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Neutral Citation Number: [2007] IEHC 217

THE HIGH COURT
DUBLIN

No. 2006/37 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDER ACT, 1991
AND IN THE MATTER OF THE HAGUE CONVENTION
AND IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003
AND IN THE MATTER OF B.P.P., O.R.P.
AND P.D.P.

BETWEEN

P. M. P.

APPLICANT

AND
K. T. P.

RESPONDENT

Judgment delivered by Mr. Justice Feeney on Friday, 19th January 2007

1. The Applicant is a businessman who is a citizen of Ireland and who has been resident in S. A. since 2002. He is the father of the three infant children named in the title hereof who are all citizens of Ireland. The infants are B. P. P. who was born in Ireland and twins, namely O. R. P. and P. D. P., who were both born in Ireland. The Respondent is an Irish citizen and is the mother of each of the three children and is also the mother of a fourth child, namely a son B., who was born during the Respondent's marriage to P. J. S.

2. The Respondent and P. J. S. were married in R., I. The Respondent obtained a decree of divorce in respect of her marriage to P. J. S. in the D. R. in A. of 1993. The Respondent obtained a declaration from the Irish High Court on 25th June, 2002 that the divorce granted to the Respondent in the D. R. was capable of recognition in Ireland.

3. The Applicant and the Respondent commenced a relationship in late 1993 and the parties were purportedly married at a marriage ceremony in N. S. W., A.,. Thereafter, the Applicant and the Respondent lived together as man and wife and the three children named in the proceedings herein were born. The Applicant and the Respondent, together with their three children and with the Respondent's eldest son, B., moved to S. A. in and during 2002. Thereafter, up until 20th September 2006, those six persons continuously resided in S. A.

4. The relationship between the Applicant and the Respondent deteriorated and the Respondent, proceeding on the basis that she was lawfully married to the Applicant, commenced divorce proceedings in the High Court of S. A. on the 1st day of February, 2005. Those proceedings record No. 000/2005 and are in the High Court of S. A. (C. of G. H. P. D.) and the Respondent in these proceedings was the plaintiff in those divorce proceedings and the Applicant in these proceedings was the defendant therein. It was expressly contended for by the Respondent, within her divorce proceedings, that she was ordinarily resident within the jurisdiction of S. A., having lived in the R. of S. A. for more than one year prior to the institution of proceedings. It was claimed that the marriage between the parties had irretrievably broken down and that there was no reasonable prospect of the restoration of a normal marriage relationship between them and K. P. claimed joint guardianship of the three infant children, B., O. and P., together with other reliefs.

5. The Applicant in these proceedings defended the S. A. divorce proceedings and contended that there was no marriage and that the parties had not been validly married and that the recorded marriage of June, was void *ab initio*. P. P. sought that the parties to those S. A. proceedings be awarded joint custody of the three children and sought to rely on the terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. In a document entitled 'Defendant's claim in reconvention' dated the 24th day of March, 2005 P. P. asserted that it was in the best interests of the three minor children that he be granted rights as co-guardian and joint custodian of the said children pursuant to the provisions of s. 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 and he expressly sought an order that he be afforded rights as co-guardian and joint custodian and also other relief in relation to his entitlement to contact the said children and also an order in relation to the maintenance of the said three children, and he further expressly sought a declaration that the purported marriage was invalid and void *ab initio*.

6. The plaintiff within the S. A. divorce proceedings, the Respondent herein, put in a plea in reconvention wherein, in para. 4, she averred that it was in the best interests of the three children that herself and P. P. be awarded joint guardianship and that she be awarded custody of the three children subject to P. P.'s rights of reasonable access and it was denied that the provisions of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 applied.

7. During the course of the said divorce proceedings a hearing took place in relation to arrangements pending the hearing of the action. That hearing took place on 4th March, 2005 and an order was duly made dated the 8th day of April, 2005 which incorporated therein a agreement between the parties as a term that the order granted on the 3rd day of February, 2005 in respect of residency of the children should remain in force pendente lite. The order of 3rd February, 2005 which was made pursuant to rule 43 and which was incorporated into the order made in the High Court on 4th March, 2005 provided that the three children should reside with their mother for eight out of every fourteen days and with their father for the remaining six days and that the school holidays should be equally shared. That order also provided for assessments to be carried out by experts to identify what was in the best interests of the children and the mother and father undertook to co-operate with the experts who were appointed.

