



**THE COURT OF APPEAL
CIVIL**

**Court of Appeal Record No. 2021/330
High Court Record No. 2021/No. 21 HLC
Neutral Citation No. [2022] IECA 65**

**APPROVED
NO REDACTION NEEDED**

**Murray J.
Haughton J.
Barniville J.**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF
CUSTODY ORDERS ACT 1991**

AND

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION**

AND

**IN THE MATTER OF A, B AND C, MINORS
(CHILD ABDUCTION: HABITUAL RESIDENCE)**

BETWEEN

A.K.

APPLICANT/APPELLANT

– AND –

U.S.

RESPONDENT

JUDGMENT of Mr. Justice Murray delivered on the 16th day of March 2022

The basic facts and issues

1. The applicant and the respondent are, respectively, husband and wife. The applicant was raised in England, while the respondent was born and grew up in Ireland. In 2009 the respondent moved to live in England, and thereafter married the applicant. They resided in London where they purchased a home. Each of them worked in or from London. They have three children – two boys, A (born March 2013) and B (born April 2016) and one daughter, C (born March 2019). Each of these children was born in England and each holds a British passport. A attended school there.
2. As of July 2020, there is no doubt but that the applicant, the respondent and each of their children were habitually resident in England. They were, however, regular visitors to Ireland where the respondent's mother, aunt, sister and brother – together with their respective families – reside. The appellant, respondent and their children travelled here on average four times per year – often for periods of two to three weeks or more. On 22 July 2020, the family came to Ireland for what was intended to be a similar holiday. They travelled by ferry, bringing their car. Their visit coincided with the COVID-19 pandemic.
3. At the end of their scheduled stay, the applicant and the respondent decided to remain in Ireland. The decision to extend their stay was prompted by increasing restrictions arising from the pandemic and the consequent disruption to their everyday lives in London. They took a short term let on a house and enrolled A and B in a local school. The applicant says that the original plan was to remain here for a few months, but that because of a spike in COVID numbers in late December 2020 they extended their stay into the new year. Then, he said, they decided to stay until March 2021, and from then

until July 2021. At none of these points in time was there any restriction on travel that prevented the parties from returning to the United Kingdom.

4. Both parties agreed that the initial decision to remain in Ireland was brought about by the pandemic. During the period of their stay in Ireland the applicant and respondent retained – and did not rent out – their home in London. The family maintained their registration with medical practices and with the National Health Service in England, and the applicant and respondent had private medical insurance and bank accounts there, owned a car registered and insured in that jurisdiction and retained their English mobile telephone numbers and accounts. Each of the applicant and respondent remained tax resident in the United Kingdom, declared their income there, remained jointly liable for council tax, were registered to vote in that jurisdiction and retained their British health insurance.
5. However, and at the same time, the family had firm connections in Ireland arising from the respondent's personal ties here and the frequent visits they had undertaken to this jurisdiction. These developed further in the course of their stay. The applicant rented temporary studio space near their rented house. As well as A and B attending school close to the house in which they were residing, C was enrolled in a creche. A and B made friends in their new home, spent time with their grandmother, aunts, uncles and cousins (some of whom were close in age to A and B), and joined local sporting clubs and societies. The children were registered with a local GP and in September 2020 their medical and immunisation records were transferred from London to that GP. The parties opened a bank account here, and the children obtained Irish PPS numbers in December 2020.

6. The relationship between the applicant and the respondent deteriorated between March and May 2021. The applicant returned to England in May 2021, and on 18 June he came back to Ireland. In the meantime, on 6 June, the respondent secured a new home on a long term agreement. On 30 June, the applicant assisted the family move from their then residence to that new home. On 12 July he returned to England, bringing A and B with him. He did so with the agreement of the respondent. She says that her agreement was given on foot of the applicant's assurance that the trip to England was for the purposes of a holiday and that the children would return to Ireland with her. The applicant originally disputed this, saying that he had at all times made it clear that he was not agreeable to the children remaining in Ireland.
7. While in England, A and B spent four nights with their paternal grandmother. On 24 July the respondent and C travelled to England whereupon the applicant made clear his intention to prevent the children from returning to this jurisdiction. To that end, the applicant retained possession of the children's passports. On 12 August 2021 the respondent told the applicant that she was bringing the children to lunch and then to the cinema with a friend. In fact, it was her intention to remove the children from the United Kingdom which she thereupon did, travelling to this State through Belfast.
8. At that point the applicant enjoyed custody rights under English law in respect of all three children. On 13 September 2021 these proceedings were instituted seeking *inter alia* an order pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ('*the Hague Convention*' or '*the Convention*') directing the return to the United Kingdom of A, B and C.
9. The Hague Convention is given effect to in Irish law by the Child Abduction and Enforcement of Custody Orders Act 1991 ('*the 1991 Act*'). Article 3 of the Hague

Convention provides that the removal or retention of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person under the law of the State where the child was habitually resident immediately before the removal or retention. The effect of Article 12 of the Convention is that where a child has been wrongfully removed from or retained outside the State in which the child was habitually resident and a period of less than one year has elapsed from the date of wrongful removal or retention, the courts of the Contracting State to which the application is made pursuant to the provision must generally direct the return of the child to the place of their habitual residence. That general obligation is qualified by a number of other provisions of the Convention, one of which (Article 13) is engaged where it is found that there is a grave risk that the return of a child would expose him or her to *‘physical or psychological harm or otherwise place the child in an intolerable situation’* (Article 13(b)).

- 10.** Central to Article 12, and critical to this application, is the requirement that the child or children the subject of such an application be *‘habitually resident’* in the jurisdiction to which their return is sought. This term has been the subject of exhaustive analysis in decisions of the courts in this and other jurisdictions. In this case, the applicant contends that each of the children were, as of 12 August 2021, habitually resident in England, while the respondent says that they were habitually resident in Ireland. If the respondent is correct in this regard, the court cannot direct the return of the children to England. If she is incorrect and each of the children is habitually resident in England the court must (subject to an issue arising under Article 13 of the Convention) direct the return of the children to that jurisdiction.

11. The application came for hearing before the High Court (Gearty J.) on 1 and 2 December. It proceeded on foot of affidavit evidence delivered by the parties in respect of which each was cross-examined. Judgment ([2021] IEHC 845) was delivered on 14 December. Gearty J. found that while A and B were habitually resident in England, C was habitually resident in Ireland. However, she declined to order the return of A and B, as the separation of A and B from C would place each of the children in ‘*an intolerable situation*’ (at para. 8.5). The applicant’s appeal and respondent’s cross appeal of the judgment of Gearty J. were heard by this court on 24 February 2022.

12. Across the positions of the parties in that appeal and cross appeal three essential questions arise. These are:

- (i) Whether the trial judge erred in deciding that C was habitually resident in Ireland.
- (ii) Whether the trial judge erred in deciding that A and B were habitually resident in England.
- (iii) If the judge was correct in each of these conclusions, whether she erred in refusing to direct the return of A and B to the United Kingdom on the basis that their resulting separation from C would be ‘*intolerable*’ and/or whether the trial judge erred in reaching that conclusion without (as the applicant says) enabling the applicant to address the court on that issue and/or whether the matter should be remitted to the High Court to address the possible implications of Article 13.

13. On 2 February 2022 – and while this appeal was pending – the applicant abducted A and B from Ireland and brought them to England. The two children were returned to

this jurisdiction on foot of an order of a family court in England a short time later. In the course of this process they spent a brief period in protective custody in a police station in London. These developments have prompted an amendment to the respondent's notice in which she seeks to raise new issues under Article 13 of the Hague Convention.

- 14.** At the commencement of the hearing of the appeal the court advised the parties that it wished to first hear argument as to, and give judgment regarding, the first two issues. This was not the subject of any strong objection and the hearing proceeded accordingly. This judgment, therefore, is addressed only to the issue of where A, B and C were habitually resident when they were brought from England to Ireland in August 2021.

The evidence

- 15.** Consistent with the generally understood meaning of the term '*habitual residence*' each party adduced evidence directed to establishing that the children were, as of their removal from England on 12 August 2021, integrated into a family and social environment in (according to the applicant) England and (the respondent said) Ireland.

