Neutral Citation Number: [2007] IEHC 440

THE HIGH COURT
FAMILY LAW

[2007 No. 11 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND THE CHILD ENFORCEMENT OF CUSTODY ORDERS ACT, 1991 AND
IN THE MATTER OF THE HAGUE CONVENTION AND
IN THE MATTER OF C. P. C

BETWEEN

P. L.

APPLICANT

AND
E. C.

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 19th day of December, 2007

1. The applicant in this case is the father of C., who was born in Melbourne, Australia on 25th August, 1999 and the respondent is his mother. The applicant and the respondent were never married to one another.

2. C. was habitually resident in Melbourne, Australia from the date of his birth.

3. Difficulties arose in the relationship between the applicant and the respondent. They separated. Subsequently, proceedings before the Family Law Courts in Melbourne in relation to the welfare of C were commenced. The applicant and the respondent were legally represented in those proceedings and C was also independently legally represented in the proceedings. The proceedings had been at hearing in Melbourne for nine days in October 2005. Following nine days of hearing the proceedings were adjourned and were due to resume on Monday 7th November, 2005. On 30th October, 2005 the respondent without the knowledge of the applicant and without leave of the court removed C from the jurisdiction of the Courts of Australia. The whereabouts of the respondent and C were not known to the applicant or to the Family Law Courts in Australia and were not made known to them by the respondent. An application was made to the Australian Central Authority seeking the return of C on 23rd November, 2005. Ultimately the whereabouts of the respondent were discovered and these proceedings commenced by special summons issued on 8th March 2007 seeking the return of C to Australia under the provisions of the Hague Convention.

4. It appears that the applicant and the respondent enjoy joint guardianship of the minor under the laws of the requesting State.

5. Following an order made herein by the High Court on 31st July, 2007 (Finlay Geoghegan J.) it was ordered that Dr. Helen Greally assess C and report to the High Court for the purposes of the Court exercising its discretion under Article 12 and 13 of the Hague Convention on the following issues:

1. The degree of maturity of the said minor,

2. Whether the said minor objects to being returned to Australia,

3. If the said minor does object to being returned to Australia,

(a) the grounds of such objection and in particular whether it relates to an objection to living in Australia and/or a desire to remain in Ireland or whether it relates to an objection to living with or living in the vicinity of a particular parent and/or wish to live with the other parent and

(b) Whether any objections expressed have been independently formed or result from the influence of any other person including a parent.

4. Ascertain the said minor's attitude to the circumstances in which he is now living in Ireland.

6. It was further ordered that certain facts be furnished to Dr. Greally for the purpose of the said assessment. Those facts are as follows:

(a) The age and date of birth of the said minor.

(b) That the said minor was removed from Australia to Ireland on 30th October, 2005 during the course of court proceedings in Australia relating to custody and access of the said minor where inter alia the mother, (the respondent in these proceedings) believes that the minor had been sexually abused by the father (the applicant in these proceedings) – the father (the applicant in these proceedings) vehemently denies any such abuse.

(c) The said minor whilst in Australia had been assessed as "on the autistic spectrum".

7. It was further directed that the applicant deliver points of reply to a points of defence previously delivered by the respondent. It would be helpful to summarise the points of defence and points of reply. In the points of defence it was pleaded that:

(a) The applicant did not hold or exercise "rights of custody in respect of C. on 30th October, 2005.

(b) The applicant has been guilty of culpable and unconscionable delay in instituting these proceedings

(c) Or that his inaction amounts to acquiescence.

(d) That C. has acquired a habitual residence in Ireland is well settled here and that the proceedings were not instituted within one year of 30th October, 2005.

(e) C. has attained an age and degree of maturity at which it is appropriate that his views be taken into account and that he objects to being returned for valid and cogent reasons.

(f) There is a grave risk that the return of C. to Australia will expose him to physical harm and psychological harm and place him in an intolerable situation in light of the evidence of sexual abuse of the infant by the applicant and in light of the proposed order and approach of the court in Australia in his case.

(g) There is a grave risk that the return of the infant to Australia will expose him to physical harm and psychological harm and place him in an intolerable situation in light of the well-founded belief of the respondent that he was sexually abused by the applicant.

(h) There is a grave risk that the return of the infant to Australia will expose him to physical harm and psychological harm and place him in an intolerable situation in light of the lack of accommodation or means of support in Australia.

8. The points of reply can be summarised as follows:

1. The removal of C was wrongful and in breach of rights of custody of the applicant on 30th October, 2005.

2. The applicant was exercising rights of custody and the litigation before the Family Court of Australia at Melbourne in the State of Victoria, inter alia amounted to an exercise of rights of custody.

3. The respondent deliberately concealed her whereabouts and removed the minor from the jurisdiction of the Courts of Australia without leave of the Courts in the course of the trial of an action pertaining to the welfare of the minor and without notice to or leave of the applicant.

4. It is denied that there was any delay. The conscious and deliberate conduct on the part of the respondent in concealing her whereabouts and the whereabouts of C placed significant obstacles in the way of the applicant proceeding with the matter.

5. The applicant never acquiesced in the conduct of the respondent.

6. C was at all material times habitually resident within the jurisdiction of the courts of the State of Victoria, Australia prior to his wrongful removal.

7. The request for return of the minor pursuant to the Hague Convention was instituted within days of the abduction of the minor by the respondent herein. Service was rendered difficult by the concealment of the whereabouts of C and the respondent.

8. It is denied that C has attained an age or degree of maturity at which it is appropriate for a court to take his views into account. It is denied that C objects to being returned to Australia for valid or cogent reasons.

9. It is necessary and appropriate in the interests of the welfare of C that he be protected from the harmful effects of his wrongful removal and that he should be promptly returned to the State of Victoria.

10. It is denied that there is risk, that the return of C to Australia will expose him to physical harm or to psychological harm or place him in an intolerable situation. It is further denied that there is evidence of sexual abuse of the infant by the applicant or that there is a proposed order of the courts of Australia capable of being the subject of consideration by this court. The proceedings before the Court of Australia would be re-entered on the return of the minor to the jurisdiction of the courts in Australia.

