present appeal the request is at an earlier stage, where the Central Authority of the USA faced with the 1992 English order and a complicated matrimonial history, seeks our assistance before placing the application before the judicial authorities. In the interests of comity, it is proper for us to assist when called upon to do so. In the general run of cases on such a request made before there is a decision or assumption by the requested State as to where is the habitual residence of the child, it would be preferable for the English court, if the facts permit, to make a declaration upon the assumption that the habitual residence is in England, rather than making a specific finding on an issue still in dispute in the other State. *The issue properly to be the concern of the English court under the Convention is whether an applicant parent had rights of custody according to English law at the time of the removal*. In order to make a declaration however under section 8 that the removal or retention was wrongful, the English court would also have to make a provisional decision about breach, although that too is a matter within the jurisdiction of the other State. The request for a declaration makes it inevitable that the English court will have to consider, however provisionally, issues which are to be decided in another place, unless the English court always declines to make a declaration which Parliament has given jurisdiction to the court to make. In my view as a question of policy the English court should not debar itself from its power to grant a declaration at the request of another signatory to the Convention. In my view the approach of Lord Chancellor`s Department, or more particularly the Official Solicitor on their behalf, to the problems of English law faced by the Central Authority of the USA in this case was helpful and the advice to seek a declaration sensible. The judge on the application was justified in granting the declaration.
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> The only question which remains is whether he should have made findings as to habitual residence. On the particular facts of this case with the existence of the 1992 order the judge, on being asked to make a declaration, had no alternative but to grasp the nettle and make his findings on habitual residence. If he did not on the facts of this case, he could not make a declaration nor assist the requested State. A finding of cohabitation and habitual residence of the mother was crucial to the decision as to the present status of the 1992 order and he was not in a position to assume habitual residence as one might on other facts.
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> I do not however consider that his judgment and its clear conclusions based upon the written evidence available to him will be misunderstood in the USA. That jurisdiction has received a Convention application from the father and will deal with it as appropriate. The judicial or administrative authorities faced with the judgments from the English courts and the declaration will accept as little or as much of them as they choose. We are not trespassing upon their jurisdiction in these judgments. They know, as we know, that the decision whether the removal or retention of this little girl was wrongful within the definition of Articles 3 and 5 and whether Article 12 is to apply is theirs and theirs alone. Douglas Brown J made this point clearly at page 26 of his judgment and I make it again. I have no concern that our judgments will be

misunderstood or misapplied in the USA." (emphasis added)

20. I note also that Millett L.J. in the same case said:

> "In my judgment "the purposes of Article 15" does not mean "for the purpose of enabling the Central Authority to satisfy a request made in accordance with Article 15". It means "for the purpose of satisfying, either immediately or in due course, the appropriate judicial or administrative authorities of the requested state that the removal was wrongful *by the law of the requesting state*." In the present case the application was initiated by the State Department in Washington and there is no evidence that it was made at the request of the judicial or administrative authorities in California; but it was made in order to satisfy them (and the Californian court in due course) that the President's Order did not authorise the Mother to remove the child from the jurisdiction in February 1994. It does not matter whether its immediate purpose was to persuade the Attorney General of California to proceed, or whether its purpose was to provide evidence on which the Californian court could act; either would in my view fall within the words of Section 8." (emphasis added)

He also commented: "I do not think it is possible to lay down any general rule. It will often be sufficient to assume that the child was resident here rather than decide it, and if so this will be the better course".

21. My understanding of the above case is that it decides not only that an applicant may bring an application pursuant to s. 8 of the English legislation even where a court of the other State has not requested it, but that it is not necessarily forbidden for the Court of the requested State to consider and reach conclusions of fact on a provisional basis if this is necessary to resolve the particular legal question in issue. However, it seems to me that the comments in the judgment, particularly the italicised passages above, also make it clear that it was envisaged that the key legal issue, which was the reason for the English court becoming involved at all was a legal issue as to whether under English law the left-behind parent had custody rights.