The applicant's evidence

- 16.** The applicant said that the visit to Ireland in July 2020 was at all times understood to be temporary, that it was never intended that Ireland would be the children's home and that the holiday was simply extended due to the pandemic. He exhibited correspondence from a number of persons in England which, he said, corroborated that intention. His

evidence was that when A and B were originally enrolled in school it was not expected that they would complete the entire school year.

17. He emphasised the connections maintained by the family in England as I have outlined them earlier. He said that they had extended family in England as well as permanent school placements there and said that it was there that they practised their faith. He identified friends the children had in England, and said that upon the return of the two boys in July 2021 he re-engaged them in activities – such as football – in which they had been involved prior to their departure to Ireland. He identified various other courses on which they were registered upon their return such as karate and language classes. He said that the children were involved in his ethnic community in London, taking part in cultural and religious events and observances, and gave evidence that his mother was a frequent visitor to their home and that she cooked for them. It was his evidence that the children would often attend the homes of his mother, brother, sister in law and nephew and go on trips with the latter three family members, that A had a network of friends from school and various clubs and that he had a particularly strong bond with one of his cousins.

18. When in Ireland, the applicant said, a large portion of the family's time was spent isolated during government mandated lockdown as a result of the COVID pandemic and that the children only began something approaching a normal life from February 2021. He notes that the schools in Ireland were closed in January and February 2021, observed that the children's experience of school was far from normal because of the pandemic and consequent school closures and disputed that A had made friends quickly in Ireland, saying that in fact he missed many of his friends in England.

19. As I have earlier noted, in March 2021, the applicant and respondent were experiencing some marital difficulties, and the applicant accepts that from then their relationship was under strain. According to the evidence he gave under cross-examination, the applicant said that he first obtained legal advice in relation to the position of the children in May 2021 – seemingly while he was in England. The respondent emailed him on 27 May. As recorded in the judgment of Gearty J. that e-mail included the following (at paras. 4.8, 4.10 and 4.11):

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

... I believe that returning here is what is best for us at this time. I can't speak for you of course, but I do believe it is better for me and the children for the following reasons ...

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

.... “Brexit has also created an atmosphere which I have really come to dislike and after the trauma of last year and the future still very uncertain, the UK is just not a place where I want to be at this moment in time. I've spent ten years

living there, away from family and friends and my own culture and I want to spend some time here now.”

.... “My preference is that we can find a way to make it work with my supporting whatever would meet your needs with regards to being wherever you need to be, when you need to be there. That is why I suggested keeping our home there and that you can come and go as you need to, something which I simply cannot realistically do.

I would like to come back with the kids at the end of June and spend time there seeing family and being there before returning before the start of the school year. We would all come back to the UK to see family and spend time there at the school holidays 4/5 times over the next year, similar to how I had been doing when there. We’re lucky in that we can keep the house without having to let it out to sustain our life here.

Nothing is forever, I realise this place may not be suitable for us long term but I believe it is right for now. I’m really asking for your support at this point, for some faith in me that I know what I need right now to give the best life I can to the kids and the best chance to my career and the family’s financial security.”

20. The parties thereafter exchanged messages in which the respondent said that he was not willing to extend the temporary stay in Ireland and that he did not consent to such permanent change for their children.

21. The applicant said having regard to that email that it was not until May 2021 that the respondent raised the possibility of remaining in Ireland ‘*in any meaningful way*’ and

that prior to that it was at all times the parties' shared understanding that they were in Ireland on a temporary basis that was being intermittently extended as the COVID-19 pandemic unfolded. Accepting that he assisted the respondent to move house in June 2021, he says that his intention in doing so was not an indication of his consent to their remaining in Ireland, and that he had set out in writing his disagreement with their doing so. In the course of his cross-examination, he adopted the position that he assisted the family to move into their new house because he was '*coerced*' into doing so. This was not a claim upon which he elaborated, nor was it one he had previously reduced to writing.

22. The respondent contended that when he brought A and B back to England in July 2021 this was for the purpose of resettling them in England. He claims that in April 2021 he sought A's school reports from the school he was attending in Ireland as he would not be returning there and that in May he began arrangements to enroll A and B in school in England. He exhibits correspondence confirming this. Even if these children had acquired a habitual residence in Ireland, he says, they re-established their habitual residence in the United Kingdom when they returned there in July 2021. He says that he never agreed to the children taking up long term residence in Ireland.

23. The affidavit evidence of the applicant and respondent disclosed a stark conflict around the circumstances in which A and B were brought back to England by the applicant in July 2021. The respondent says that she agreed to their travelling to England on the basis of the applicant's assurance that they were merely visiting and that they would return to Ireland. He says that the boys viewed themselves as returning home and that they were delighted to do so. He repeats that at no point did he agree or advise the respondent that he agreed to the children returning to Ireland. He avers that the

respondent led him to believe that she was looking for a house in England at which she would live separately from the applicant and claims that the respondent had given the children assurances that they would be remaining in England and that she would be returning to Ireland solely for the purposes of picking up the family dog. He said that A and B believed that they were staying in England and that they were brought back to Ireland on the basis that they were going to a party. He said that A wanted to return to England. However, in cross-examination, the applicant accepted that when the respondent allowed the children to go to England in July 2021 this was on the basis that they would be coming back to Ireland:

[COUNSEL]: *So, [the respondent] came to the UK on the basis – with [C], and allowed the children travel to the UK on the basis that they would be coming back to Ireland; isn't that correct?*

[THE APPLICANT]: *Yes.*

The respondent's evidence

- 24.** The respondent disputes the applicant's account as to the extent to which their children were absorbed within the applicant's family and their community in England. She says that the applicant's family interacted with them only on a social basis, and that they did not participate in school or creche drop offs or pickups. It was her evidence that at all times her mother was their main source of hands-on family support while they lived in England, travelling from Ireland when help was required. The respondent averred that she was the children's primary care giver and said that the connections and activities

they enjoyed in England were organised by her. She asserted that after they arrived in Ireland, the children did not maintain frequent contact with their friends in England, that A when living there was not involved in sports with friends outside school and was not engaged in any local community activity in England. She disputes that they were engaged in the applicant's ethnic community locally and says that they had no immersion in their father's culture. She says that the children had little contact with the applicant's brother or sister in law from August 2019 to March 2020 and that they had rarely seen their English cousin in the eight months before the beginning of the pandemic. She also stresses that the applicant (as she puts it) suddenly, unusually and without informing her enrolled A and B in multiple activities in July, never having (she claims) done so previously.

- 25.** The respondent in her evidence underlines – as of August 2021 – the lengthy period relative to their respective ages spent by each of the children in Ireland. She says that after being here for a year, they have enjoyed spending time with her family and have embraced Irish culture *via* their passion for GAA sports, their love of the Irish language and of the region of the country in which they have resided. She stresses their ties with the local community. She points to a strong family network in Ireland comprising her mother, her mother's sister, the respondent's brother and sister and their respective children, A, B and C's cousins. It is her evidence that her children see one set of their cousins a minimum of three nights each week, that one of her sister's children is close in age to A (although this family live in the same region as the children are presently located, they are not in the same locality), that her boys are members of the same soccer club as her brother's sons, and that they are actively involved in local GAA clubs and the wider community. She says that A and B have bonded well at school and have an

established group of friends, that the respondent herself has established relationships with other parents and arranged playdates, and that C has attended the local creche where she is happy and settled. It is her evidence that the children have a wide network of social support and of friends in the area in which they live.

26. Generally, the respondent paints a picture of a healthier and less constrained lifestyle for her and her children in Ireland, as compared with that in the urban environment in which they had been living in London. She also makes a series of complaints about A's schooling there and what she alleges to be a failure to identify or treat particular issues with which he was presenting. She contrasts this with the experience in Ireland where, she suggests, his schooling was more satisfactory, his needs were identified and the necessary supports for A were made available to him.