11. It is denied that the return of C will expose him to physical harm or psychological harm or place him in an intolerable situation. It is denied that there is a well-founded belief on the part of the respondent that C was sexually abused by the applicant.

12. It is denied that there is a lack of accommodation or means of support for C in Australia.

13. It is pleaded that the court should disregard and discount the period of time spent by the minor in hiding in this jurisdiction.

9. The grounding affidavit in this case is sworn by Miriam A. Walsh, Solicitor of Tallaght Law Centre. She confirmed that the applicant caused an application to be made to the Central Authority for the Australian Commonwealth on 23rd November, 2005 under the Hague Convention. The application was then exhibited. The Central Authority for the Commonwealth of Australia forwarded the application for the return pursuant to the Convention on 19th January, 2006. That letter noted *inter alia*:

"I noted that Mr. L's access to C has been the subject of lengthy court proceedings in Australia. It is our understanding that during the final hearing regarding the access of C, Ms. C removed C from Australia to Ireland. Accordingly the matter has been adjourned indefinitely and no final court orders have been made in Australia regarding Mr. L's access to C."

10. The letter went on:

"I further note that in his affidavit dated 23rd November, 2005 Mr. L states that in May 2004 an allegation was lodged by Ms. C with the Victorian Department of Human Services, alleging sexual misconduct by Mr. L towards C. We further understand from discussions with Mr. L's legal representatives that these allegations of sexual misconduct were being heard by the court in the above mentioned access proceedings. The father addresses these allegations in paras. 8 – 11 of his affidavit. Under Australian law Mr. L retains parental responsibility for C. An affidavit of relevant law is attached."

11. The affidavit of laws referred to in that letter was an affidavit of a Mr. Scott-Wilson and I will refer to that affidavit in due course.

12. As can be seen from the affidavit of Ms. Walsh and the letter from the Australian Authorities to which I have referred reference was made to an affidavit of Mr L in the Australian proceedings which was sworn on 23rd November, 2005 after the respondent had left the jurisdiction. That affidavit sets out some of the background to the relationship between the applicant and the respondent. They met in 1993 and formed a relationship and commenced residing together that year. In 1998 the applicant was informed by the respondent that she was pregnant and C was born on 25th August, 1999. In 2002 the relationship between the applicant and the

respondent broke down and the respondent left the home which they resided in together and returned to reside with her mother who resided close by in Melbourne, Australia. There is no dispute that after the separation the applicant had access to C including overnight access midweek and access every weekend from Saturday morning until Sunday night. Difficulties arose in the access arrangements in early 2004 and by May 2004 allegations of sexual misconduct had been made by the respondent against the applicant in respect of C. A complaint was made to the police and proceedings commenced in the Family Court of Australia.

13. Thereafter a number of hearings took place in the Family Court and culminated in a hearing before the Honourable Justice Mushin of the Family Court of Australia in Melbourne on 17th October, 2005. The matter was adjourned on that date to 19th October, 2005 and then listed for hearing for nine days before the court. On 28th October, 2005 the case was adjourned to 7th November, 2005. In her affidavit sworn herein on 30th April, 2007 the respondent denies that the case was adjourned for full hearing on 7th November, 2005. Rather she states that on the last day in court, the 28th October, 2005 the trial judge made his proposed order known to the respective lawyers and that there was therefore no question of resuming for full hearing. The applicant states on the contrary that upon the conclusion of the day's proceedings on 28th October, 2005 the trial judge invited counsel on behalf of the applicant, the respondent and the child representatives to meet in chambers to discuss his "tentative views" as to what he might order regarding C's future contact with the applicant. He noted in his affidavit that the matter was adjourned until 7th, 8th and 9th of November, 2005.

14. Insofar as any issue arises on this aspect of the matter it is clear from the papers before me and having regard to the affidavits sworn herein, that the proceedings were to be resumed by way of full hearing on the 7th, 8th and 9th contrary to the assertion of the respondent that there was no question of resuming a full hearing. It was further stated in the affidavit of the applicant herein that during the trial:

> "The judge made comment in open court that his tentative view was for my contact to resume with C albeit on a strictly supervised basis for an initial period of time."

15. I have no doubt that it was the expression of the tentative view of the trial judge that caused the respondent to remove C from the jurisdiction of the Australian Courts.

16. The question as to whether or not the removal by the respondent of C from Australia in the course of the proceedings amounts to a wrongful abduction depends on the determination of the issues that have been raised in this case. I now propose to deal with those issues. In the grounding affidavit of Miriam A. Walsh referred to above she stated at para. 10 that:

> "I say that I am informed and so believe that pursuant to the laws of the Commonwealth Australia the applicant and the respondent have equal parental rights in respect of their dependent child."

17. It should be noted that the respondent does not deny that the applicant has equal parental rights. At para. 16 of the replying affidavit of the respondent sworn herein on 30th April, 2007 she stated:

> "I beg to refer to para. 10 of the said affidavit (the affidavit of Miriam Walsh referred to above) and await proof that the applicant is entitled to equal parental rights as alleged. I deny that the removal of the infant is unlawful as alleged or at all."

18. Accordingly it is clear that the respondent whilst not accepting that the applicant has equal parental rights did not deny this.

19. It is clear from the above that the first issue to be determined is whether the applicant enjoyed "rights of custody" on 30th October, 2005 within the meaning of Article 5 of the Hague Convention. Article 5 provides as follows:

> "For the purposes of this Convention:
>
> > (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> >
> > (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

20. An affidavit of Scott Raymond Wilson was provided by the Central Authority in Australia. In his affidavit sworn in support of the application for the return of a child in accordance with the Hague Convention, he set out his qualifications as a Senior Legal Officer in the Australian Central Authority. He exhibited a number of sections from the Australian Family Law Act, 1975 which define "parental responsibility", deal with the rights of parents and confer parental responsibility for a child. He concluded:

> "The effect of ss. 61C and 11B(4)(a) is that both parents of a child retain joint parental responsibility for the child until the child reaches the age of eighteen. Therefore, in this case, the applicant parent has rights of custody in relation to the child and these rights of custody have been breached within the meaning of Article 3 of the Convention."