22. Similarly, in *A v. B (Abduction: Declaration)* [2008] EWHC 2524, a decision of Bodey J. in the Family Division, the core issue before the English court was whether the father had custody rights under English law. Here, the parents were not married to each other and the father obtained orders from the English courts on an emergency basis when he discovered that the mother was taking the child to France; she was not served with any proceedings or order until after she arrived in France. The father made a Hague application in France and (according to the English court), the decision at first instance there was based upon an error by the French court as to English law. The error was that the French court considered that because the mother had not been *served* with the court orders before the child's removal, no custody rights had been breached by the child's removal i.e. that service was the key event. The father entered an appeal in France and, before that appeal was heard, he asked the English court to determine whether or not he had rights of custody for the purpose of Article 3 of the Convention. The Court granted the declaration sought. It held that under English law, both the English court and the father had obtained rights of custody before the mother left the jurisdiction with the child. It commented that international comity required it to make the declaration and that while it had no wish to trespass on the French court's functions, it would be wrong to allow the French court to proceed on the flawed basis that service was necessary under English law.

23. I note the comment at paragraph 28 of the judgment in that case that while the grant of declaratory relief is always a discretionary matter, Munby J. in *Re C (A Child) (Unmarried Father: Custody Rights)* [2002] EWHC 2219 (Fam) had said that in the normal case, an applicant who can successfully demonstrate that a child has been wrongfully removed contrary to the Hague Convention could normally expect to have the Court's discretion exercised in his favour when seeking declaratory relief to assist in an application for substantive relief from the Courts of the requested state. However, in my view, it is important to note that this was said in a context where the Court was being asked to clarify an aspect of English law which was key to the decision in the Hague proceedings in France.

24. In *K v L (Child Abduction: Declaration)* [2012] EWHC 1234 (Fam), a decision of Moor J. in the Family Division, a child's British father and American mother had arrived at an agreement following a process of mediation between them. The agreement divided the child's time between both parents but at no stage asserted that the child's habitual residence had changed to the United States. The mother brought the child to Kansas but failed to return the child to the UK in accordance with the agreement and commenced divorce proceedings in the United States. The father then obtained an *ex parte* declaration from the English court that the child remained habitually resident in England and that he had been unlawfully retained in Kansas. The mother participated to a limited extent in the English proceedings and contended that the child's habitual residence was now Kansas and the US court had jurisdiction. The Court declared that the child was habitually resident in England and Wales. Again, this was a case where an issue as to the interpretation of the mediation agreement entered into in England arose.

25. Counsel helpfully referred me to an extract from the textbook "*International Movement of Children: Law Practice and Procedure"* by Mark Everall, Michael Nicholls and Nigel V. Lowry which included references to the cases discussed herein. I note that the extract sets out the purpose of the Article 15 mechanism and when it should be invoked in the following terms: -

> "20.1 Where, prior to making a return order, *there is doubt or uncertainty as to how the law of the State of the child's habitual residence applies*, Art 15 of the Hague Abduction Convention creates a mechanism for the judicial or administrative authorities of the requested State to ask if the removal or retention of the child was wrongful within the meaning of Art 3 under the law of the requesting State."

This again suggests again to me that the purpose of Article 15 is to create a mechanism for clarifying an issue of domestic law for the courts of another jurisdiction which is dealing with an application under the Convention. The text also refers to some cases which re-enforce the sense of caution I believe should be exercised in a case of the present kind.

26. The first of these cases is a decision of the Supreme Court of Israel in which the Court conducted a careful examination of the purposes of Article 15 of the Convention and the dangers of it being used inappropriately; *Plonit v. Ploni* (Family Appeal Motion 1930/14, unpublished, 5th June 2014). Here a child's mother left Israel with the child and flew to England without the knowledge of the father. The father filed a claim for the return of the child under the Convention in the English courts. He also filed a motion in the Jerusalem Family Court for a declaration under Article 15 of the Convention. Various conclusions were reached by the Israeli courts on the issue of where the child had her habitual residence but when the matter reached the Supreme Court of Israel, it considered that the courts should not have entertained the application at all. Hendel J. considered the relationship between Article 3 and 15 of the Convention and set out what I consider to be a very useful explanation of its purpose as follows: -

> "Thus Article 3 take center stage and constitutes an integral part of Article 15, since it defines when a child has been unlawfully removed from the place in which it was determined he should reside…in order to determine whether a child has been unlawfully removed, the court must determine whether there has been a violation of custody rights, which may have