27. The respondent says that the relationship between herself and the applicant deteriorated between November 2020 and March 2021 culminating in the applicant asserting on 5 March that he wanted a divorce. Between then and May the relationship deteriorated further, and by then it was clear that she and the applicant had different ideas as to where the long term interests of the children lay. In her affidavit, she avers that in early 2021 she concluded that the children's needs would be best served in Ireland, that they were settled there and that the school was providing A with excellent support. In cross-examination, it was her evidence that while the family's presence here began as a five week holiday, it *'became a relocation in time'*. When asked *when* this occurred, she referenced discussions with the applicant, with the *'conversation'* about the family remaining in Ireland beyond the COVID pandemic beginning in March 2021. At the same time she was clear in the course of her cross-examination that as of July or August

2021 her view was that the applicant's habitual residence was in England: she describes the position between herself and the applicant at this point as regards their children in terms that '*[w]e had reached an impasse between us as to their long-term arrangements and I had expressly rejected the Applicant's requests to give living in England a further try to see how we got on.*'

28. It is the respondent's evidence that she was at all times both the primary carer in the family and its primary earner. Her statement in cross-examination that she was the person overseeing all the children's needs was not questioned during the oral hearing. She was, she said, throughout the latter part of 2020 and early 2021 in a position to work from Ireland. In April 2021 she accepted a specific work assignment which would have involved her spending at least some of her time in Ireland.

29. Her evidence is that in May 2021 – and with the applicant's knowledge – she took steps to purchase a house in Ireland. She says that in July 2021 she agreed that the family would travel to England for a short holiday to facilitate the children seeing the applicant's mother who (the respondent avers she had been told) was depressed and was anxious to see the children. She averred that she agreed to this on foot of express and clear assurances by the applicant that the children would return to Ireland in August in sufficient time to quarantine in accordance with the then applicable COVID regulations before returning to their school and creche on 31 August. It was her evidence that the applicant gave her his word that the children could return to school in Ireland in mid-August and that she placed her trust in him as at that time she wanted their marriage to work. She says that the children, their grandmother, their aunts, uncles, cousins, neighbours and friends all understood that the trip to the UK was a visit, that A and B were enrolled in their school here and C in her creche. She averred

that the boys' places in afterschool two days a week were confirmed, and that she had been in communication with the school to ensure that supports were in place for A, as well as arranging for various assessments of him to be carried out.

30. The respondent says that she could not travel with the applicant, A and B on 12 July as she was awaiting her vaccine. Her evidence is that she packed the boys with clothes and belongings for a short period rather than a move and that she told their friends and coaches that they were leaving for a short holiday. She arranged for their dog to be minded by members of her family for two weeks. On 24 July she travelled to England on foot of a return ticket with C, leaving her car at the airport.

31. She said that upon her arrival she was told by the applicant that he had deliberately misled her, that he intended to prevent them from returning to Ireland and that he would not give her access to the children's passports. She avers that in the course of the car journey from the airport B said that the applicant had told them that they were not returning to Ireland and that *'there was a new plan'* and that *'we would tell Mummy when she arrived'*. She says that the applicant later told her that the idea of a holiday had been a ruse, and that he had been advised that if the children *'did a year'* in Ireland that that would become their habitual residence. It is her evidence that she learnt that on 29 July the applicant had unsuccessfully sought to unenroll A and B from their school in Ireland for the 2021/2022 year. She says that the boys were never in fact enrolled in school in England for that school year. She accepts that she considered taking up a short term lease near London to allow her to live independently with the children while she processed Hague Convention proceedings in England to obtain the return to Ireland of the children. As I have already noted, she removed the three children from that jurisdiction on 12 August.

32. Finally, it should be observed that the respondent tendered affidavit evidence from a neighbour, Ms. X, who resides close to the home now occupied by the respondent and the three children. One of Ms. X's daughters is close in age to B and is in his class in school. That daughter attends afterschool with A and B. Ms. X's other daughter is close in age to C and Ms. X avers that the two girls became very friendly at the creche. She explains that her children play with A, B and C both at afterschool and in and around their respective houses and gardens and she presents a picture of regular and enthusiastic social interaction between the children both in the immediate vicinity of their residences and in the wider area. She confirms her understanding, and that of one of her children, that when the parties and their children went to England in the summer of 2021 it was for a holiday and that they would be returning after a few weeks. Another woman, Ms. Y, who describes herself as a long term friend of the respondent, also swore an affidavit in which she confirmed her understanding (based *inter alia* on her meeting and conversations with the applicant, the respondent and the children on 11 July 2021) that (as she puts it) '*the Respondent and the children clearly believed that the travel to the UK was for the purposes of a trip only. There was no sense of travelling to the UK to live.*'

The psychologist's report

33. By order dated 10 November, Gearty J. directed that Mike Van Aswegan (a psychologist) interview A as to a number of identified matters and that he report to the court on that interview. The intent was that A would have the opportunity to express

his views and be heard in the proceedings. Having regard to the age of B and C, that request was only made in respect of A. The report records A as saying the following:

- (i) The reason they were still in Ireland was *'cos we have loads of friends, a good environment, a great school, we walk to school ..'*
- (ii) The circumstances in which he travelled to England in July 2021 were that the applicant *'said he would take me and my brother on holiday to England, Mummy said 'Ok, that's fine'. Then when my Mummy and sister came, they (reference to mother and father) were arguing in the car and my Daddy said 'we're staying here now' and that made Mummy really upset'*.
- (iii) His summary of the circumstances in England as of August 2021 were that *'we went back to England on holiday, we'd all be coming back to Ireland for school. I was back in England for two months, planning to come back (to Ireland) to go to school, we'd all be coming back to school'*.
- (iv) As of September 2021, he said that he was expecting to stay in Ireland, resuming schooling in Ireland and expecting to go to England on holidays.
- (v) When asked a question directed to ascertaining whether Ireland or England was his centre of interests (the report does not record how, precisely, that question was framed), he said that he felt unable to answer the question, adding *'I feel like I live in both places'*. When asked

whether he perceived Ireland or England as his home, he said '*[b]oth, that's the way it's going to be*'.

- (vi) When asked regarding his social connections, academic and extramural experience of Ireland (again the report does not record how precisely the question was framed), he said:

'My friends are [naming four boys], my immediate friends. I play soccer, hurling and football with [naming the local club]. The school is brilliant. I love the way I have loads of friends there. They do the right amount of work. They give me time to get my energy out.'

- (vii) Asked the same question in reference to England he said:

'I had friends in all these places. The only friend I didn't talk to in England for two years is [X]. I spoke to X when I was in England. School was great but they didn't treat me well. I had difficulty focussing. One time I was in class and wasn't focussing ... I was sent to the Principal's office every day.'

- (viii) When asked here he would like to live, he replied '*Both places*'.

34. The psychologist expressed the view in his report that A's overall presentation and response style suggested that his views had been independently formed. His assessment

of where A understood his primary social integration to be is recorded as follows in his report:

‘[A] appears to have a perception that he had arrived in Ireland as a result of the Pandemic and that he was to attend school in Ireland. His responses focussed on his Irish social context with some reference to past friendships in England.’

The judgment of the High Court

35. The judge made the following relevant findings:

- (i) The judge decided that the respondent made a unilateral decision in or around March 2021 to relocate with the children to Ireland, and that the applicant never agreed to this (at para. 5.10 and 5.11).
- (ii) She accepted the respondent’s evidence that her intention in August 2021 was to return to Ireland with the children and that while the applicant did not want to live here, that he would not thwart their return (at para. 4.22). The judge found that the applicant’s assistance in the house move in June was not regarded by the court as consent to a permanent move to Ireland (at para. 5.1).
- (iii) She decided that up and until 27 May 2021 there was no question of any change of habitual residence as both parents until then understood the situation to be temporary, albeit of longer duration than expected (at para. 7.2).