21. It was submitted on behalf of the applicant that in Australia there is no distinction between married and unmarried parents and that the applicant was someone who enjoyed rights of custody on the relevant date, that is, the 30th October, 2005. It is the case as was pointed out by counsel for the respondent that as of that date, the applicant did not enjoy a right to access or contact with the child by virtue of an interim order of the Australian Courts made on 3rd March, 2005. On that date it was ordered by the Family Court of Australia at Melbourne in the proceedings between the parties that:

> "Until further order all contact between the child C. L. born 25th August 1999 and the father be suspended."

22. That order also provided for certain other steps to be taken in the proceedings before the Australian Courts. Notwithstanding the fact that the applicant's right of access had been suspended, counsel for the applicant made the point that the applicant was still entitled to determine the place of residence of C and was in a position analogous to a guardian in this jurisdiction. It was submitted on behalf of the applicant that the removal of C without the applicant's knowledge or consent during the course of proceedings to determine the issues of custody and access between the parties amounted a breach of "rights of custody".

23. In submissions on behalf of the respondent herein reference was made to the decision of the Supreme Court in the case of *W.P.P v. F.R.W.* (Unreported, 14th April, 2000.). That case referred to the decision in the case of *H.I. v. M.G.* [1999] 2 I.L.R.M. 22 in which the meaning of "rights of custody" in Article 3 of the Convention was considered. Keane C.J. at p. 10 referred to his judgment in the

earlier case in which he had stated:

> "Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, absent any legal excusing circumstances, be wrongful in the terms of the convention. The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself since its right to determine the custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence would continue to be in the requesting state."

24. In the present case it is clear that the applicant was not seeking an order for custody of C nor was there an order prohibiting the removal of C without the consent of the applicant. In the *H.I. v. M.G* case, the position was that the parent who removed the children in that case had sole rights to the legal and physical custody of the children under New York law. Further in the judgment in *W.P.P. v. S.R.W.* Keane J. dealt with the submission that the right to determine the child's place of residence was of importance in considering the issue of a "right of custody" within the meaning of the Convention. Keane C.J. stated at p. 18:

> "I am unable to accept that proposition. No doubt a parent who has the right to determine the child's place of residence but who may not have the right to the physical custody of the child is regarded, by virtue of that Article as having a right of custody which is protected by the Convention. The affidavits as to Californian law do not suggest that the plaintiff enjoyed any such right: on the contrary they proceed on the basis that the defendant, as the parent having custody, was entitled to determine the minor's place of residence. The issue was as to whether the defendant could unilaterally exercise that right in circumstances where the court had already awarded the plaintiff access rights."

25. In the present case it is clear that the applicant had enjoyed rights of access to C. At the time of the removal of C, he did not enjoy access to C by virtue of the suspension of access on 3rd March, 2005. However, it is also clear from the affidavit of Scott Raymond Wilson that in Australian law the applicant herein does enjoy rights of custody to C in that he enjoys equal parental responsibility with the respondent and did so at the relevant date. In his affidavit he expressly referred to the provisions of s. 61C and s. 111B(4)(a) of the Family Law Act, 1975. Section 61C states:

> "Each of the parents of a child who is not eighteen has parental responsibility for the child. Parental responsibility is defined in the Act as follows:
>
> > In relation to a child, means all the duties, powers, responsibilities and authority which by law, parents have in relation to children."

26. Section 111b deals with Convention of the civil aspects of international child abduction and provides as follows at (4)(a):

> "For the purposes of the Convention:
>
> > (a) each of the parents of a child should be regarded as having rights of custody in respect of the child being in force."

27. Accordingly having regard to the affidavit of Scott Raymond Wilson, it does seem to be clear that someone in the position of the applicant herein under Australian law enjoys rights of custody notwithstanding that an order has been made suspending his right of access. Thus it seems to me that the position of the applicant in these proceedings is in a different position to the applicant in the case of *W.P.P. v. S.R.W.*

28. In this case, the applicant also submitted that the fact that he was actively pursuing litigation in the courts in Melbourne in relation to his right to have access to C was consistent only with the actual exercise of rights of custody. Counsel on behalf of the respondent relied on the decision in the case of *H.I. v. M.G.* to suggest that an application to court to obtain access cannot be deemed to be an exercise of a right of custody. I do not think that this issue is of assistance in determining whether the applicant has "rights of custody". The facts of that case are different to the facts of the present case as is the legal position. Under Australian law the applicant and the respondent have equal rights as parents unlike the position of the parties in the case of *H.I. v. M.G.* At p. 133 of his judgment in that case, Keane C.J. noted:

> "It is clear from the facts of the present case, and from the various authorities which have been discussed in the course of this judgment, that the rights of unmarried fathers under the Hague Convention, present particular difficulties, given the unique relationship of the natural father to his children and the fact that in a number of jurisdictions, including our own, they do not have any automatic rights to custody equivalent to those of married parents."

29. However, in the present case it is clear from the information before this court that there is no distinction between the rights of married and unmarried parents in relation to "rights of custody". Obviously , the term "rights of custody" must be considered in the light of the legal status of the parents in the country of habitual residence. The position of parents in Australia is the same in the case of married and unmarried parents. As Keane C. J. pointed out above, the position of unmarried parents may be different in some jurisdictions as, it is in our jurisdiction where the unmarried father does not automatically have rights of custody. In the circumstances of this case I am satisfied that the applicant herein had and did enjoy rights of custody to C on 30th October, 2005 and thus that the removal of C on that date by the respondent was a wrongful removal.