been granted by law, a judicial ruling or under the terms of an agreement which is legally valid under the law of the country in which the child had been habitually resident. Making this determination may be a simple matter or a complex one. The complexity may be factual, being a product of the parents' conduct, or legal, involving a definition of the custody rights. And so the practice has been created, as entrenched in section 15 of the Convention Law, whereby the Contracting State in which the proceedings under the Convention are being conducted, requests assistance from the authorities in the State in which the place where child habitually resides is located, in order to clarify the relevant local law so as to make a determination in the main proceeding. It is often more practical for the court before which proceedings are being conducted under the Convention to receive information from the authorities in the State in which the child habitually resides regarding the law applying in that State, than to be assisted by experts or to start delving into the relevant foreign law. Under Article 15 of the Convention, the authorities of the State in which the child's habitual residence is located serve as a court, assisting and guiding the court before which the main action is being litigated. The source of the assisting court's authority derives from the main proceeding which is being conducted in the State classified as the appropriate forum under the Convention. The ability to assist is derived from its expertise in the local law in so far as recourse to that law is relevant and necessary in order to determine the outcome of the main action. While there is no obligation to request such a ruling, the possibility exists that in so far as any difficulty shall arise in adjudicating the case, the State in which the place where the minor habitually resides has the legal ability to help resolve it (see for example: A.E. Anton, The Hague Convention on International Child Abduction, 30 INT. & COMP. L.Q. 537,553 (1981).”

27. The Israeli Supreme Court accepted that an applicant could apply for such a determination even in the absence of a request from another State. However, it went on to set out the reasons a requested court should be careful when considering such applications and again I find the reasons given to be succinct and persuasive:

> “However, for a number of reasons, which I shall now enumerate and which are rooted in policy considerations, practical considerations and the purpose of the Convention, it may be concluded that not every motion filed by the litigants under section 15 of the Convention Law should be adjudicated on its substance. This is not a matter of authority but the proper exercise of judicial discretion in relation to the provisions and purpose of the Convention.
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> Firstly, there is a danger of the floodgates opening and motions for a ruling under section 15 of the Convention Law being filed frequently and automatically. And the concern here is not simply that the Family and Appeal Courts will be needlessly inundated with such motions per se, but that a real danger exists that they will not only fail to serve the objects of the Convention, but will actually undermine them and bring about an unnecessary complication that damages the main action as a result of the interference of another State in the issue, and all while the proceedings in question are of a most urgent kind and are designed to either return abducted children to their homes as quickly as possible or determine that no abduction took place.
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> Secondly, where no justification exists for such a ruling being made by another State, the concern arises that a perception will be created of inappropriate interference which undermines the sovereignty of the State in which the main proceeding is being conducted and its judicial tribunals, which are entrusted with resolving the dispute in accordance with the Convention, which has been adopted by both States.
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> Thirdly, the very fact that parallel proceedings are being conducted in two courts charged with adjudicating the same issue, including the appeal courts in each State, contradicts the purpose of the Convention. The State in which the principal action is being adjudicated, rather than another State, is supposed to address the subject of the child's habitual place of residence. The other State is obliged to accept the ruling of the first court in all matters concerning the forum which shall adjudicate the custody rights, etc. Double hearings harm the distribution of decision-making as delineated in the Convention.
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> Fourthly, the structure and language of Article 15 of the Convention show that the object of the request is to obtain from the authorities of the State in which the child's habitual place of residence is located a determination under paragraph 3 of the Schedule to the Convention. The object is not that two States shall focus on the question of the child's habitual place of residence. The mechanism contained in Article 15 of the Convention is intended for those cases where the State in which the Hague Convention proceeding is being conducted wishes to receive assistance from the other State by explaining its stance according to its own domestic laws regarding the legality of the removal or retention of the child under paragraph 3 of the Schedule to the Convention. Its purpose clearly cannot be to receive an additional opinion on a question which the second State is no better qualified to determine than the one seeking the assistance pertaining to the child's habitual place of residence. There would be no benefit in such a double enquiry. This interpretation regarding the purpose of Article 15 is also shared by the learned commentator Rona Schuz:
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> > "Sometimes the court of … [one] State also expresses its view as to whether the child was habitually resident there immediately before the removal or retention. However, there is little point in this since habitual residence has to be determined by the court of the … [other] State in accordance with its own approach to habitual residence" (Schuz, pp.156).”

28. Hendel J. went on to examine the comment of Pérez-Vera on Article 15 (already noted in this judgment) and observed: -

> “In a further remark Prof. Perez-Vera emphasizes that the Article is intended to answer the difficulties which the Contracting State is likely to experience *due to the absence of certainty regarding the question of how it should implement the law of the State in which the child's habitual place of residence is located in the circumstances of the case*.” (emphasis added)

29. Hendel J. reached the following conclusion on the general question as follows:

> “In reliance upon these reasons, my position is that even though Israeli law enables an individual to submit a motion under section 15 of the Convention Law to the courts in Israel, the court must exercise its discretion and decide whether the motion which was filed is consistent with the purpose of the Convention. In other words, does it assist and advance the main proceeding by clarifying the Israeli law which the foreign court has to consider, or maybe it only constitutes a tool in the hands of a parent who is seeking to conduct two proceedings at the same time regarding the issue of the child's habitual place of residence, in which case the motion will just needlessly complicate the main action in a way that undermines the objectives of the Convention in general and of Article 15 in particular.”