- (iv) The court found that the applicant had in discussions with the respondent referred to going on holiday to England in July 2021 and the respondent understood that she would be taking the children back to Ireland. Whatever assurances he had given her, the applicant did not in fact agree to the children returning to Ireland (at paras. 7.3 and 7.4). The judge found that he had misled the respondent as to his intentions (at para. 7.6).
- (v) Gearty J. held that knowing that they would be in England in June or July, the applicant enrolled the older children in school without the knowledge of the respondent, and he sought to remove their names from the roll of the school they attended in Ireland (at para. 7.5).
- (vi) She concluded that the parties did not reach any real agreement as to where they would live long term, that neither party acted appropriately and that both acted unilaterally – the applicant in purporting to agree a holiday in England and then seeking to prevent their return and the respondent by removing the children to Ireland after she realised his intentions (at para. 5.14).
- (vii) She found that the stay in Ireland from July 2020 did not displace England as the country of habitual residence of A and B. In this regard, the judge stressed the following factors (at para. 8.3):

‘the duration of their stay in Ireland relative to their age, the fact that their stay (although lengthy) was expressed to be temporary until the end of May of 2021, that it was the latest in a long history of holidays in Ireland, the reasons for their stay, the rented home, the fact that their

purchased home, medical, familial and longer social history is in England’.

She continued (at para. 8.4):

‘The intentions of the parents were in opposition, one to the other (from at least June of 2021) and their stated intentions do not assist the Court in determining, as a matter of fact, where each child resided at the relevant time. Both older children have close family and social ties in England and in Ireland and have medical and school histories in both places too. The courts in this jurisdiction would not struggle to deal with the case as the factual position is relatively finely balanced and indeed the relevant witnesses as to their daily lives are now in Ireland but due to the nationality of the children and their longer period in England in a place which they continued to refer to as home, the facts combine to prove, albeit marginally, that their habitual residence is probably England and, to that extent, the Applicant has made out a case for the return of the older children. I have considered in particular the persuasive effects of the English case law in this regard but ultimately, it is a question of fact and the indeterminate nature of the children’s lives in Ireland until May or June of 2021 is the most significant factor weighing against the Respondent’s argument in this regard.’

- (viii) The judge from there noted that the respondent was the primary care giver to the youngest child, C. She noted that the parties agreed that the children should not be separated (at para. 8.5). She also found that by 24 July 2021 the respondent had the requisite intention to change her habitual residence to Ireland

(at para. 8.7 and 8.8). The latter conclusion was based upon the fact that the respondent had made this intention clear in writing, that she intended to stay in Ireland, that she had moved to a new rented property here, that she had arranged school and medical care for the family and that there was '*abundant evidence of a settled purpose insofar as this is required to show an intention to move to a new habitual residence*' (*id.*).

(ix) In concluding that C's habitual residence was as of the summer of 2021 in Ireland, the trial judge emphasised the following:

- (a) She had no social ties in England that compare with those of her brothers.
- (b) She was in a creche in Ireland and was seeing her mother's family regularly.
- (c) She was integrated into a social and family environment in Ireland.
- (d) While she visited the applicant's family during her two week stay in England this stay was not sufficient to re-establish her original habitual residence.
- (e) Her mother was likely to be working in Ireland for a considerable time in the immediate future.
- (f) She '*has begun to move out into the world, walking to creche and spending time with friends and relations, in Ireland rather than in England*'.
- (g) She had known no other primary carer and her habitual residence was where her mother resides.
- (h) The judge explained (at para. 8.8):

‘The older children have enough integration in their own world as to maintain stronger links to England such that the mother’s unilateral choice is not sufficient to breach those ties in order to forge a new habitual residence as it has done in the case of the youngest child’.

(i) She continued (at para. 8.9):

‘The intention of the Respondent, in this case, combines with the very young age of the child who had not yet forged links in England as a baby and who resided wherever her mother was.’

(j) She later explained (at para. 8.11):

‘here ... the three children have lived in Ireland and the habitual residence of the youngest child changed as her mother’s intentions crystallised’.

36. These findings meant that, on the one hand, the habitual residence of the respondent and the parties’ youngest child, C, was in Ireland. Therefore, as a matter of law, she held that a return order must be refused in respect of this child. On the other hand the habitual residence of their two older children, A and B, was in England and Article 12 of the Hague Convention generally mandates a return order in respect of those children to their jurisdiction of habitual residence. However (a) the respondent intended to remain in Ireland, (b) she was C’s primary caregiver, and (c) it was accepted by all the parties that the children should not be separated and neither party had argued for different orders in respect of the children. This combination pointed the judge to the

conclusion that no order should be made for the return of any of the children. This, she felt, was the ‘*child-centered*’ view of the facts (at para 8.14). She explained her decision in this regard as follows (at para. 8.12):

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

(Emphasis added).

37. In the penultimate paragraph of her judgment the judge explained why she was refusing the application notwithstanding the manner in which the children were removed from England (at para. 8.13):

‘The Court has considered the rule of law implications of refusing to return children who were removed in circumstances of subterfuge but, exceptionally,

and taking into consideration the youth of the third child and findings of fact set out, which involve some measure of deceit on the part of the Applicant also, but primarily because of the length of their stay here and the measure of their integration into their new lives, the balance of the factors combine, as set out, to persuade the Court to refuse the Orders sought.'

(Emphasis added).

Habitual residence: the law

- 38.** It is often observed that the question of where a child is habitually resident for the purposes of the Hague Convention is one of fact (*PAS v. AFS* [2004] IESC 95 at p. 12; *A v. A and anor.* [2013] UKSC 60, [2014] AC 1 at para. 54). This differentiates the term from concepts such as domicile which are subject to legal rules and presumptions the application of which may in a given case produce an artificial outcome that is at odds with the reality yielded by an unvarnished factual analysis. Nonetheless, it is clear that the meaning of the term '*habitual residence*' is one of law to be determined in the light of the purpose, text and context of the legislative instrument in which it appears.
- 39.** In interpreting the phrase, primacy must be given to the ordinary meaning of the two words comprised within it. Put most simply, a person is habitually resident where they live, where their stable home for the time being is located, where their social and family life is and where they are integrated into an identified environment (see *Re R* [2015] UKSC 35, [2016] AC 76 at para. 23). These are concepts that are universally

understood and widely applied by ordinary people in their everyday lives. They should not in the vast majority of cases give rise to any difficulty of identification or analysis.

40. The location of a person's habitual residence – as with that of their home – can change, they can be so resident there for a long or short period of time, and while their presence must have a degree of stability it may at the same time be contingent insofar as they may anticipate that it may change in certain eventualities. Thus, the practical focus in ascertaining where a person is habitually resident is upon where they have put down roots, whether they have established social relationships in a location, where their wider family life is centred and where they work or, if they are children, attend school. It is a fact sensitive inquiry, and therefore must in any case be conducted by reference to all the circumstances of a case and in the case of a child – particularly a very young child – it will obviously be affected by the location of the habitual residence of his or her primary carer.

41. All of this explains why the term is used in the Hague Convention, while the context and purpose of that Convention suggests how it should be specifically applied in cases brought pursuant to its provisions. Underlying the Convention is the calculation that the best interests of children are generally served by decisions regarding their welfare being made in the jurisdiction in which the children have their home and that unilateral attempts to remove children from that jurisdiction should be discouraged. Thus, it is a '*fundamental animating principle*' of the Convention that factual disputes about the care and welfare of children are best resolved where the children have their habitual residence and thus where the connections relevant to that inquiry are located (*CT v. PS* [2021] IECA 132 at para. 61 per Collins J.). The trial judge expressed the position well: the Hague Convention, she said, is a blunt, emergency instrument to make sure that the

relevant court decides welfare issues in the best interests of the relevant children (at para. 8.2). It is for that reason that the central inquiry when identifying the habitual residence of a child is directed to his or her integration into both family and society and to that extent the degree to which he or she has mixed with or become absorbed into a community moderating their way of life, habits and customs accordingly. It is thus that the jurisdiction most closely connected with the factors relevant to the care and welfare of the child is identified. That gives effect to the purpose of the Convention and, to bring the matter back full circle, explains why the draftsman chose habitual residence as the centrepiece of the power to direct repatriation provided for by Article 12.