30. It would be helpful to refer briefly to two other authorities cited by counsel for the applicant in relation to the issue of rights of custody. The first of those was a case of *Re. A.* [2004] 1 F.L.R. 1 in that case the family had lived together in New South Wales and were subject to the Family Law Act, 1975. It was noted in the head note that that Act gave automatic parental responsibility to the unmarried father on the birth of his son. Section 61C(3) of that Act was noted by virtue of which parental responsibility had effect subject to:

> "Any order of the court for the time being in force."

31. The mother had obtained three apprehended violence orders (AVOs) against the father, these being the Australian equivalent of non-molestation orders. He admitted to a breach of the last AVO and was imprisoned as a result for two months. The mother secretly

removed the son and his elder half sister from Australia while the father was in prison and brought both children to England. The father issued an application under the Hague Convention. The mother argued that the last AVO had the effect of suspending the father's parental responsibility, rendering him unable to exercise his rights of custody under Article 3 of the Hague Convention. It was held, refusing the application to adjourn for a declaration from the Family Court in Australia and directing the return of the child to Australia.

> 1. While the father was unable to exercise some of his rights by virtue of the AVO, he was still entitled to consent or refuse to the removal of his son from the jurisdiction of the Australian Family Court. The parental responsibility of the father had not been suspended, although the way in which he could exercise his rights had to some extent been curtailed.
>
> In those circumstances it was further held that the removal of the son by the mother was wrongful within the meaning of the Hague Convention.

32. At p. 6 of her judgment it was noted by Butler Sloss P. in that case as follows:

> "Taking therefore, the first point, I do not think that the parental responsibility of the father in this case has been suspended. It has been to some extent curtailed in the way in which he can exercise it, both in the absoluteness nature of the Australian legislation and by analogy with the English legislation, where we would not treat a non molestation order as affecting the right to parental responsibility. My view is that the AVO of 14th October, 2002 did not interfere with, and certainly did not suspend, the right of custody that was given to the father by the Family Law Act, 1975.
>
> The second question is whether or not he was actually capable of exercising the right of custody in order to comply with Article 3(b) of the Hague Convention. Again, it is quite clear that he was unable to exercise the whole of his bundle of rights because part of them, at least, were subject to an order of the court under s. 61C(3). But the restrictions were specified and it was clear that what he was unable to do. I do not myself see the effect of the order of the court of 14th October, 2002 was to deny him other parts of his bundle of rights of which, for the purpose of this case, the most important was the right of veto to the removal of his son from Australia. I think the case of *Ryan v. Phelps* [1999] N.Z. F.L.R. 865 is, for the purpose of this proposition, very similar. He was imprisoned; there were injunctions – AVOs – and he certainly could not do what he was forbidden to do; but he was entitled either to consent or to refuse to consent to the removal of his son from the jurisdiction of the Australian Family Court. The mother, by her secret removal of the child from the jurisdiction – and it is significant in such a case, that she very carefully departed without letting the father know about it – was, in my judgment, in breach of the rights of custody which would have been exercised but for the removal of A. from the jurisdiction of Australian Family Court."

33. The other case relied on by counsel on behalf of the applicant was the judgment of the Supreme Court in the case of *H. v. H.* [2003] I.R. 390. That also was a case where the father was in prison and clearly not in a position to exercise a relationship in the sense of living with the children or having access to the. It was noted in the head note of that decision:

34. In dismissing the appeal:

> 1. That the serving of a parent of a term of imprisonment could not be said to divest a parent of a legally established right of custody of his children. The burden of proving that a parent was not exercising rights of custody at the time of removal fell on the abducting parent and in this instance had not been discharged.
>
> 2. That the defendant had not established that there was a grave risk as set out under Article 13(b) that the child would be placed in an intolerable situation if returned to England. In assessing whether or not there was a grave risk, grave risks apply to both parts and was not to be read disjunctively. The fact that the proceeding relating to the matter were already in being prior to the removal of the children and the fact that the defendant had removed the children in full knowledge there was a court order in existence prohibiting such action, further militated against refusing the return of the children."

35. It seems to me to be clear from those decisions that given the nature of the parental responsibility rights enjoyed by the applicant under the Family Law Act, 1975, the fact that the father had consented to an order suspending access or contact with C pending the conclusion of the proceedings before the Australian Family Law Court does not mean that the entire bundle of rights enjoyed by him were suspended. He still retained the right to consent or refuse to the removal of his son from the jurisdiction of the Australian Family Court and he was deprived of that right by the wrongful removal.

Delay and Acquiescence.

36. The proceedings in this case were commenced by a special summons dated 8th March, 2007. The disappearance of the respondent and the child only became apparent to the applicant on 7th November, 2005. Subsequently, a number of hearings took place in the Australian Family Law Court in order to attempt to ascertain the whereabouts of the respondent. Police inquiries determined that the mother had left the jurisdiction of Australia on a flight bound for Dubai on 30th October, 2005. On 9th November, 2005 the respondent's sister was subpoenaed to court to give evidence as to her whereabouts. Further proceedings took place on 17th November, 2005 for the purpose of attempting to ascertain the whereabouts of the respondent. The respondent's brother Daniel Cullen and her father Patrick Cullen were cross examined but neither indicated where she was. On 17th November, 2005 the proceedings before the Family Court in Australia were adjourned *sine die*. The application to the Australian Central Authority under the Hague Convention was made by the applicant herein on 25th November, 2005.

37. Her mother was also subpoenaed but did not appear and it subsequently transpired that she had gone to England where she had relatives. It was not known whether the respondent went to England or Ireland and accordingly the Australian Central Authority wrote to both jurisdictions in an effort to ascertain the whereabouts of the respondent. This fact was set out in a letter from the Australian Central Authority to the Irish Central Authority in a letter dated 19th January, 2006. A list of addresses at which the respondent could be staying was furnished by the applicant to the Australian Central Authority. These addresses consisted of the details of relatives of the respondent. It does appear that there may have been some problem in the transmission of those addresses to the Irish Central Authority.