8. In an affidavit sworn by P. P. on the 30th day of June, 2006 within the divorce proceedings it was averred at para. 10 thereof, that in the light of Mrs. P.'s stance that in the event that the marriage is invalid that she is the sole guardian and that Mr. P.'s consent for her to remove the children from S. A. would not be required, that Mr. P.'s attorneys of record had requested an undertaking from Mrs. P.'s attorneys of record that they would not release the children's passports to the Respondent without an appropriate court order or written agreement between the parties until the action had finished. That affidavit was sworn in relation to an application concerning the three children's visa applications. The notice of motion was returnable for the 27th day of July, 2006 and expressly sought an order directing Mrs. P.'s attorneys of record to hold the minor children's passports in their possession until otherwise agreed between the parties or otherwise directed by the Honourable Court. An opposing affidavit was sworn by Mrs. P. dated the 1st day of August, 2006 praying the Honourable Court to dismiss the relief sought by Mr. P. in his notice of motion. Prior to that affidavit being sworn and to the motion being heard, by order dated the 27th day of July, 2006 Mr. Justice Cleaver declared that the marriage ceremony entered into between Mr. P. and Mrs. P. was invalid and that the parties were not validly married. The judgment of the High Court of S. A. in relation to the validity of the marriage is contained in a detailed and reasoned judgment dated

the 27th day of July, 2006. It is therein expressly recited that on the 16th day of February, 2006 that by agreement between the parties an order was granted in the terms of rule 33(4) of the Rules of Court to the effect that the issue of the validity of the parties' marriage and the issue of the loans claimed would be determined separately before the remaining issues in the divorce action are determined. It, therefore, was the position that the judgment of the High Court of S. A. of the 27th day of July, 2006 did not terminate the divorce action, it being expressly provided for by agreement between the parties and as recited in the judgment of the court that the remaining issues would be determined separately and thereafter.

9. Subsequent to the High Court order declaring that the parties were not validly married, Mr. P. continued with his application for a protective order pending a full hearing of the remaining issues. The issue concerning protective relief was dealt with by an agreement between the parties which was incorporated into a court order on the 25th day of February, 2006. That order dealt with, *inter alia*, Mrs. P. granting authority to permit Mr. P. to make an application for study visas for the three minor children and at para. 2 of the order that the Respondent's attorneys of record were directed to hold the passports of the three children and to give Mr. P.'s attorneys on record fourteen days' written notice of their intention to release such passports and it was also provided for in para. 6 that the divorce proceedings, which would be dealing with the remaining matters over and above those dealt with by the court judgment of the 27th day of July, 2006 would be enrolled for hearing on the 30th day of November, 2006.

10. The remaining issues in the divorce proceedings due for hearing before the S. A. High Court on the 30th day of November, 2006 included the guardianship, custody and potential relocation of the three children. This included the claim by Mr. P. to the joint custody of the three minor children under the 1997 Act, which said claim was subsequently amended to a claim for the sole custody. The issues concerning custody, guardianship and possible relocation were considered by the two court-appointed experts, M. Y. and L. P., as part of an ongoing psychological assessment and the opinion of Mr. and Mrs. P. and their three children. The report of the 22nd day of January 2006 dealt with access and custody. In preparing that joint report, the experts between them saw Mrs. P. on some sixteen occasions and Mr. P. on some six occasions and also separately assessed the children and had observed the children with both Mr. P. and Mrs. P. and had also conducted a co-joint session at which Mr. and Mrs. P. were both present. In their report of 3rd August, 2006 the experts confirmed that their original brief was to assess for custody and access the mother and father and the three children but in the report of 3rd August, 2006 the experts identified that Mrs. P. had recently indicated that she would like to relocate to Ireland and that whilst there were a number of overlaps between custody and relocation assessments, that a relocation assessment raised a different set of questions and they confirmed that they had only commenced their assessment in relation to relocation as of the middle of June, 2006 and had not completed same and they expressly stated that absent further investigations that it would neither be ethical nor responsible to provide a formal opinion in relation to relocation.

11. It is clear that as of 20th September, 2006 the divorce proceedings case remained in being with a number of issues yet to be determined and those issues included, *inter alia*, the custody, the guardianship and the potential relocation of the children, together with other additional and ancillary reliefs. Those issues form part of the remaining issues between the parties which were expressly postponed by court for hearing on 30th November, 2006.