42. It is for these reasons that at the heart of the case law in interpreting the term habitual residence lie concepts of stability, of proximity to the place in question and of social and familial integration: repeatedly courts across many jurisdictions state that in order to be habitually resident in a place, the child's location there must reflect some degree of integration in a social and family environment, and with equal regularity it is stressed that the determination of whether there is such integration must be conducted in the light of all circumstances specific to the individual case (see in particular *Mercredi v. Chaaffe* (Case C-497/10 PPU [2010] ECR I-14309, ECLI:EU:C:2010:829).

43. In her judgment in *Hampshire County Council v. CE and NE* [2020] IECA 100, Whelan J. (at para. 77) most helpfully expanded on what that multi-factorial approach entails. From her detailed analysis of the authorities and principles, she identified twenty-one propositions. Although *Hampshire County Council v. CE and NE* was not a Hague Convention case, it was accepted by the parties that the analysis applied here. The following are particularly relevant in this case, and I gratefully adopt (and if in some instances, paraphrase) them:

- (i) The meaning of habitual residence is shaped in the light of the criterion of proximity, that is '*the practical connection between the child and the country concerned*'.
- (ii) The duration, regularity and conditions for the stay of the child in the country where it is claimed habitual residence has been acquired must be examined.
- (iii) The inquiry is directed to whether the child has achieved '*some degree of integration in a social and family environment*', not whether her or she has been '*fully integrated*'.
- (iv) The focus in that regard is not upon permanence but stability: '*it is the integration of the child into the environment rather than a mere measurement of the time a child spends there*'. There is no requirement that a child be resident in a country for a particular period of time, but the deeper the child's integration in the old state, probably the slower his or her achievement of the requisite degree of integration in the new state.
- (v) Parental intention is relevant, but not determinative. However, in relation to a pre-school child the circumstances to be considered will include the geographic and family origins of the parent or parents who effected the move and their degree of integration in the relevant jurisdiction. For older children, if all the central members of the child's life in the original state have moved with him or her, the faster habitual residence will have been achieved there. Conversely where any of the central family members have remained behind, the slower his

or her achievement of habitual residence will likely be. In particular, as Whelan J. put it:

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

- (vi) Other relevant factors include the reason for the parents’ move to the jurisdiction, the child’s nationality, attendance at creche or school, family and social relationships, location of possessions, and the existence of *‘durable ties’*.
- (vii) Where the child has moved from another jurisdiction the court must assess the degree of connection with the State in which he or she resided before the move.

44. I will return to the specific relevance of these propositions in this case later. Here, the trial judge conducted her own analysis of the authorities, deducing from them the following succinct statement of the law, which identifies with clarity the high level governing principles (and with which neither party disagreed) (at para. 7.1):

‘The onus is on the Applicant to establish, on the balance of probabilities, that all three children had their habitual residence in the United Kingdom on the 12th of August 2021. There is no single determinative factor in this case. The relevant factors have been set out above and include the duration, context and nature of their residence in the relevant countries, the intention of their parents and the integration of the children in the relevant countries, in particular their social and familial ties.’

Habitual residence and the role of this court

- 45.** The decision of a court of first instance as to the habitual residence of a child may – depending upon the case – be based upon the resolution of issues of law, findings of primary fact and/or inferences drawn from those findings of fact. In what should be a minority of such cases (and this is one) the findings of fact may be dependent upon the resolution of conflicting oral evidence, but in most cases they will involve determinations of fact based upon affidavit or documentary evidence and the application of the facts so found to the clearly established meaning of ‘*habitual residence*’.
- 46.** Differing standards of appellate review fall to be applied to these different categories of finding. For this reason, the description of the issue of where a child is habitually resident for the purposes of the Convention as one of fact can confuse, as it risks the elision of the different standards of review that must be applied to distinct components of a trial court’s answer to that question in a given case.
- 47.** In the course of his judgment on behalf of this court in *Minogue v. Clare County Council* [2021] IECA 98 Humphreys J. (with whom Whelan and Pilkington JJ. agreed) presented a general categorisation of the situations in which an appellate court is called upon to review findings of law, or of fact or of mixed questions of fact and law (at para. 100) and explained the standard of review to be applied to three broad categories of finding. The differences in the standards of review applicable to these distinct categories of finding are important in this case, and it is necessary to disentangle them.

48. At one end of the spectrum lie cases in which the appellate court simply forms its own view as to the matter in issue untrammelled by any finding that has been reached by the trial court. This is the standard applicable to findings of pure law. Given that a finding of habitual residence involves the application of primary facts to what are now well-established criteria, issues of law should not arise frequently in these cases. The whole point of the approach now adopted to the term is to avoid rules of law which distort the core factual issue to be determined by the court. In this appeal it is not contended that the judge formulated the definition of habitual residence incorrectly, but it is suggested that in one respect she misapplied by the law by assuming that a change in the habitual residence of the respondent resulted in a unilateral change in C's habitual residence. This is the standard of review applicable to that issue.

49. At the other extreme lie findings with which the appellate court will interfere only in very limited circumstances. This is the approach to be adopted where the High Court judge makes findings of primary fact based on his or her appraisal of conflicting oral evidence and/or where inferences are drawn by the judge that depend on such findings. In such cases, provided the judge has delivered a properly reasoned judgement that engages with all relevant evidence (and that is not an issue here), the role of an appellate court is limited, and in particular it will not upset findings of fact or inferences drawn from those findings where they were supported by credible evidence (*Hay v. O'Grady* [1992] 1 IR 210). This follows from the obvious fact that the appellate court is not in a position to make the same assessment of credibility as was the trial judge: the appellate court has not seen the witnesses and '*[t]he arid pages of a transcript seldom reflect the atmosphere of a trial*' (*Hay v. O'Grady* at p. 217 per McCarthy J.). It is important to stress that it is not sufficient to trigger this standard of review to observe

that oral evidence was received in a case and that therefore this is the applicable test. What matters is the basis for the specific finding: to benefit from the high threshold for review arising from this aspect of *Hay v. O'Grady*, the finding challenged must be one grounded on the resolution of conflicting oral evidence.

50. Although there was oral evidence in this case, this is and should be the exception in cases of this kind. Hague Convention cases are regulated as summary proceedings to be heard on affidavit with a discretion to permit or direct oral evidence only in exceptional circumstances (O.133 Rule 5(2) of the Rules of the Superior Courts). In few decisions concerned with the application of the concept of habitual residence in the Hague Convention should the relevant primary facts be disputed or open to dispute: the time the child has spent in a jurisdiction, the place of his or her residence, school attendance, friendships, and the location of familial relationships will in all but the most unusual of cases be objectively verifiable. That said, the trial judge did rely upon the oral evidence she heard in assessing some aspects of the evidence, and in particular regarding the point at which the respondent changed her residence and the understandings of each party as to the purpose of the trip to London in July 2021. In relation to these findings, the court is concerned to identify whether the findings of the judge were supported by credible evidence.

51. The third category is an intermediate one, and it is the standard of review under this heading that is most engaged in this case, as it will be in most cases of this kind. It arises where the appellate court is addressing alleged errors by a trial judge in *inter alia* (a) the findings he or she has based on affidavit or documentary evidence alone (*Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11; *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46, [2018] 2 IR 1 at para. 163 to 164) or (b) where the

court is reviewing ‘*secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven otherwise than by way of oral testimony*’ (per Humphreys J. *Minogue v. Clare Co. Council* at para. 100). Here, the standard of appellate review is ‘*somewhat deferential*’ (*id.*). Henchy J. explained the position in *Northern Bank Finance v. Charlton* [1979] IR 149 at p. 192:

‘if the question of fact that was answered in the court of trial does not depend on a choice of alternatives arising out of divergent oral testimony, but amounts to a conclusion in the nature of an evaluation of proved or admitted facts, the court of appeal will consider itself free to rely on its own judgment as to whether the evaluation made by the tribunal of fact is correct or not...’

52. As explained in *Ryanair Ltd. v. Billigfluege.de GmbH*, in cases of this kind the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that ‘*the appellant must establish an error in those findings that is such as to render the decision untenable*’ (per Charleton J. at para. 5). Charleton J. explained this further in *McDonagh v. Sunday Newspapers Ltd.* (at para. 163) as follows:

‘... the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.’