30. Appling these principles to the case before him, Hendel J. concluded that the decision of the Israeli courts had been superfluous and unnecessary: -

> "From the English court's point of view the result is neither decisive nor helpful. It would therefore have been better if the District Court had held that it was inappropriate for the Family Court to have made a ruling regarding the child's habitual place of residence, and that in the concrete circumstances there had been no need to address or clarify the local law… Just as it is the role of the Family Court and Appeal Courts to adjudicate the substance of the motion in appropriate cases, so they are obliged to exercise discretion and refrain from doing so in inappropriate ones".

31. The opinion of Hendel J. also pointed out that the danger of applications under Article 15 being "superfluous and inconsistent with the purpose of the Convention" arose mainly in motions filed by litigants and not authorities, although of course cases could certainly arise where a litigant filed a motion which should be examined and adjudicated upon. Danziger J. said that he agreed with this and "even wish[ed] to take a small stride beyond it", saying that the Family Courts should scrutinize very carefully motions filed by parents without a request from the Central Authority of a foreign State and remarking that Article 15 of the Convention itself did not allow for the filing of such a motion. He was in favour of a "rebuttable quasi-presumption" that a motion filed by a parent without a request from a Central Authority. I would not go so far as a rebuttable quasi-presumption but I agree that where there is no request from the authority or court of a foreign jurisdiction to conduct the exercise under Article 15 of the Convention, the Court should carefully scrutinise whether the purposes of the Article and the Convention as a whole would be served by hearing the application on its merits and adjudicating upon it.

32. Another case of interest in this regard is a decision of the English Court of Appeal in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976. This was a case in which an English court at a pre-trial stage of a Convention application had requested a determination from a New Zealand court under Article 15. The determination was carried out expeditiously in that country and the case then resumed in the English court. Delivering the ultimate judgment in the case, the Court of Appeal took the view that an Article 15 determination should not have been sought because no issue of domestic law had been raised. Commenting on the conclusions to be drawn from the outcome of the appeal, Thorpe L.J. said:

> "40. It seems to me that there are two lessons to be learned from this appeal. The first is in the use of Article 15. In my judgement the Article 15 request was not appropriate in this case. The dispute between the New Zealand experts as to whether there was an agreement recognised in law regulating the father's contact was a bye-way. The mother's real defence was that what he exercised was no more than a few hours of visiting contact each week and that, according to this jurisdiction's construction of Articles 3: and 5:, could not have amounted to "rights of custody". That defence had to be adjudged here. The New Zealand adjudication would not be binding. Its request merely risked the waste of precious months and substantial legal costs. It has extended what is intended to be a swift summary remedy into a lengthy and complex piece of international litigation.
>
> 41. I have had the advantage of reading in draft the judgment of Dyson L.J. with which I agree. *Had Article 15 been directed to requests to ascertain rights under the domestic law of the requesting state its utility would be more apparent. Where however the question for determination in the requested state turns on a point of autonomous (i.e. Hague Convention) law then I find it hard to see in what circumstances an Article 15 request would be worthwhile.*
>
> 42. Second it must be recognised that in any Hague case involving the construction or interpretation of an article of the Convention the answer is to be found in the International Jurisprudence of the Contracting States. Therefore counsel preparing their skeleton arguments cannot simply research and cite relevant decisions in this jurisdiction. It is incumbent on them to research the reported decisions in other Contracting States. The task is made easy by the service that the Permanent Bureau has provided by setting up and maintaining (at no small expense) the INCADAT site." (emphasis added)