12. As of July 2006 there were also parallel proceedings in being before the Magistrates Court in S. A. concerning access. In response to an order from the Magistrates Court, Mr. P. issued a motion in the High Court in relation to access arrangements, which motion was returnable for 2lst September, 2006. On the 12th day of September, 2006 Mrs. P. instituted on her own behalf, being unrepresented in respect of such application, an application for permission to travel back to Ireland with the four children. At the beginning of September, 2006 Mrs. P.'s attorneys on record had withdrawn as attorneys of record. The application brought by Mrs. P. was instituted by an ex parte Chamber Book application under case No.000/O6. The ex parte application of 12th September, 2006 came before the court and an order was made directing that Mrs. P. was to give notice to Mr. P. that the application would be made on 19th September and also directing that notice be given to her former attorneys who had custody of the children's passports. Mr. P. duly received notice of the application which was due to be heard on 19th September, 2006. However, on 19th September, 2006 the matter was not listed. Mr. P. at all times intended to be represented at the hearing on 19th September, 2006 and had made arrangements to be so represented. Mrs. P. has indicated that on 19th September, 2006 she again appeared on her own behalf, that is unrepresented, in chambers and the court adjourned the matter to 21st September, 2006. On that date Mr. P. had an application on notice to the High Court in relation to access arrangements.

13. On 20th September, 2006 Mrs. P., again unrepresented, appeared in chambers and requested leave of the court for her application to be heard that day. That application was made ex parte and without Mr. P. or his lawyers being aware that it was being made. The judge, who was a different judge from the earlier judge who had dealt with the matter, granted an order in the terms of a Chamber Book application on 20th September, 2006. That order was granted ex parte and without any party being present other than Mrs. P. in person. The affidavit of A. E. N., Mr. P.'s attorney, confirms that on 20th September, 2006 at 15.30 hrs. a telephone call was received from the registrar of a High Court judge requesting an affidavit pertaining to an urgent matter on the court's roll for 2lst September, 2006 and at that point an inquiry was made about the whereabouts of the urgent application and it was then indicated that an order had been granted in the terms of a Chamber Book application earlier on that date. At 16.46 on the same day a fax was received from Mrs. P.'s former attorneys enclosing a copy of an order made earlier that day to the effect that the attorneys were ordered to release the passports of the Applicant's children and that permission was granted to travel to Ireland with all of the Applicant's children. That order was made within case No. 0000/06. Within those proceedings which were brought by Mrs. P. on her own behalf and without legal representation, she had sworn a handwritten affidavit. She had sought to return to Ireland and to leave S. A. with her four children because her ex partner would not pay anything to her or her son, B. However, no reference was made within the affidavit to the continuing payment of maintenance to the other three children or of the payment of rent. Also in the affidavit Mrs. P. expressly swore "I give an undertaking to travel back for the High Court issue in November, 2006". It is the order of 20th September, 2006 on which the Respondent expressly relies as entitling her to remove the children the subject matter of these proceedings from S. A. and it is thereby claimed that their removal from S. A. was not unlawful.

14. Once Mr. P. and his attorneys became aware of the making of the order on 20th September, 2006 steps were put in place to seek a rescission of that order and the return of the passports. Mrs. P. avers at para. 19 of her affidavit sworn on 13th November, 2006 within these proceedings that after she had obtained the court order *ex parte* on 20th September, 2006 she received a communication from her family to the effect that an uncle, by name P. W., had died and that she thereupon decided to make an immediate return to Ireland with her four children. In a further affidavit sworn by Mrs. P. within these proceedings on the 28th day of November, 2006 she avers at para. 25 thereof that she left C. T. with her children at 7p.m., that is 19.00 hrs, on 20th September, 2006 and that she had booked the flights at approximately 2.30p.m. on that date.

15. In para. 26 of the same affidavit Mrs. P. confirms that when she made the application on 20th September, 2006 there was no mention in her grounding affidavit of Mr. P.'s application for access which was listed for hearing the following day and also confirms that there was no mention of the fact that Mr. P. was financially supporting the children. Nor were these matters disclosed during the hearing. Mrs. P. contends that it was her belief that the court was aware of the listed application for the following day because of an overlap of registrar/judge and she goes on to aver that she informed the court that she would return to S. A. for the proceedings in

November if the court required her to do so, but that during the course of her application Judge Fortuin informed her that if she did not return to S. A. for the proceedings in November those proceedings would simply be struck out.