53. It follows that in cases to which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application

of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. This, I should observe, reflects the standard of review referred to by Finlay Geoghegan J. in *D.E v. E.B* [2015] IECA 104 at paras. 39 and 40, while taking account of the decision in *Ryanair Ltd. v. Billigfluege.de GmbH* to which she also referred. In is, in particular, the standard to be applied where the issue is whether the combination of a set of primary facts that are either agreed or deduced from affidavit or documentary evidence result in the conclusion that the child is or is not habitually resident in a particular place.

C's habitual residence

- 54.** Critical to the court's finding as to the habitual residence of C, was its decision as to the habitual residence of the respondent. In that regard, the judge's conclusion was located in the oral evidence she had heard and the resulting impression she had formed of the respondent's settled intentions. Her central finding was this (at para. 8.8):

‘The Respondent has made her intention clear in writing and this was the Court’s impression of her evidence as a whole: she intends to stay in Ireland and does not intend to return to England. She has moved to a rented property which is available to her in the medium term. She has arranged school and medical care for the family, including health insurance, in Ireland. There is abundant evidence of a settled purpose insofar as this is required to show an intention to move to a new habitual residence. The Respondent’s social and familial circumstances are also such as to suggest she and her youngest child, have a new habitual residence.’

55. Insofar as the habitual residence of the respondent is concerned this is, classically, a decision within the first category to which I have referred above. Having regard to the applicable principles as I have outlined them earlier, there is no basis on which this conclusion – rooted as it is in the application to an admittedly correct summary of the legal test of the oral evidence of the respondent as corroborated by her own documented intentions – could be unsettled by this court, and the applicant has identified no credible ground on which it could. This is important when it comes to the identification of the habitual residence of C, who it will be recalled was one year and five months old when she left England, and one year older by the time she was removed from that jurisdiction.

56. So, as of that point C had spent almost half of her life in Ireland. The respondent was her primary care giver – and the person who was her primary carer when the family left England in July 2020 – and as I have just explained this court must proceed on the basis that the respondent was herself habitually resident here by August 2021. Insofar as C was concerned it was in Ireland that the family ties of longest duration and proximity had been formed. She attended creche here and had arrangements to return to that

creche. In England, by contrast, she had no creche or other child care in place as of August 2021. Insofar as a child of that age experiences social interaction outside of her immediate family, that all occurred here. The only home she would have recognised was located in Ireland. For all intents and purposes the only environment into which she could have been integrated was Ireland.

57. It is for reasons such as this that in the case of a child of such a young age the courts have emphasised the following factors, each one of which strongly supports the conclusion of the judge in this case (*OL v. PQ* Case C-111/17 PPU ECLI:EU:C:2017:436 at para. 45):

‘Where the child in question is an infant, the Court has stated that the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of, and that an infant necessarily shares the social and family environment of that person or persons. Consequently, where ... an infant is in fact taken care of by her mother, in a Member State other than that where the father habitually resides, the factors to be taken into consideration include, first, the duration, regularity, conditions and reasons for the mother’s stay in the territory of the former Member State and, second, the mother’s geographic and family origins and the family and social connections which the mother and child have with that Member State’.

58. The applicant’s challenge to this finding focuses on what he says are two errors by the judge. The first is the claim that she erred by not taking account of the child’s connection with the applicant. It is emphasised that the applicant expressly stated in

his affidavit that he accepted an equal share in caring for the children, and that he had averred to the balance of the responsibilities as between the parties reflecting the fact that the respondent was caring primarily for C, while the applicant cared for A and B.

59. I reject the implication in this claim. The respondent averred that she was at all times C's primary care giver. That was not disputed by the applicant at any point, and at no stage in the course of either his affidavit or oral evidence did he suggest any basis on which it could be concluded that anyone other than the respondent was the child's primary caregiver. He identified no sequence of ongoing involvement on his part in the day to day life of C that could have prompted any other conclusion. He gave no evidence as to C's daily activities, or her family or social environment. It is hard to my mind to see how the trial judge could have reached any other conclusion as to who C's primary carer was at the material times. Insofar as C was concerned, that was the critical consideration.

60. The second objection is one of law. The trial judge's decision, it is said, assumes that the youngest child's place of habitual residence will change with the respondent's, and that the respondent's unilateral decision to change place of residence for the youngest child suffices legally to alter her habitual residence. That unilateral decision, it is said, overrides the clear lack of consent of the applicant. It has, it is said, never been conclusively determined as a matter of Irish law that one parent can unilaterally change a child's habitual residence. It is argued that to conclude that one of two parents with rights of custody under the Convention may unilaterally alter their child's habitual residence whether in the face of or absent opposition to such change by the other parent diminishes the right of custody which that other parent has and negates the protection offered to children under the Convention. In this connection, the applicant stresses that

he did not agree to C or the other children changing their habitual residence and that he had never agreed to relocate to Ireland.

- 61.** In this regard the applicant refers to the judgment of Fennelly J. in *PAS v. AFS* who cited with approval (at para. 38) the comments of Waite J. in *Re B (Minors Abduction)* (No. 2) [1993] 1 FLR 993, at p. 995:

‘The habitual residence of young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.’

- 62.** This argument is, I believe, misconceived. As Whelan J. explained in *Hampshire County Council and CE v. NE* (at para. 77(vi)):

‘Hague Convention decisions which considered parental intention to be of pre-eminent importance are no longer good law. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. The purposes or intentions of the parents are merely one of the relevant factors’.

- 63.** This must be correct. For a start, the test applied by Waite J. was based upon an examination of where the relevant persons had their abode which they had adopted voluntarily and for settled purposes and as part of the regular order of their lives for the time being. This derived from authorities addressing the meaning of the term ‘ordinary residence’ in other statutory provisions (*R v. Barnet London Borough Council ex parte*

Shah [1983] 2 AC 309), and has since been disavowed in the United Kingdom as a basis for determining habitual residence under the Hague Convention in favour of the approach adopted by the CJEU. Lady Hale explained in *A v. A* (at para. 54(v)) why this was so: ‘*the test adopted by the European court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors.*’ That, I believe, reflects the general position adopted more recently by the courts in this jurisdiction and I agree both with it, and with the resulting implication that the courts here should interpret ‘*habitual residence*’ as the phrase appears in the Hague Convention to correspond with the construction the CJEU has placed on the term in Council Regulation (EC) 2201/2003 governing jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. From there, inevitably, the courts in England and Wales have reached the conclusion that there is no ‘*rule*’ that where both parents had joint responsibility neither could unilaterally change the child’s habitual residence, and that the position now is that that issue is resolved by a factual inquiry tailored to the circumstances of the individual case (*In Re H* [2014] EWCA Civ. 1101, [2015] 1 WLR 863; *In re R* [2015] UKSC 35, [2015] 2 WLR 1583 at para. 17).

- 64.** The same conclusion holds good here, and indeed mirrors the conclusion reached by Finlay Geoghegan J. in *D.E v. E.B* at paras. 31 to 34. The proposition (more suggested than vigorously urged by the applicant) that his failure to agree to a change of habitual residence was in some sense determinative of the issue would be inconsistent with the factual nature of the inquiry and would overlay the identification of habitual residence

with a legal test that was liable to (and indeed would if applied in this case) produce a decision as to residence that departed from that shown by the facts.

65. This reflects the position adopted by the CJEU. In *OL v. PQ* at para. 52 it explained that having regard to *inter alia* the structure of the Convention, *‘the argument that the parents jointly exercise rights of custody and that the mother could not, therefore, decide alone on the child’s place of residence cannot be determinative for the purposes of establishing where the child is ‘habitually resident’*. It continued (at para. 54):

‘Consequently, the consent of the father or the absence of that consent, in the exercise of his rights of custody, to the child settling permanently in a place cannot be a consideration that is decisive for the determination of the ‘habitual residence’ of that child, within the meaning of Regulation No 2201/2003, which is consistent, it may be added, with the idea that that concept reflects essentially a question of fact.’