33. Dyson L.J., agreeing with Thorpe L.J., added some of his own observations:

> "48. This is the background against which the utility of a request for a determination under article 15 should be considered. An assertion that the removal of a child is wrongful within the meaning of article 3 entails three propositions, viz: *(i) the applicant enjoys certain rights in relation to the child*; (ii) these rights are "rights of custody" within the meaning of the Convention; so that (iii) the removal of the child is in breach of those rights and therefore wrongful.
>
> 49. *The first proposition raises the domestic law question.* In many cases this question is satisfactorily resolved on the basis of expert evidence; or in reliance on a certificate or affidavit under article 8(f) "emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State"; or by taking notice "directly of the law of, and judicial or administrative decisions, formally recognised or not in the State of habitual residence of the child, without recourse to the specific procedures for the proof of that law or the recognition of foreign decisions which would otherwise be applicable" (see article 14).
>
> 50. *But it can also be resolved by a determination pursuant to article 15: a request for a determination that the removal was wrongful within the meaning of article 3 can include a request for a determination of the domestic law rights (if any) of the applicant in relation to the child*. Such a request was made in the present case. Hedley J made a consent order that the father obtain from a court of competent jurisdiction in New Zealand "a description of any rights in relation to the said child enjoyed by the father". The decision of a court of competent jurisdiction is, obviously, more authoritative on the domestic law question than the opinion of an expert. In some circumstances, it is preferable to obtain a court ruling…
>
> 51. *Whether it is right to request a determination on the domestic law question under article 15 will depend on the circumstances of the case. These will include (i) the nature of the dispute raised by the question, (ii) whether the parties intend to adduce evidence from experts who appear to be suitably qualified to express an opinion on the issues raised by the dispute, (iii) whether the question can be satisfactorily answered on the basis of articles 8(f) or 14, and (iv) what delay is likely to be caused by the request. In many cases, the court is likely to conclude that the domestic law question can be resolved without recourse to a request under article 15.*
>
> 52. I turn to consider the use of article 15 to obtain a determination on the Convention question. It is convenient to refer to In *re J (a Minor) (Abduction: Custody Rights)* [1990] 2 AC 562… Although no order had been made pursuant to article 15, Lord Donaldson MR referred to that article and said at page 568D:

"In my judgment, article 15 and, indeed, article 14 were intended to assist a court which is asked to order the return of a child to ascertain the law of the other contracting state, in so far as that law is relevant to whether the removal or retention was wrongful within the meaning of article 3. *It cannot, as I see it, have been the intention that the courts of the other contracting state should be asked to determine the issue of the applicability of article 3 in so far as it turns on the meaning of the Convention itself, because that is something which the courts of both countries are equally able to determine*. Indeed, they would be expected to arrive at similar determinations. If, unhappily, this did not occur, the court which is being asked to order the return of the child would be bound to apply its own view of the Convention, particularly where, as here, the Convention only takes effect by virtue of a domestic Act of Parliament." (emphasis added)

34. He continued at paragraph 56 and said:

"56. *In my judgment, therefore, no useful purpose is served in asking for a determination solely on the Convention question. Take the present case. The courts of New Zealand are no better placed than the courts of this country to decide whether the rights enjoyed by the applicant in relation to the child according to New Zealand domestic law amount to rights of custody within the autonomous meaning of articles 3 and 5 of the Convention.* It is regrettable, but perhaps inevitable, that there are divergences of view as to the international meaning of concepts such as "rights of custody" and "rights of access". The present case illustrates this only too vividly, and shows why there is no point in obtaining a ruling on the Convention question." (emphasis added)

35. Lloyd L.J. agreed as to the disadvantages of the Article 15 procedure at paragraph 61:

"There could be cases in which it would be valuable to have an authoritative and speedy decision from the courts of the State of the child's habitual residence before removal, *if there is doubt as to the extent and nature of the rights exercised by the applicant before the removal*. Those rights are likely to have taken effect under and been governed by the law of that State. Depending on the nature of the dispute and the circumstances of the case, recourse to a court in that State may be the best way of resolving the dispute, but as my Lord, Lord Justice Dyson says, there are also other, possibly quicker and more economical methods as well." (emphasis added)

36. My overall interpretation of the above authorities is that while the Court is entitled to reach factual conclusions (even provisionally) if this is necessary to the expression of an opinion on the legal issue properly before it, a prior question arises as to what legal issues may properly be before the Court. The Court should be alive to a distinction between two different scenarios: (i) a case where the Court is asked to clarify or rule upon an issue of domestic Irish law which may be relevant to another court's determination of whether there was a wrongful removal, and (ii) a case where the Court is being asked to determine an issue of Convention law without any real need to clarify any aspect of Irish law. Only the former serves the purposes of Article 15 and the Convention more generally.