16. Mr. P., upon being made aware of the order of 20th September, 2006, immediately applied within the proceedings wherein that order had been made, that is record No. 0000/2006. An *ex parte* application was made on 21st September, grounded on affidavit and the High Court of S. A. duly ordered that the Respondent, that is Mrs. P., immediately hand to the attorneys for Mr. P. for safekeeping, the passports of the three children or, alternatively, that the custom authorities attach and seize the passports and hand them to Mr. P.'s attorneys for safekeeping and, further, that pending the finalisation of the application to rescind the order made on 20th September, 2006 that Mrs. P. be interdicted and restrained from removing the children from the jurisdiction of S. A.. That order was made at a stage when Mrs. P. and the children had already departed from S. A..

17. The High Court also ordered that pending the outcome of proceedings under case record No. 000/05 that Mr. P. be entitled to have access to the three children. The order of 21st September, 2001 in case Record 0000/2006 had adjourned the finalisation of the application seeking rescission of the order of 20th September, 2006 to 5th October, 2006. Mrs. P. was duly put on notice of such application and of the fact that it was due for hearing on 5th October, 2006.

18. Due to the fact that Mr. P. was unable to establish the whereabouts of his children, he travelled to Ireland on 23rd September, 2006 and ascertained that Mrs. P. and his three children were at B. B. in C. W. and that the children had been enrolled in a school in D. The application to rescind the order of 20th September, 2006 proceeded before the High Court in S. A. on 5th October, 2006. Mrs. P. confirmed that she was aware of that application and that she was on notice of same prior to that date, but stated that she only became aware of the hearing date a few days prior to 5th October, 2006 and that she was not financially in a position to arrange representation. When the matter came on for hearing before the High Court on 5th October, 2006 it was determined and ordered that the order granted by the High Court under Chamber Book record No. 000/06, case No. 0000/06 is hereby rescinded and it was further ordered that the Applicant within those proceedings, that is Mrs. P.'s Chamber Book application under case No. 0000/06 is dismissed. That order of 5th October, 2006 remains in force and has the clear effect of rescinding the order of 20th September, 2006 and of dismissing Mrs. P.'s application made within case record No. 0000/06. The order of 5th October, 2006 has not been appealed.

19. The effect of the order of 5th October, 2006 rescinding the earlier court order of 20th September, 2006 is dealt with in the affidavit sworn by A. E. N. on the 9th day of November, 2006. Mr. N. makes that affidavit as an expert and as a qualified attorney and in para. 5 it is stated that the consequences of the order of 5th October, 2006 rescinding the earlier order is that the earlier order is deemed in S. A. law as being void *ab initio* and at para. 5.3 of the same affidavit it is confirmed that the application brought on behalf of Mr. P. to rescind the order of 20th September, 2006 was brought on the grounds that such order had been obtained by fraud and that the order was rescinded on that basis. Some issue as to the accuracy of those averments are raised within these proceedings and it is suggested on behalf of Mrs. P. that the order of 20th September, 2006 was rescinded on the basis that it was obtained *ultra vires* rather than by fraud. However, it is clear that rather than appeal the order of 5th October, 2006 Mrs. P. has brought separate proceedings commenced on the 15th day of December, 2006, seeking a declaration that the order obtained by Mrs. P. on 20th September, 2006 was not fraudulently obtained. Those proceedings would appear to confirm that, as of this point of time, the effect of the order of 5th October, 2006 is that a decision has been made that the order of 20th September, 2006 is not only void *ab initio* but was fraudulently obtained. The new proceedings brought by Mrs. P. are based upon the position that the 5th of October order has the consequence and effect that the earlier order was obtained by fraud.

20. Mrs. P. claims that this Court, in Ireland, should await the outcome of that application for declaratory relief prior to making any determination herein. That application is made on the basis that if Mrs. P. were to succeed in her application for a declaratory order to the effect that the order of 20th September was not fraudulently obtained that it would mean that her departure from S. A. on 20th September, 2006 was lawful and, indeed, a declaratory order to that effect is also sought within the proceedings commenced on 15th December, 2006. This Court has a real concern that those proceedings have been instituted for the purpose of supporting an application to delay this Court and also for a further purpose of seeking to give legal effect, however indirectly, to the order of 20th September, 2006. No cogent or legal basis has been established as to why the order of 5th October, 2006 has not been appealed and why separate proceedings have been commenced.