66. Of course, the applicant is entirely correct in suggesting that his rights *vis-à-vis* C and his refusal to consent to a change in her habitual residence was a highly relevant consideration to be factored into the analysis of where C was habitually resident at the relevant times. However, he has disclosed no basis on which I could conclude that the judge erred in her approach to this issue and the conclusion she reached regarding it.

67. In particular and as I have explained earlier, one of the central features of the inquiry into the habitual residence of a child is the criterion of proximity. This means *‘the practical connection between the child and the country concerned’* (*H v. R* [2021])

EWHC 2024 (Fam) at para. 18(ii)). For a very young child that ‘*practical connection*’ necessarily manifests itself within a more restricted compass than in the case of an older infant or teenager. Factors such as attendance at creche or kindergarten, the location of a particular house or the company of other infants are of some relevance to that inquiry, but critical to it is the child’s immediate family in general, and its primary carer in particular. This follows from another central element in the inquiry – the criterion of stability. The relationship with a primary carer for a child of this age is a critical component of the various factors that go to those considerations of proximity, of stability and of social and familial integration. The CJEU has thus been clear that an infant child necessarily shares the social and family environment of his or her primary carer and it is therefore necessary to assess the integration of that carer in the relevant social and family environment (*Mercredi v. Chaffe* at para. 55).

- 68.** That conclusion does not depend on any general principle that by moving to another jurisdiction the primary carer for that reason alone changes the habitual residence of a child of this age. Here, this was not a case merely of looking to the carer’s intentions or preferences, but to the fact that the child had been in this jurisdiction for a year, the fact that she had been here for most of that period in the company of all members of that family, the fact that she had developed within a network of members of the respondent’s wider family here and the fact that the circumstances were such that the respondent had herself acquired a habitual residence here. It was *all* of these facts – not any one of them – that drove the trial judge’s conclusion. To conclude that these factors combined to result in C also having that habitual residence is not, therefore, to baldly conclude that a unilateral change by the respondent of her habitual residence changed that of the child. On the contrary, any other conclusion would have afforded to the applicant a veto on C’s changing of her habitual residence that is rejected by the modern

authorities and would have resulted in the precise outcome the concept of habitual residence is intended to avoid – a conclusion that C’s habitual residence was in a jurisdiction with which she has had no connection of any kind for a very significant part of her life in preference to a place she had been for a year and into which she had, as a matter of fact, significantly integrated.

A and B’s habitual residence

69. The trial judge’s conclusions as to the habitual residence of A and B fall squarely with the intermediate standard of review to which I have earlier referred. It is clear from paragraphs 8.3 and 8.4 of her judgment as I have quoted earlier that it was a combination of the fact that their stay in Ireland was expressed to be temporary, that it was the latest of a long series of holidays in Ireland, that their stay here had been prolonged because of the uncertainty caused by the COVID pandemic, the fact that they were in rental property, and the extent of their connections in England (purchased home, medical, familial and longer social history there) that she decided they were habitually resident in that that jurisdiction. It is important to recall that it was the judge’s view that the indeterminate nature of the children’s lives in Ireland until May or June 2021 was the most significant factor weighing against their being habitually resident here.

70. The respondent has sought to deduce an error of principle in this analysis from the fact that the judge conducted a comparative analysis of the children’s connections in England and in Ireland. The respondent relied in this regard upon the decision of the English Court of Appeal in *Re M* [2020] EWCA Civ. 1105, [2020] 4 WLR 137. I disagree with the contention that there was any such error. While fully understanding that the question before the court was whether the children were habitually resident in

England, not whether they were so resident in Ireland or England, taking on board the fact that it is possible for a child to have no habitual residence, and bearing in mind that the onus was on the applicant to show that the children were habitually resident in his jurisdiction of origin, I have some considerable difficulty with the proposition that where children have moved from one jurisdiction in which they are habitually resident to another, that the inquiry as to whether they are habitually resident in that other jurisdiction could ever be conducted without regard to residence in the jurisdiction they had left. This is not what was decided in *Re M*, where the court made it clear that historical connections were relevant, saying instead that this should not become the focus of the inquiry which should properly be directed to the child's *current* situation (see para. 62). The judgment of Whelan J. in *Hampshire County Council v. CE and NE*, in my view states the position correctly. She said (at para. 77(ix)):

'In evaluating whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up and assess the degree of connection which the child had with the State in which she resided before the move.'

71. The real point, in my view, is that there was no need to identify an error in principle in this analysis. While the trial judge's decision requires some considerable deference, not only is the need for that deference diminished by the fact that she – quite properly – observed that her conclusion on this issue was marginal, but if this court believes the judge clearly erred in her application of the admitted facts to the proper meaning of '*habitual residence*' it must – for the reasons I have outlined earlier – correct that error.

72. Here, the following appear to me to be particularly relevant:

- (i) As of August 2021 A and B had been residing in this jurisdiction for twelve months. For children aged a little over eight and five, this was a very significant period of time. Critically in terms of the stability of their residence, they lived here until July 2021 with the agreement of both parents and as a family and in June 2021 had moved to a new house on a long term lease.
- (ii) During that time they had attended school here, commencing in September 2020 and continuing until the end of the primary school year. In the case of B, this was his first and only experience of school.
- (iii) Each had developed friendships, had involved themselves in local community and sporting activities, and had adapted themselves to the local culture.
- (iv) They had at the same time a network of close relatives, including cousins with whom they had spent considerable time and had bonded. The judge concluded (on the basis of the affidavit and documentary evidence before her) that the ties between the children and the applicant's family members in England – while important and deserving of support – were not such as would, taken alone, necessitate a finding of such integration as would strongly support their immediate return (at paras. 4.5 and 4.6). The close nature of the respondents' family relationships was not disputed (at para. 4.7).
- (v) During by far the greater part of that period they had resided in the one house, and when they moved at the end of June, remained in the same locality. The normal incidents of a residence that is other than transient – registration with medical professionals, enrollment in school, creche and aftercare and the like –

were in place and availed of. Here again I stress that they so resided until July 2021 as a family and with the agreement of both parents.

- (vi) For the reasons I have earlier outlined, their younger sister with whom they had at all times lived, had acquired a habitual residence here. The psychologist's report records A as describing his relationship with his siblings as '*close*'.
- (vii) When they left Ireland in July 2021 A was under the impression that he was visiting for a holiday, and that he would be returning to school in Ireland in September. I repeat that only a few weeks before A and B went to London they had moved to a new house in Ireland. The evidence discloses quite clearly that A had no expectation of remaining in England but instead fully believed that he would return to Ireland to resume his life here.

73. Having regard to these factors it is not surprising that the trial judge concluded that *each* of the children had achieved a '*measure of their integration into their new lives*' and that they had '*strong family and social ties in Ireland*' (at paras. 8.12 and 8.13). This was clearly correct. A, B and C had a solid extended family network here. C had a relationship with her mother that was found in the light of her absorption into the familial environment in this jurisdiction to – again correctly – merit the conclusion having regard to the other facts of this case that when the respondent's habitual residence changed, C's also did. Yet, A, B and C had arrived in this jurisdiction together as a family and lived here as a family. A and B had attended school here for one year and (at the very least) A believed that this was where he was returning to school for (at least) a further year. They had just moved to a new house, and had friends, points of social contact and a rooting in a local community in this jurisdiction in a context with which they had been, by reason of their frequent visits here in the past,

well familiar. In itself this collective integration of the three children as found by the judge pointed strongly to the conclusion that Ireland was their place of habitual residence: *‘[t]he relevant question is whether a child has achieved **some degree of integration** in a social and family environment. It is not necessary for a child to be fully integrated’* (emphasis added) (per Whelan J. *Hampshire County Council v. CE and NE* at para. 77(v)). It was for the same reasons that the judge found that insofar as the ability of the courts to deal with welfare issues went, *‘the relevant witnesses as to their daily lives are now in Ireland’* (at para. 8.4) and, for much the same reasons again that this pointed towards the conclusion that their habitual residence was, for the purposes envisaged by the Convention, properly viewed as being here.

74. In my view, the error into which the trial judge fell was that although having correctly reached these central findings on the facts in her exceptionally clear and otherwise compelling analysis of the evidence, she then proceeded to reach a conclusion which departed from the logic underlying them. In this regard I would stress three features of the case, and would note one aspect of the evidence.