The legal issue raised in the present case: whether a removal on consent is a wrongful removal

37. Counsel on behalf of the applicant sought to persuade the Court that there was an issue on which Irish law had a distinctive character and that this should be clarified for the Belarussian court. This was on the issue of whether a child's removal with the consent of the left-behind parent is a wrongful removal for the purposes of Article 3 of the Hague Convention. It is true that there has been some divergence, for example as between different courts in England and Ireland on this particular issue; however, in my view, these divergent approaches concern an issue of Convention law rather than an issue of Irish law.

38. In *P (A child)* [2004] EWCA Civ 971, the Court of Appeal considered the relationship between Articles 3 and 13 of the Convention and the issue of consent. This discussion is at paragraphs 28-34 of the judgment. The Court posed the question thus: "Is consent relevant for Article 3 or only for Article 13?". It said (at para 28):

"This raises a question which has caused some divergence of view among judges of the Family Division. The argument advanced is that if a child is removed with the consent of the other party, then it is difficult to characterise the removal as "wrongful" or "in breach of custody rights", the prerequisites for Article 3. Consequently if there is consent, then there is no wrongful removal at all and the exercise of discretion under Article 13 does not arise. At first blush one can see that the argument has some superficial attraction."

39. It then went on to consider the decision of Holman J. in *Re C (Abduction: Consent)* [1996] 1 F.L.R. 417 who concluded:

"The Convention clearly intends that once it has been show that:

(i) there has been a removal from or retention away from the state of habitual residence; and

(ii) that is prima facie in breach of custody rights; and

(iii) consent is put in issue,

then the onus shifts firmly onto the person or body which opposes the return of the child to prove that the removal or retention was by consent. Further, even if that is proved the court still has, and must exercise, a discretion."

40. The Court then referred to some other authorities, including *Re O (Abduction: Consent)* [1997] 1 F.L.R. 924 and *T v. T (Abduction: Consent)* [1999] 2 F.L.R. 912, before saying that it preferred the views expressed by the Irish Supreme Court in a particular case. I will reserve my comments about its treatment of the Irish decision until after I have set out the English Court of Appeal's conclusion in P, which was set out at paragraph 33:

"If the giving of consent prior to the removal had the effect that the removal could never be classified as wrongful or in breach of the right of custody, then there would be no need for Article 13 at all. Whereas acquiescence is expressly recognised to be acquiescence subsequent to the removal, consent is not so limited in Article 13 and must, therefore, include permission which is given before the removal. If clear unequivocal and informed consent is given to the removal of a child, then it is difficult to see why the court should not exercise the discretion conferred by Article 13 to permit the child to remain in the country to which it was agreed he or she should go. The policy of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. If a child is removed in *prima facie* breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and

establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Convention and Article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention. Mr Nicholls cannot be entirely surprised that we reach this conclusion because it coincides with views expressed in paragraph 17.44 of the excellent textbook *International Movement of Children* written by him, Professor Nigel Lowe and Mr Mark Everall Q.C."

41. The Court of Appeal's reference to the Irish decision is puzzling in a number of respects. On a minor point, the case title and citation were incorrect; the case is in fact *B v. B* [1998] 1 IR 299, but there can be no doubt that the Court was referring to the decision of Denham J. at pages 312-313. More importantly, my understanding of the Irish decision is that it does not unequivocally reach the same conclusion as the Court of Appeal in *P*, even though the English court appeared to approve of it. What occurred in *B v. B* was that the High Court had concluded: (1) that (as a factual matter) the child's mother had given consent to the removal of the child from England to Ireland, and (2) because there was consent, there was no wrongful removal and therefore the terms of the Convention did not apply and the application for return of the child must fail (without need to consider Articles 12 or 13 at all). The appeal to the Supreme Court was on two grounds: (1) that the trial erred on holding that the appellant (the mother) had in fact consented to the child's removal; and (2) even if the removal had been with consent, the trial judge erred in not proceeding to consider exercising discretion under Article 13 of the Convention as to whether the child should be returned to England. The Supreme Court upheld the trial judge's finding of fact on consent but allowed the appeal and allowed the matter to be remitted to the High Court on the ground that Article 13 and discretion arose. The basis for that conclusion is not entirely clear to me. What is clear is that the Supreme Court considered that where a respondent has proved that an applicant consented to the child's removal, the issue of discretion arises and the case does not merely terminate at that point. What is less clear is whether the Court considered that in such a situation, i.e. where (it has been proved that) the child's removal was with consent, the removal is then deemed to be 'wrongful' or not within the meaning of Article 3. There are passages which give rise to ambiguity in this regard. I note the following:

> "The issue of whether there was a wrongful removal of the child was grounded on the question as to whether the appellant had consented to the removal of the child to Ireland…"

This opening characterisation of the issue seems to suggest that if there is consent, there is no wrongful removal. Having considered the relevant articles of the Convention, Denham J. continued in similar vein:

> "These articles must be applied to the facts of this case. *It having been determined that the appellant consented to the removal of the child it was not wrongful pursuant to Article 3.* Thus the mandatory Rule in Article 12 that a child wrongfully removed, where less than a year has elapsed from the date of such wrongful removal, does not apply. The sole issue is whether there is a discretion in the Court, when there has been a consent to removal, as to whether the child is returned to the country of its habitual residence.
>
> Article 13 is drafted in a rather convoluted form. However, it does refer to situations where consent has been given. The relevant words are:
>
> > "… the judicial … authority of the requested State is not bound to order the return of the child if the person … which opposes its return establishes that -
> > (a) the person … having the care of the person of the child … had consented to … the removal …"
>
> Thus, notwithstanding the mandatory and discretionary powers set out in Article 12 relating to a situation where a child has been wrongfully removed, special situations and defences are established in Article 13. One of these relates to the position where there had been consent to the removal.
>
> This Article must be construed so as not to render it nugatory. It must be capable of applying to both parties in an action. I construe it to mean that the judicial authority is not subject to a mandatory rule in relation to the child if the party opposing the return establishes that the persons having care of the child consented to the removal. If this situation arises the judicial authority is not bound to order the return of the child. Yet the Court, being not bound, has a discretion. It is helpful in construing the Article to name the relevant parties in this action in the words of the Article. It would then read:
>
> > "notwithstanding the provisions of the preceding Article, the judicial … authority of Ireland is not bound to order the return of V.B. if the respondent who opposes her return establishes that … the appellant had consented to the removal."
>
> The effect of this is that while the Court is not mandated it has a discretion. Such a discretion is in keeping with the Convention because:-
> (a) the Convention stresses that the interests of the children are paramount.
>
> (b) the Convention desires to secure protection for rights of custody and access.
>
> (c) the objects of the Convention set out in Article I are to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and to ensure the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> (d) in considering the circumstances referred to in Article 13 i.e. the consent to the removal, the judicial authority shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence: See Article 13, final paragraph. Consequently, the social background of the child must be considered."

42. However, Denham J. followed this with the following:

> *"Thus it is entirely consistent with the Convention that even if there is no wrongful removal - but that there is removal - the rights of custody and access in both the Contracting States are effectively respected".* (emphasis added)

This passage arguably suggests that if there was consent, there was no wrongful removal. She then went on to discuss a number of

English authorities and referred with approval to the decision of Holman J. in the C case (citation already above), saying that a similar approach had been adopted in Ireland by Morris J. in *N.K. v. J.K.* [1994] 3 IR 483. She disagreed with the analysis of Bennet J. in the O case. Given the passages referred to together with the complexity of the analysis in its cross-references to English authority, it is not entirely clear to me whether, in the final analysis, Denham J was viewing a "removal with consent" as a wrongful removal or not.

43. Theoretically, therefore, there are three possible interpretations of the relationship between Articles 3 and 13 of the Hague Convention if a court is satisfied the requesting parent consented to the removal: (i) that of Barron J. in the High Court in *B v B,* that in such a case there is *no wrongful removal* and the application is dismissed without the court going on to consider Articles 12 or 13; (ii) that in such a case there is *no wrongful removal* but the court nonetheless proceeds to consider discretion under Article 13; or (iii) that in such a case there *is a* wrongful removal and the court proceeds to consider discretion under Article 13. In Ireland as in England, it has been held that the court should proceed to exercise discretion under Article 13 and therefore interpretation (i) is not correct. The theoretical distinction between (ii) and (iii) does not matter in an ordinary application for a return under Article 12 because the Court has to go on to consider discretion under Article 13 anyway. The issue of whether (ii) or (iii) is the correct interpretation of Articles 3 and 13 of the Convention has come into focus in the present case only because Article 15 concerns the discrete issue whether or not there was a wrongful removal. Importantly, however, this concerns the interpretation of the Convention, not Irish law.

44. I do not think it is necessary for me to resolve the issue of whether interpretation (ii) or (iii) is the correct interpretation of Convention in the present case because it seems to me inappropriate to embark on an Article 15 inquiry when the issue is purely one of Convention interpretation without any need for an input from an Irish court on any issue of domestic Irish Law.