21. This Court is satisfied that as matters presently stand the order of 5th October, 2006 has the effect of rescinding the order of 20th September, 2006 and rendering that order void *ab initio* and that the order of 5th October, 2006 has the effect of determining that such order was fraudulently obtained. The existence of separate proceedings seeking declaratory relief does not and cannot have the effect of altering the effect of the order of 5th October, 2006 and this Court should and will proceed on the basis that the order of 5th October, 2006 is in effect and renders the order of 20th September, 2006 void *ab initio*. One other factual matter raised in the proceedings herein concerns Magistrates Court orders and in particular an order of 17th January, 2005 which was an interim protection order which was made final on 10th February, 2005. That order has not been varied, rescinded or set aside and that it is therefore contended that it remains in full force and effect and that it follows that the Respondent's removal of the minor children from S. A. without Mr P.'s written consent as provided for in the order of 20th February, 2005 is in breach of the protection order and accordingly unlawful. Those facts are used as a basis to ground a legal argument that the Applicant herein, Mr. P., had custody rights. During the course of argument before this Court it was acknowledged that the argument put forward to the effect that the Applicant had custody rights was secondary to the contention that custody rights were vested in the court. Given the findings hereinunder made concerning the fact that this Court is satisfied that rights of custody were vested in the S. A. court, it is unnecessary to address either the factual matters raised in relation to the Magistrates Court orders or the legal consequences flowing therefrom.

22. The father and the mother and their three children together with the child B. were permanently resident in S. A. from 2002 to the 20th September, 2006. Indeed, on the facts of this case there can be no doubt but that the three children the subject matter of these proceedings were habitually resident in S. A. up to their removal on 20th September 2006. Habitual residence is not defined in the Convention or in the Act but the courts have made it clear that such words are to be understood and interpreted according to their ordinary and natural meaning. It is also clear from article 3 of the Convention that the question of habitual residence must be decided at the point immediately before the removal or retention. The Irish Courts have recognised that habitual residence is a matter of fact which falls to be decided on all the relevant evidence. What is habitual residence and how it is to be applied was considered by McGuinness J. in *C.M. v. Delagacion de Malaga* [1999] 2 I.R. 363, where she stated at p. 381:-

> "Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that 'habitual residence' is not a term of art, but a matter of fact, to be decided on the evidence in this particular case. It is generally accepted that where a child is residing in the lawful custody of its parent (in the instant case the mother), its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually

present in a country before he or she can be held to be habitually resident there."

23. There is no doubt but that on the facts of this case the mother, father and the three children, the subject matter of the proceedings were all habitually resident in S. A. up to 20th September, 2006. Indeed, it is not argued on behalf of the Respondent that the children were other than habitually resident in S. A. up to the 20th of September, 2006. The argument relating to habitual residence is limited to the contention that the habitual residence of the children changed thereafter and that the mother and three children became habitually resident in Ireland from the 20th of September, 2006. That argument is used in relation to the alleged consequence or effect of any S. A. court order made after the alleged change of habitual residence. However, what is clear, beyond doubt, is that this Court can proceed on the basis that up to and including the 20th September 2006, the mother, father and three children were all habitually resident in S. A. for the purpose of the Convention and the 1991 Act.

24. In considering the applicable law, it is appropriate to start with the preamble to the Hague Convention, which recites the wishes of the signatories to that Convention in the following terms:-

> "...Desiring to protect children internationally from the harmful effects of the wrongful removal or retention and to establish procedures to ensure the prompt return to the state of their habitual residence, as well as to secure protection for rights of access..."

25. Article 1 of the Hague Convention states that its objects are:-

> "(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

26. Article 3 identifies the circumstances in which a removal or retention is wrongful in the following term, namely:-

> "The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

27. Article 5 goes on to provide, as follows, namely:-

> "(a) rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."

28. As identified by Keane J. in *H.I v. M.G* (Child Abduction: Wrongful Removal) [2000] 1 I.R. 110 at p. 124:-

> "To trigger the mechanisms of the Hague Convention, there must have been a wrongful removal of the child from the place where it was habitually resident and for the removal to be wrongful within the meaning of the Hague Convention it must have been in breach of a right of custody as defined by article 3. The article specifies three possible legal origins of a right of custody:
>
> (a) the operation of the law of the state of the habitual residence,
>
> (b) a judicial or administrative decision or
>
> (c) an agreement having legal effect under the law of the state of the habitual residence.
>
> Common to all three is the requirement that the right should have been attributed to the person or body concerned under the law of the state of the habitual residence."