38. It is clear from the affidavits herein and in particular from the first affidavit of the respondent that the applicant herein was aware of the fact that the respondent had a number of relatives residing in this jurisdiction. In particular, a number of her relatives resided at Wollengrange, Thomastown, Co. Kilkenny. The applicant and the respondent had in 1998 approximately visited the respondent's family at Wollengrange for some four weeks. Again in 2001 they travelled to Ireland and stayed in Wollengrange. However, the

respondent was not residing at any of the addresses of her relatives in Wollengrange following her return to this country in 2005.

39. In his affidavit sworn herein on the 14th May, 2007 the applicant herein stated that he had provided all the names and addresses of the respondents relatives in Ireland and known to him to the Australian Central Authority. He also supplied the names and addresses of relatives in the UK to a solicitor retained by the Central Authority in the United Kingdom. The respondent stated that she had been a frequent visitor to Wollengrange since her return to this jurisdiction in November 2005 but notwithstanding this her relatives did not indicate this to the Australian Family Court although a number of her immediate family relatives had given undertakings to assist the Australian Family Court as to the location of the respondent. I note that the first affidavit of the respondent herein states that she arrived in Ireland on the 31st October, 2005 and stayed at a house rented for her by an uncle at 37 Sherwood Park, Mullingar and that she has resided there since early November, 2005. C was registered at a school in Mullingar since 9th January, 2006. She registered with Manpower in Mullingar and has been in employment through them since November 2006. It would appear from the affidavits herein that ultimately she was located through her registration with Manpower. When C was registered at the school, he was registered in the name of C C. This was so notwithstanding that he was known as C P L in Australia.

40. In her affidavit sworn on 12th June, 2007 Miriam Walsh, Solicitor set out the details of the efforts made by the authorities here to locate the respondent. It does appear from her affidavit that the list of addresses of the respondent's relatives was not originally provided to Ms. Walsh. However, this was rectified in October, 2006. Further details of the efforts to serve the respondent with these proceedings are set out in the affidavit of service of Peter O'Callaghan sworn here on 12th June, 2007. An affidavit was also sworn by Jane Catherine Francis Sellwood on 8th June, 2007. She is a principal legal officer in the Central Authority in Australia and she set out the details of the steps taken by that body to assist in the search for the respondent herein.

41. The respondent in an affidavit sworn herein on 4th October, 2007 stated that she had lived openly in this jurisdiction since she came. She says that she was informed in March of this year by her uncle that child abduction proceedings were about to be served on her. She stated that there was no question of trying to avoid service or attempting to flee the jurisdiction. She commented that she could not understand why the applicant had made no attempt to assist the central authority in obtaining an address for her in Ireland. Finally it appears to be clear that her work commenced in November, 2006 and she complains of the fact that as that information was readily available there was no reason why proceedings were not served on her before April of this year. Finally, an affidavit was sworn by her aunt P.C. She stated that when her sister K.F., the respondent's mother visited her at Christmas in 2005 she was distraught and having a nervous breakdown. She stated that she did not tell her that the respondent was in the country as this was "the respondent's wish". It was also stated by P.C. that the respondent did not visit Kilkenny during that period of time.

42. Having considered all of the affidavits sworn in relation to this issue, I can only come to the conclusion that the respondent had taken some steps to conceal her whereabouts. In the first instance C, when he went to school when he was registered in the name of C as opposed to C P L the name by which he was known in Australia. The address at which he resided in Mullingar was rented property which was not and could not have been known to the applicant herein. It is clear from the affidavit of P.C. referred to above that at the very least, the respondent was actively engaged in preventing her mother from finding out where she was residing in Ireland, whatever about anyone else.

43. This is a case in which the provisions of Article 12 of the Hague Convention it provides:-

> "1. Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> 2. The judicial administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

44. This is a case clearly were a period of one year has expired after the wrongful removal and in that context the case of *P. v. B. (No.2)* [1999] 4 I.R. 185 is of assistance. In that case it was held by the Supreme Court that culpable delay by an applicant might be a form of acquiescence but that even where culpable delay did not constitute acquiescence, it might well be reasonable to determine that culpable delay by an applicant was such that the Hague Convention procedures were not applicable. It was also held that in the special circumstances of the case, in particular the inappropriate delay by the plaintiff, the court should exercise its discretion under the Hague Convention in favour of the child remaining in Ireland. In that case Denham J. considered in detail the delay in that particular case. She went on to say at p. 216 of her judgment:-

> "The plaintiff was aware of her home address. He knew she visited there before. He knew she had gone there before when she wrongfully removed the child. He himself had visited her home. It is extraordinary that he did not telephone her parents or attempt to do so to enquire of her and R. It is remarkable in circumstances that Interpol was asked to trace her – that neither the plaintiff nor his lawyers rang her home in Ireland. In assessing the evidence it is clear that common sense would have suggested that the defendant had once again returned to her parents and this could have been confirmed easily and speedily"

45. She went on to say at p. 217:-

> "Delay is contrary to the Hague Convention. Significant culpable delay by a requesting party is contrary to the fundamental policy of the convention. Sometimes culpable delay may be a form of acquiescence. However, there may well be circumstances where there is culpable delay and yet no acquiescence. It may well be reasonable to determine in certain circumstances that delay by an applicant is such that the convention procedures are not applicable".

46. Taking into consideration the passage from *P. v. B* referred to above, I could not equate the fact of this case with the fact in the case of *P. v. B*. It is correct to say that the proceedings in this case have been issued more than twelve months after the wrongful removal. However, from a consideration of the large number of affidavits before this court as to the steps taken to trace the respondent and the child, it does seem to me that everything was done that could be done by the applicant to locate the respondent and C. He supplied a list of names and addresses of relatives in Ireland and England to the Central Authority in Australia. He continued the court proceedings in Melbourne with a view to ascertaining from the respondent's relatives her likely whereabouts. In the circumstances, given the difficulty that the Gardaí had in tracing the respondent here, it seems to me difficult to argue that there was any form of culpable delay on the part of the applicant in issuing proceedings herein. The respondent was ultimately traced after she had registered with Manpower. It is not reasonable to expect that the applicant would have been able to ascertain her whereabouts at rented accommodation in Mullingar, a place with which she had no previous connection. It is quite clear that there

was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts at the very least from her own mother. However, I think that it is also true to say that she was also engaged in concealing her whereabouts from the applicant. It is to some extent the case that the delay in this case was not helped by the apparent failure of the Australian Central Authority to forward to the Irish Central Authority the list of addresses supplied by the applicant. In my view the delay in this case while significant could not be described as culpable. It is only culpable delay that can amount to acquiescence and therefore it seems to me that the delay in this case clearly does not amount to acquiescence.