75. First, and most generally, the fact that A and B had achieved the measure of integration identified by the judge and to the fact that they had, as she said, strong social and family ties in this jurisdiction pointed to the view that this was where the boys were habitually resident and, in my view, the factors I have outlined at (i) to (vii) combined to coerce that conclusion. By the summer of 2021 Ireland was the centre of their interests, the jurisdiction with which they were most proximately connected and the place where each at that point lived and had their home. If it was to be concluded both that they had in fact integrated in Ireland to the degree referenced by the judge and yet had *not* acquired habitual residence here, there had to be a very substantial counterpoint.

76. Second, and following from this, while the trial judge rightly attached importance in reaching the conclusion she did regarding the habitual residence of A and B to their nationality, the fact that they had spent more of their lives in England than in Ireland, and to the evidence that their purchased home, medical, familial and longer social history was in England, the consideration which trumped the evidence of their integration for Gearty J. was the fact that their stay was expressed to be temporary until May 2021 and as a result, what she described as the ‘*indeterminate*’ nature of A and B’s residence here. In my view, the judge attached a weight to this factor which, having regard to all the other matters to which I have referred, it did not bear.

77. Without a doubt there are many authorities contrasting a residence that is properly found to be habitual, with one that is temporary. The statement in *OL v. PQ* at para. 43 also appears in other decisions:

‘in addition to the physical presence of a child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child’s residence corresponds to the place which reflects such integration in a social and family environment (judgment of 2 April 2009, A, C-523/07, EU:C:2009:225, paragraph 38)’

78. Lord Reed in *In Re R* observed (at para. 16) that it is the stability of the residence that is important, not whether it is of a permanent character. Terms such as ‘*temporary*’ or ‘*intermittent*’ (which are relative) should be viewed as the obverse of ‘*stable*’, and when so understood they necessarily and properly lean heavily against establishment of habitual residence. By the same logic, a residence which is ‘*stable*’ and based upon some degree of integration is neither temporary or intermittent. It is for this reason that

the Court of Appeal for England and Wales concluded (correctly) in *Re M* at para. 46 that the need for ‘*some degree of integration*’ is intended to *distinguish* habitual residence from temporary or intermittent presence. Where a child has achieved that level of integration it will follow that their presence is, by definition, neither temporary nor intermittent. Treating the use of the term ‘*permanent*’ in this way as urged by Lady Hale in *A v. A* (at para. 51) this, in essence, is what the court was saying in *Mercredi v. Chaffe* (at para. 51):

‘it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence’.

79. Obviously – as the decision of CJEU in *Mercredi* shows – a short stay in a State arising in the course of a peripatetic life is liable to constitute an indicator that the child is not habitually resident in that State (at para. 41). However, it similarly follows that the characterisation of a stay as ‘*indeterminate*’ will diminish in significance and accuracy the longer the child is in the location, and the weight to be afforded to that fact will necessarily reduce in inverse proportion to the increasing intensity of the child’s social and familial integration in the relevant place. Bearing in mind that the evidence disclosed that as of August 2021 both the respondent and A believed that they were returning to this country after their holiday in England and that A was returning to school here, it is of particular importance in this case to stress that an intention to live in a country for a limited period is not inconsistent with a person becoming habitually resident there (per Lord Reed *In Re R* at para. 21).

80. When these factors are born in mind, I do not believe that the trial judge was right in viewing the '*indeterminacy*' of A and B's residence here as having the consequence she attached to it. What was far more important was the time they had been here, the roots they had put down here, the relationships they had built here and the consideration that – whether indeterminate or not – the evidence disclosed that the respondent and A (at least) believed as of the summer of 2021 that he was to spend a further year in this jurisdiction.

81. Third, the degree of integration of the family as a whole becomes particularly striking when the conclusion that C was habitually resident in Ireland is put into this mix. It was, as it is put in the Respondent's Notice to this court, a critical element of the factual matrix pertinent to the issue of the habitual residence of A and B that the circumstances of the family had changed to the extent that C, their sister and the youngest child in an admittedly close sibling relationship, had acquired a habitual residence here. This is not, it must be stressed, to say that siblings cannot have different habitual residences: clearly they can. But where three siblings separated in age from each other by only a few years and enjoying a close relationship come to a jurisdiction at the same time, remain in that jurisdiction for the same period and for the same reasons, live together for that period, and solidify the same broader familial relationships in that jurisdiction at the same time, the conclusion that one has acquired in that period habitual residence here while the others have not requires some clear and definite point of distinction between them.

82. Of course, there were differences. C's change of habitual residence was closely related to that of her mother's, A and B had friends and had developed familial relationships in England when C had not, and by reason of her age the proportion of C's life spent in

Ireland was far greater than that of her brothers. At the same time, however, A and B had developed connections with Ireland that C, by reason of her young age, could not. They attended school here, had formed friendships here, had become involved in identified social activities here, shared for the duration of their time in Ireland the same primary carer as C and – in the case of A – believed himself to be returning to school (and therefore to live) in Ireland for one year. At the very least, in my view, the variables balance each other out. On the facts here the (correct) conclusion that C had habitual residence in this jurisdiction should have prompted the same decision in relation to A and B for at least some of the same underlying reasons.

83. It follows that in applying the criterion of proximity and stability to all of these facts viewed as a whole, I believe that they point to a level of integration in the social and familial environment in Ireland that is consistent only with A and B establishing habitual residence in this jurisdiction. I am fortified in that conclusion by the report of the clinical psychologist following his interview with A. As I have observed when A was asked whether his '*centre of interests*' was in Ireland or in England his answer was that he lived in both places and when asked as to his perception of the relative strengths, significance and integration of his family relationships in Ireland and England his response was '*the same amount*'.

84. But I think the way he answered other less direct questions is more revealing. As I have already stressed, he was clear that he understood that as of August 2021 he was returning to Ireland for school and that he was expecting to stay there after returning to England for holidays. The very fact that England was a place he visited on a holiday, and Ireland a country to which he returned from that holiday tells its own story. That answer reflects A's understanding that, having come to Ireland because of the COVID

numbers the reason they remained there was because *‘we have loads of friends, a good environment, a great school...’*. When asked about the strength of his links to *‘school, sports clubs and other activities and his friend groups’* his answers in relation to Ireland were fulsome, those regarding England noticeably less so. I have quoted them in full earlier. This was specifically commented upon by the psychologist in his report to the court. When specifically asked to assess where A understood his primary social integration to be, the psychologist’s response was to observe that A had a perception that he had arrived in Ireland as a result of the pandemic and was to attend school here, adding that *‘his responses focused on his Irish social context with some reference to past friendships in England’*.

- 85.** It must at once be acknowledged that any child is likely to focus on their immediate experience when answering questions around their social interactions. That, however, is in many respects the point. The report corroborates what I would expect to follow at a practical level from the conclusion I have reached when the meaning of the term *‘habitual residence’* is applied to the facts as disclosed by the evidence. Those facts disclosed a situation in which A and B were as of August 2021 comfortably and happily absorbed within the environment that had been created for them in Ireland. It was where their home was, where their school and friends were, where their carer and siblings were, it was where A believed he was returning following what he viewed as a holiday to England, and it was the centre of their interests then and for the foreseeable future thereafter.

Conclusion

- 86.** It is, therefore, my view that the High Court judge was correct to conclude that at the relevant times C was habitually resident in this jurisdiction, while I have also decided

that her conclusion that A and B were so resident in England was in error. The correct analysis of the facts in the light of the meaning of the term '*habitual residence*' is that all three children were so resident in this jurisdiction. Haughton and Barniville JJ. agree with this conclusion, and my reasons for it.

87. It provisionally appears to all members of the court to follow from this conclusion that the appellant's appeal against the judgment and order of Gearty J. of 14 December 2021 should be dismissed, and that the cross appeal of the respondent should be allowed. The parties should liaise following receipt of this judgment and within seven days of the date hereof should advise the Court of Appeal office what orders each contends should follow. If a further hearing is sought, the court will convene one as soon as possible.