29. Given that on the facts of this case there is no issue but that the three children the subject matter of the proceedings were habitually resident in S. A. up to the 20th September, 2006 the issues for consideration by this Court are, firstly, whether or not there was a wrongful removal; secondly, whether at the time of the removal from S. A., custody rights vested in the courts of S. A. or in the Applicant and, thirdly, even if there has been a wrongful removal, whether or not a defence under article 13 is available to the Respondent.

30. It is clear from the Supreme Court's decision in *H.I v. M.G.* that in giving the Hague Convention a purposive and flexible construction that circumstances can arise where a removal will be wrongful within the meaning of article 3 because it is in breach of the rights of custody not vested in either of the parents but in the court itself; however, the Hague Convention does not provide protection for "inchoate" rights of custody. In dealing with this issue, Keane J. (at p. 125) stated:-

> "If, for example, proceedings are actually pending before a court in the state of the habitual residence and an interim order has been made restricting a person entitled to lawful custody from removing the child from its jurisdiction without the consent of another person or of the court, there would be little difficulty in concluding that the child's removal without such consent constituted a wrongful removal. Clearly, in such a case, the court could reasonably be regarded as having reserved to itself the right to determine where the child should reside until such time as the proceedings were finally disposed of..."

31. The Supreme Court recognised that depending upon the circumstances of a particular case that it could be the case that the removal of a child would be a breach of a right of custody vested in the court itself.

32. Later in the same judgment (at p. 132) Keane J. went on to say:-

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

33. In the light of the factual history of the litigation in S. A., outlined above, it is clear that a situation existed as of the 20th September, 2006 that rights of custody vested in the S. A. court. Therefore, absent excusing circumstances, the removal of the three children would be in breach of rights of custody attributed to the court itself, since the S. A. court had taken upon itself the right to determine the custody or to prohibit the removal of the children. The Respondent contends that the order made on the 20th September, 2006 amounts to excusing circumstances and therefore results in the removal not being wrongful.

34. The recognition of rights of custody being vested in the court is one clearly acknowledged and recognised by the Irish courts and *H.I. v. M.G* has been followed and applied within this jurisdiction including in the case of *T.D. v. A.M.P. and J.R.* judgment of Finlay Geoghegan J. delivered 8th March, 2006 where she stated:-

> "The right of custody in a court will only be considered to exist where by reasons of existing proceedings or by the law of the State of habitual residence the court's of the state are considered to have reserved to themselves the right to decide whether the children should be permitted to relocate."

35. Keane J. in considering the issue of rights of custody vested in the court itself in the *H.I. v. M.G.* decision (at p. 125) identified circumstances in which "the court could reasonably be regarded as having reserved to itself the right to determine where the child should reside until such time as the proceedings were finally disposed of". The concept of a right of custody being vested in the court itself until the final disposal of proceedings was reiterated by the House of Lords in the case of *Re H*(Abduction: Rights of Custody) (2000) 2 WLR 337 wherein it was recognised within the speech of Lord Mackay that as a general rule the courts right of custody arose at latest when the application to it was served and continued until the application was disposed of or stayed.

36. In considering the issue as to whether or not there was a wrongful removal by the Respondent of the children in this case, this Court has considered the above legal position as set out in the authorities and has also considered the facts herein before outlined. The court is satisfied that there was a wrongful removal and that there was an absence of any legal excusing circumstances.

37. Firstly, the history of the court proceedings in S. A., including in particular proceedings Record No. 000/05 instituted by the mother, the orders made within those proceedings including orders relating to the childrens passports, the listing of the remaining issues in the case for hearing on 30th November 2006, the process being carried out by the court to investigate through experts issues relating to custody, access and relocation all make it clear beyond any doubt that the rights of custody were vested in the S. A. court.

38. Secondly, the manner in which the S. A. courts were dealing with the proceedings was such that it was clear that the rights of custody remained vested in that court until it finally disposed of the remaining issues, due for hearing on 30th November, 2006.

39. Thirdly, the S. A. court had clearly reserved to itself the issue as to where the children should reside until the proceedings were finally disposed of or concluded.

40. Fourthly, the order of 20th September 2006, even if it could be relied upon by the Respondent, (and this Court is of the clear view that it cannot be relied upon) only permitted the release of the passports and the entitlement of the children and mother to travel to Ireland and not any more. It is not the case that the order of 20th September, 2006 meant or could be taken to mean that the S. A. court had divested itself of the right to determine where the children should ultimately reside or the issues of custody or access.