47. I was also referred to the English decision of the Court of Appeal in *Cannon v. Cannon* [2005] 1 F.L.R. 169 which considered the provisions of article 12. That case considered the concept of tolling. It was decided that the use of the concept of tolling was too crude an approach but that each case should be considered on its own facts. A purposive approach to the construction of Article 12 was taken. That seems to me to be the correct approach. The case is also of assistance in considering the meaning of the phrase "well settled in its new environment". It was stated at p. 49 of the judgement of Thorpe L. J.:

> "Concealment or subterfuge in themselves have many guises and degrees of turpitude. … This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert fro any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest….
>
> There will often be a tension between the degree of the abductor's turpitude and the extent to which the 12 moth period has been exceeded.
>
> Obviously, the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history it has achieved…"

48. I have already described the degree of concealment and subterfuge in this case. It undoubtedly contributed to the delay in commencing proceedings. However, I do not think it is at the extreme end of the range of turpitude as considered by Thorpe L. J. in that case. On the contrary, I think it could be described as being at the opposite end of the range. Although the respondent used her name to register C at school, she did not take any steps to conceal her identity. She did engage actively in concealing her whereabouts from her mother and it is clear that she did so to avoid having her mother placed in a position where she was obliged to disclose her daughter's whereabouts. She did not make her whereabouts known. She remained out of the employment market for a considerable period of time. However, that is all she did. It seems to me that in the circumstances I must consider the issue as to whether C is well settled in his new environment. That issue was to some extent dealt with in the evidence of Dr. Helen Greally and I will refer to it in that context.

49. The referral of C to Dr. Helen Greally, a clinical psychologist was for the purpose of assisting the court in respect of the following questions:

> (a) The degree of maturity of C.
>
> (b) Whether C. objects to being returned to Australia.
>
> (c) If he does object to being returned, the grounds of such an objection and further whether this relates to specifically to living in Australia rather than living in Ireland and/or an objection to living in the vicinity of a particular parent.
>
> (d) If there are such objections whether the objection has been influenced by any other parent.
>
> (e) The current circumstance of C's living arrangements in Ireland and his attitude to living in this country.

50. In this regard the court has had the benefit of a written report from Dr. Greally and the oral evidence of Dr. Greally. Dr. Greally had received limited information in accordance with the court order made herein previously in relation to the background of C. She was aware that there had been allegations of sexual abuse made in proceedings in the Australian courts. She was also aware that there was a query as to his developmental progress. She described his presentation at interview as unusual. She also described him as a very detached child and she came to the conclusion that he had not been influenced by anybody in the immediate family background. Her view was that the child's presentation was so unusual that he required further assessment including intellectual assessment and emotional assessment. In her report she noted "a striking aspect of C 's interview was that he showed little or no affect during all of the interviews that he had with the writer and did not respond in an animated or an enthusiastic way to any questions that were asked of him. His presentation was consistently flat". Dr. Greally was of the view that there was some degree of fantasising on the part of C in relation to his contacts with his father and that for that reason the interviews were unreliable in respect of the questions posed by the court. In the course of her direct evidence she commented that "I really would be very unhappy to say anything except to say what I think which this child merits further investigation and his presentation. It gives me a lot of cause for concern, because he is so flat and detached". She went on to note in the written report that in relation to the level of maturity "C 's lack of real involvement in the interview situation makes it a difficult question to answer. However, aspects such as his concept of time suggests that he is somewhat immature". In the course of her evidence she observed that it was not possible to stand over a view that C should be either sent back or kept here having regard to his presentation to her. One of the final comments made by Dr. Greally in her evidence was that C's presentation suggested to her that he would settle anywhere. He did not show enthusiasm about Ireland or about Australia. It is I think obvious from the above that there are difficulties with the presentation of C and that the position in relation to his levels of maturity and his presentation generally is a cause for some concern. There was a query as to his developmental progress. Given the report of Dr. Greally and the evidence given Dr. Greally in court, it seems to me that it is not possible in this case to rely on the provisions of Article 13 of the Hague Convention which provides "the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." Firstly it seems to me that there is a question mark over the maturity of C. Secondly, Dr. Greally has expressed serious concerns about the level of intellectual functioning and emotional state of C. That being so she concluded that the interviews were unreliable for the purposes of deciding matters in relation to whether C should return to Australia or not or remain living in Ireland.

51. It further seems to me that in reading the report of Dr. Greally that C expressed contradictory views as to his wishes in relation to where he would like to live. Accordingly it seems to me that this is not a case in which one could take account of the views of C. It would be unsafe to do so.

52. Finally, having regard to the evidence of Dr. Greally, I could not conclude that C was well settled in his new environment. Her evidence to the court was that he would settle anywhere. The evidence put forward by the respondent as to C's school reports and

general circumstances does not alter this view.

Grave Risk

53. The final issue raised in this case relates to the question of grave risk. Article 13 of the Hague Convention provides:

> "Notwithstanding the provisions of the preceding articles, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
>
> > b) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

54. In setting up a defence under the provisions of article 13, the respondent relies on three elements:

> (a) That his return would expose C to physical harm and psychological harm and otherwise place him in an intolerable situation in light of the evidence of sexual abuse as an infant by the applicant and in light of the proposed order and approach of the court in Australia in his case,
>
> (b) In light of the firm and well-founded belief of his primary carer that he was sexually abused by the applicant, and
>
> (c) In light of the lack of accommodation or means of support in Australia.