Article 8 of the European Convention on Human Rights and the Convention

45. Counsel on behalf of the applicant also referred to me the decision of the European Court of Human Rights in *Carlson v. Switzerland* (No. 49492/06, 6th November 2008). Here it was found that Switzerland was in breach of Article 8 of the Convention on Human Rights (respect for family life) because of the manner in which the Swiss courts had dealt with the applicant's application for return under the Hague Convention. The problems included the Swiss courts' delay in dealing with his application, which arose partly because of an incorrect joinder or merger of his Hague application with domestic divorce and custody proceedings. Another problem was that the Swiss court of first instance wrongly placed the burden of proof to disprove consent on the father instead of the burden of proving consent on the mother. Interestingly, there are parallels between the events in the Swiss courts in that case and those in the Belarussian courts in the present one, and no doubt the *Carlson* case will be relied on by the applicant in the forthcoming Supreme Court appeal in Belarus. For present purposes, however, it seems to me that the relevance of the *Carlson* case is limited; while it clearly sets out that the burden of proof of proving consent is upon the person alleging that there was consent (which is the same interpretation as that set out in the Irish authorities on the issue; see *S.R. v. M.M.R.* [2006] IESC 7), the judgment fundamentally concerns an issue of Convention law which must be applied by each State. It does not address or remove what I consider to be the fundamental obstacle to the applicant's current application, namely that he is asking the Court to rule on a matter of Convention law which is currently before the courts of another State without any dispute as to Irish law having arisen which might render it appropriate for an Irish court to become involved.

Conclusions

46. I am prepared to accept – on the basis of the English authority relating to applications pursuant to s. 8 of the English legislation which is identical to the Irish legislation on the relevant point – that an applicant may have *locus standi* to request a ruling under Article 15 of the Act of 1991 even if there has been no request from another State under Article 15 of the Convention, provided the application otherwise properly serves the purposes of Article 15 of the Convention.

47. I am also prepared to accept that an Irish court may have to resolve disputed issues of fact (or, at least, resolve them provisionally) in order to make a ruling where an Article 15 Convention application is otherwise properly before it.

48. However, a different question is whether the declaration, if granted, would be consistent with the purposes of Article 15 and the distribution of functions as between the courts of the Contracting States under the Convention as a whole. My examination of the relevant authorities and commentary above has led me to the conclusion that an Irish court should not proceed to entertain such a case or grant a declaration of wrongful removal in circumstances where the Court of another country is already seized of that issue under the Convention and there is no disputed issue of Irish law upon which the Court can usefully rule which would be of assistance to that court. In the circumstances of this case, it is not in dispute in the Belarus proceedings that the applicant has rights of custody under Irish law for the purpose of Article 3 of the Convention. What appears to be solely in issue in those proceedings is the factual question of whether or not he consented to the child being brought to Belarus and the application of Convention concepts to those facts. That is a matter for the Belarussian courts, and how an Irish court thinks it should be done is irrelevant. It does not seem to me appropriate that I would grant a declaration on an issue of Convention law (i.e. that the removal was wrongful), requiring resolution (even provisional) of an issue of fact necessary to that issue of law, when there is no conflict between the parties, or need to guide the Belarussian court, on any Irish law aspect of that question. It is clear that the father in this case acquired custody rights upon the birth of the child by virtue of s. 6 of the Guardianship of Infants Act 1964. The issue arising for decision on the part of the Belarussian courts as to whether there was consent to the child's removal is one which it should determine in accordance with the Convention principles, including the principle that the burden is upon the respondent to prove consent (and not upon the applicant to disprove consent). There is no good reason, in my view, why an Irish court should be contributing in any way to that decision.

49. The position would be different if, for example, at least part of what the Court were being asked to determine was an issue of Irish law; such as whether the father had rights of custody under Irish law by reason of legislation, or an agreement between the parties, or some other factual situation. In such a situation, the Court might have to reach a determination of fact, or perhaps make an assumption of fact - as described in the English case of *P (A Child)* [2004] EWCA Civ 791 - for the purpose of dealing with the domestic legal issue. However, that situation seems to me to be very different from a situation where the Court is being asked to determine a factual matter and a Convention legal issue without any domestic legal issue being addressed at all. For the reasons eloquently set out by the Israeli Supreme Court as set out above, to do so would be contrary to the purpose of Article 15 and the allocation of judicial responsibility across the Convention as a whole.

50. For the above reasons, it seems to me that the Court should refuse the declaration sought.