41. Fifthly, this Court is satisfied that the order of 20th September, 2006 cannot be relied upon as an excusing circumstance or a basis for contending that the removal was lawful as that order has been determined to be void *ab inito* and to have been obtained by fraud. There is an extant and unappealed order of the S. A. court of the 5th October, 2006 determining that the order of 20th September, 2006 was void *ab initio*. In those circumstances, this Court, as matters currently stand, must proceed on the basis that the order of the 20th September, 2006 has no effect and cannot be relied upon as an excuse. It would also be contrary to policy for this Court, as matters currently stand, to allow and permit a party to use an order deemed to have been obtained by fraud, as a basis for a legally excusing circumstances for the removal of the children from S. A.

42. Finally in relation to this issue a court must have regard to the undertaking given by the Respondent in the affidavit to support the application moved on 20th September, 2006 to the effect that she would travel back for the High Court issue in November 2006. This Court is satisfied that it cannot reasonably be contended by the Respondent that she was of the belief that she was in any way excused from attendance in court on 30th November, 2006 or that her undertaking was in any way diluted or removed by the lack of an express requirement from the Court on the 20th September.

43. As is clear from the foregoing, it is this Court's decision that the Respondent cannot be permitted to rely upon the order of the 20th September, 2006 and that such order has been deemed to be void *ab initio* and that there is no legally excusing circumstances present and that, therefore, the removal of the three children from S. A. on 20th September, 2006 was wrongful.

44. I have already indicated that in the light of the court's determination concerning the fact that there was a wrongful removal by the Respondent in breach of the rights of custody vested in the court it is unnecessary to consider the supplementary argument in relation to a claim that the rights of custody vested in the father.

45. A further matter which requires to be considered by this Court is the claim by the Respondent that the court should not return

the children to the jurisdiction of S. A. because an intolerable situation would arise if such an order for return was made. The Respondent has expressly pleaded the defence of grave risk under Article 13(b) of the Hague Convention. Article 13 states:-

> "Notwithstanding the provisions of the proceeding Article (which directs that when a child has been wrongfully removed that the court shall order the return of the child or children forthwith) the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body which poses its return establishes that...(b)there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

46. The Respondent claims that an order for return of the children would create an intolerable situation.

47. The onus is on the Respondent to establish such a defence. In considering the issue of grave risk or intolerable situation under Article 13 Denham J. in *RK v. JK* (Child Abduction: Acquiescence) [2000] 2 I.R. 416 stated at p.434 as follows:

> "The grave risk contemplated in the Hague Convention is that of a serious risk."

48. In *Thomson v. Thomson* (1994) 3 SCR 551, LaForest J. of the Supreme Court of Canada stated at p. 596:

> "In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause 'or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation."

49. Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.

50. The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the court orders in the requesting country, then the policy of the Hague Convention to return the children to the country of their habitual residence will be met. Also, the particular children affected by the Hague Convention in a case will have their interest protected.

51. Barron J. in the same Supreme Court case stated (at p.451):-

> "In my view, the words 'intolerable situation' relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed."

52. Barron J. went on to determine (on the same page) that a grave risk for the purposes of the Hague Convention could exist in only two situations:

> (a) when return of the child would put the child in imminent danger prior to the resolution of the custody dispute e.g. returning the child to a zone of war famine or disease
>
> (b) in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason might be incapable or unwilling to give the child adequate protection.

53. There is no doubt but that the so called defence of grave risk imposes a heavy burden on the party raising such a defence. Such a defence of grave risk has been acknowledged as being a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence and not only is the onus on the party raising such a defence, but it is clear that such defence must be construed strictly.

54. The Respondent relies on a number of factual matters to ground the so called defence of grave risk or intolerable situation. Firstly, reliance is placed upon the difficulty relating to visas. Secondly, an issue is raised which is linked with the visa issue which is that the Respondent might not be permitted to remain in S. A. for the entire of the court hearing. It is contended that if the mother is not able or permitted to reside in S. A. for the duration of the proceedings that the children will be placed in an intolerable situation. Also an issue in relation to family unity is raised, including the question of B. being permitted to remain in S. A. with the potential consequence on the unity of the family and the potential psychological damage which would be caused if the family were to be split. As regards the child B., the court is not satisfied that even if it could properly take his position into account as effecting the other three children, that there is a real risk that he would be split from his mother. The argument about his desire to remain in Ireland appears somewhat unreal given the history of his long-term custody and residence with his mother.