55. A number of reports had been prepared for the court in Australia in relation to the alleged incidents of sexual abuse of C by the applicant herein. Reports were prepared in the course of the proceedings in the Australian courts including one from the Gate House Centre and a lengthy report dated 14th April, 2005 by Dr. Simon G. Kennedy a clinical and forensic psychologist. It is also the case that a police investigation took place in relation to the allegations concerned that it appears that no prosecutions followed that investigation. It should be noted that the report of Dr. Kennedy was based on assessments made on 31st March and the 7th April, 2005. It was noted in the summary of that report as followed:-

> "On 31st March and 7th April, 2005, C made disclosures about sexual contact in the past between his father and himself. The time frame of the sexual contact is uncertain. My understanding is that the last unsupervised contact occurred in early 2004. The statements made by C about his father touching him sexually broadly coincide with statements that he had made to his mother, grandmother and aunt about such contact in the past. There are other areas that are somewhat less clear. It is uncertain whether or not there has been some physical abuse. I would consider, based on my evaluation, to be somewhat less likely. Nevertheless, it should be recognised that C has spoken to his mother about incidents in the past.
>
> Based on the information provided it is likely that C's statements in this evaluation represent actual events, rather than fantasy or story making. C has developed reasonably well since mid 2004. This may be due to the reduction in contact between himself and father over the last several months… despite the above incidents, it is clear, based on the evaluation that C has on on-going attachment with his father as is common in cases of abuse… In my opinion, the information provided by C regarding the sexual contact between the father and himself represents consistent enough statements to consider these as representing actual events. As indicated previously he did not present as coached… Based on the background of the sexual abuse, in my opinion, C's emotional development would probably be hampered by him continuing to have on-going contact with his father. C 's evaluation in 2004 indicated that he was functioning quite poorly at this stage, both cognitively and emotionally. He was continuing to have contact with his father at this point. There were clearly other factors impinging on C's own development at this stage. It is likely that Ms. C was not coping particularly well with the events surrounding the family court issue and C's disclosure and behaviour. Nevertheless, the most likely explanation for C's reasonably extreme presentation in to 2004 relates to the sexual abuse".

56. It is important to note that the applicant herein vehemently denies the allegations of sexual abuse. Apart from the report of Dr. Simon G. Kennedy, the respondent also relied on a report of the Gate House centre dated 19th May, 2005 and a letter from the Department of Human Services to the Family Court of Australia dated 20th July, 2004. The Gate House Centre report noted:

> "whilst there is still not complete clarity about C's experiences with his father he has made a number of statements indicative of possible and physical sexual abuse and has indicated a wish to not have contact with Mr. P L. Given his young age and possible traumatisation it is possible that C may not say much more about his experiences. Therefore decisions will need to be made about a future contact with his father based on probabilities and likelihoods rather than certainties.
>
> Some of the changes noted in C's presentation may be attributable to his ongoing development and his growing familiarity with the counselling setting. However his growing capacity to describe his experience has also come in the context of having no contact with his father.
>
> The writer is of the view that it would pose an unacceptable risk to C's safety and wellbeing for him to resume contact with his father."

57. The conclusion of the letter from the Department of Human Services dated 20th July, 2004 to the Family Court of Australia observed as follows:-

> "Information obtained from the above mentioned forces would appear to indicate that the remain concerns for the safety and welfare of C L due to the likelihood of significant harm due to sexual abuse. This view is supported by the opinion of Dr. Bronwyn Fitzgerald from the Gate House Centre who states in her report dated 31st May, 2004
>
> > 'the sexualised behaviours which include frequent masturbation, exposure of his genitals to adults, requests of his mother to touch his penis and attempts to touch the genitals of others, behaviours commonly that are beyond those seen in four and half year old boys. These behaviours raise the suspicion of possible child sexual abuse'".

58. It is clear from the affidavits filed herein that the proceedings before the Family Court of Australia concerned the issues of child sex abuse. As stated in the affidavit of the applicant herein sworn on the 15th May, 2007

> "Evidence was given by each relevant medical practitioner and psychologist. Evidence was given by them in chief and they were cross examined and re-examined by counsel retained for me and for the respondent as well as acting as independent children's lawyer on C's behalf".

59. It is clearly the case that the Family Court of Australia had not concluded the hearing before it and that the court had not made a determination or ruling as to child sexual abuse. It is also clear that the catalyst for the wrongful removal of C from the jurisdiction of the family law court of Australia was the comment made by the trial judge, the Honourable Justice Mushin at the conclusion of the proceedings on the 28th October, 2005 as to his tentative views on C having contact with the applicant on a supervised basis for a period of time and thereafter unsupervised access after that time. The respondent in her first affidavit frankly noted:

> "I say that my only concern at all times has been the safety of C. I say that having seen my attempts to protect him set at nought by the trial judge in Australia I believe I have no other course of action open to me except to flee the jurisdiction with C".

60. It was strongly urged on this court on behalf of the applicant there is no evidence of sexual abuse before this court. It was stated that there was evidence of allegations of sexual abuse being made by the respondent and it was acknowledged that the respondent may genuinely believe those allegations but it was submitted that there was no evidence of such sexual abuse. It was of course accepted that the issue of sexual abuse was one of the matters to be determined at the hearing in Australia and that the courts of Australia were actively dealing with the allegations before the departure of the respondent, but there was no determination by those courts that sexual abuse had occurred. On that basis it was submitted that it was inappropriate for the courts in this jurisdiction to carry out a review or to operate by way of an appeal against the anticipated determination of the court of a competent jurisdiction and it was further submitted that to do so would be contrary to the spirit and intendment of the Hague Convention and contrary to the principles that underpin the doctrine of the comity of courts. It was also submitted that it would be inappropriate for this court to proceed on the basis that the final orders likely to be made in Australia would expose C to physical harm or psychological harm or otherwise place him in an intolerable situation. It was pointed out that the respondent could appeal any decision she disagrees with in the normal way. Counsel on behalf of the respondent submitted that there was clear cogent independent professional evidence before the Australian court that the respondent had sexually abused C. She referred to those reports. She noted the recommendations that had been made in the various reports to the Australian courts to the effect that it would be inappropriate for there to be contact between C and the applicant.

61. A number of authorities were opened to me on this issue. The first of those is the decision in the case of *A.S v. P.S.* [1998] 2 I.R. 244. Denham J. gave judgment in that case on behalf of the Supreme Court and in the course of her judgment at p. 258 she stated:-

> "Grave risk may take many forms. It may be particular to a family or a country. The grave risk in this case is the matter of child sexual abuse of V. by the plaintiff. There was evidence before the learned High Court judge which she accepted, and which I accept, which raises a prima facie case of child sexual abuse of V. of the plaintiff. Thus I would not order the return of V. to the plaintiff pending full custody proceedings. It must be noted that this is the summary proceedings and the issue while successfully raised has not been finally determined in a full hearing.
>
> There is no evidence that there is a grave risk in returning V. to the jurisdiction of England and Wales. The evidence related to a grave risk for V. is the presence of the plaintiff. The learned trial judge erred in holding that there would be a grave risk of psychological harm in returning V. to the family home. The evidence in the case does not sustain such a finding".

62. She went on to say at p. 264 as follows:-

> "The strong thread through all the case clause is the fundamental concept of the Hague Convention that (except in rare cases). The issues of custody and access should be determined in the jurisdiction of the children's habitual residence. Thus if children are abducted or retained across state lines they should be returned to their habitual residence. The exception to this fundamental concept carries a heavy burden. The test is high one. It is not a case of determining where the custody and access should lie what is paramount interest of the child in that regard. It is a question of enforcing the Hague Convention which has at its core the paramount interest of the child that it should not be wrongfully removed or retained across the state borders.
>
> I must take account of the practical consequences of an order and the affect of undertakings and court proceedings in England. Thus an order that the children be returned to the jurisdiction of their habitable residence in the care of the descendent with whom they would live pending an order from the English High Court is an option. In this option the danger to V. does not exist. England has a sophisticated family law legal system which can deal with issues of custody, access and child abuse. Thus V. is protected.
>
> The learned trial judge fell into error in law in determining that there was a grave risk without giving due accord to the practical obstacle of the children living in the family home with the defendants, in the absence of the plaintiff, pending custody hearings. He also erred on the evidence in determining that the English jurisdiction and the family home posed a grave risk. The grave risk in issue is that of the presence of the plaintiff. This can be excluded. As such the learned trial judge wrongly exercised his discretion".

63. It seems to me that that decision is of great assistance in dealing with the issue of grave risk in this case. In that case it was the court's view that the risk related to the possibility of the children being in the family home with the plaintiff. That risk was removed if the father in that case was not present with the children. I accept that the respondent has raised a prima facie case of sexual abuse of C by the applicant. However, the issue of child sexual abuse although raised cannot be determined in these proceedings. It can be determined in the extant proceeding in the Australian Family Law Court. The factor that poses the risk in this case is the presence of the applicant. Similar arrangements could be made in the present case to obviate the possibility of any risk to C until such time as the issue of child sexual abuse is finally determined.

64. Very serious issues were raised by the respondent in this case as to the manner in which the trial judge was dealing with the issues in this case in Australia. It is clear that the views expressed by the trial judge were tentative views and involved in the first instance the possibility of supervised access leading thereafter to unsupervised access. Such arrangements would clearly only take place under the supervision of the courts in Australia. There is nothing before me to suggest that the respondent would not have the assistance of the Australian courts in ensuring the protection of C.

65. I want to make it clear that in dealing with this aspect of the case I am doing so on the basis that there is at the very least a

case made out which raises the issue of sexual abuse, but I am very conscious of the fact there has been no determination by the appropriate court to deal with this issue, namely the Family Law Court of Australia. I do not accept the submission made on behalf of the applicant that there is "no evidence of sexual abuse". However I note the comments of Denham J. in the case of *A.S v. P.S.* that this issue while successfully raised has not been finally determined. The position here is the same.

66. Finally I should briefly refer to the decision in the case of *Danaipour v. McLarey*, a decision of the U.S. Court of Appeals for the First Circuit. In that case the Federal District Court had declined to resolve the issue of whether the children in that case had been sexually abused, preferring that the children be returned to the courts of Sweden for the resolution of that issue, but the Court of Appeals reversed that decision and determined that the sexual abuse question should be decided as part of the courts obligation to consider the grave risk issue and then that the question of grave risk be addressed in light of that finding. Whilst I note that decision, I am bound by the decision in this jurisdiction in the case of *A.S. v. P.S.* and have no hesitation in following that decision. For that reason I do not propose to refer at any length to the other authority opened by counsel on behalf of the respondent in this regard namely the decision in the case of *Re. Q.* [2001] F.L.T. 243.l

67. Therefore, it seems to me that the issue of grave risk is not such as to preclude the return of C to Australia provided that appropriate undertakings are forthcoming from the applicant.

68. It is important in this case to bear in mind that in making an order to return C to Australia, I am doing so on the basis that there are in being proceedings before the Australian courts which will have to be reinstated to deal with the question of access by the applicant to C. The issues in relation to sexual abuse have not been finally determined in that court. Whilst the respondent has expressed concern as to the direction those proceedings were taking in the light of the tentative views expressed by the trial judge, this court must have respect for the courts of the other contracting states to the Hague Convention. Not to do so would undermine the foundations of the principles enshrined in the Hague Convention.

69. The respondent has a number of close relatives in Australia, she has their support and backing as is clear from the affidavits filed before this court and there is nothing to suggest that the Australian court will not have regard to the welfare of C in the decisions ultimately to be made in this case. In the circumstances it is my view that C must be returned. I will hear further from the parties as to the appropriate undertakings to be sought and as to the arrangements to be made in this regard.