55. Finally, an issue is raised in relation to an alleged inability on the part of the Respondent to fund representation at the hearing in S. A. and the absence of legal aid. That is interlinked with the visa situation because the Respondent will be unable to obtain any visa which would entitle her to work in S. A. and, therefore, she would be unable to earn a living whilst she was in S. A.

56. The most significant of these issue relates to the question of visas. An argument has been advanced that unless the court could be satisfied that a visa would be granted to the mother and that she would not be denied entry into S. A. that a situation would arise where the children would be returned alone and that that would amount to an intolerable situation under article 13. Reliance was place upon an Australian authority from the Family Court of Australia, *State Central Authority Victoria v. Ardito*, judgment delivered 29th October, 1995 where return was refused because it had been established that the mother was denied entry into the United States where the pending case was to be heard and that that constituted a grave risk that the child in question would be placed in an intolerable situation if sent back alone.

57. If it were factually the case that the children would be sent back alone, then the court would have to address this issue. On the facts of this case, given the earlier extensive contact and access by the father, it would be arguable that such grave risk would not or could not arise even if the children were to return alone. However, this Court does not have to address the matter as the common factual position agreed before the court is that the great probability is that the mother and the three children the subject matter of these proceedings, and indeed B., would receive three-month visitor visas on arrival in S. A. and that those three-month visas would be renewed within S. A. for a further three-month period as a matter of course. The visas are obtained on arrival in S. A. and the court can by means of its order within these proceedings deal with the circumstances which might arise if the three children were to receive a visitor visa and the mother was not to do so. The evidence establishes that it is a matter of significant probability that the mother and the three children, and indeed B., will be able to return and remain in S. A. for a period of six months and that, in those

circumstances, a situation is not likely to occur where it could be said that the mother would be denied entry into S. A. and that there is a grave risk of the children being sent back alone. Also, the Applicant has undertaken to fund any travel necessary to permit exit and re-entry required for a further visitor visa if the proceedings are not completed within the period of the first two visas.

58. The Respondent also sought to rely on a Canadian authority which suggested that an intolerable situation might arise where a mother would be returned to Canada where she had no means of support. The facts in this case are not to be equated with that situation. There are undertakings available to the court in relation to the financial support which the Applicant will provide for the support of the children and their mother and for their accommodation pending the conclusion of the proceedings in S. A. Those undertakings will be incorporated into the order made by this Court and, as is clear from the judgment of Denham J. in *R.K. v. J.K.* (at p. 434) that envisaged intolerable situations can be addressed or abated by undertakings in circumstances created to protect the children and that then the return of the children to the country of their habitual residence should be ordered.

59. The final matter relied upon by the Respondent in relation to a claim of an intolerable situation relates to the lack of legal aid and funds. This is a different issue from an inability to attend because of a lack of a visa. However, this Court has already indicated that on the facts of this case it does not have to address the situation of an inability to attend as the great probability is that a visa will be available to the Respondent and her children. The courts of the United Kingdom have rejected the suggestion that the lack of legal aid could amount to an intolerable situation under article 13(c) in *Re K* [1995] 2 F.L.R. 550. However, this Court does not have to decide the matter as the facts of this case are such that an undertaking has been proffered which will provide for some funding to the mother in ensuring legal assistance. Also, to some extent, this Court must recognise that the dissipation of funds available to Mrs. P. has to a degree been caused by her own actions. The court will hear the parties on the nature and extent of such funding. This Court must have regard to the Supreme Court judgment of Denham J. in *S.R. v. M.M.R.* (delivered 16th February, 2006) where she made it clear that undertakings are provided to enable the safe transition of minors and they relate to the short duration between the order of the High Court and the exercise of the jurisdiction by the court in the country to where the children have been returned. However, in this case the issue of lack of ability to obtain legal aid as a potential intolerable situation can be addressed by means of an undertaking.

60. This Court is satisfied that the removal of the three children the subject matter of the proceedings is in breach of the rights of custody within the meaning of article 3 of the Hague Convention and that the Applicant is entitled to an order for the return of the children to the jurisdiction of S. A.. The Court will hear the parties in relation to the nature, extent and type of undertakings necessary and appropriate.