[2018] IEHC 662

**THE HIGH COURT**

**Record No. 2018/15 HLC**

**FAMILY LAW**

**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 COUNCIL REGULATION 2001/2003**

**AND IN THE MATTER OF N.M.O'D, A CHILD**

**BETWEEN**

**N.J.**

**APPLICANT**

**-and-**

**E. O'D**

**RESPONDENT**

**Judgment of Ms. Justice Ní Raifeartaigh delivered on the 31st day of August, 2018**

**Nature of the Case**

1. This a case in which the father of a 4-year old girl seeks the return of his daughter to England pursuant to article 12 of the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") and in accordance with the provisions in Section 2 of Council Regulation 2201/2003. He also seeks a declaration that the respondent, the mother of the child, wrongfully removed the child from England and Wales within the meaning of article 3 of the Convention. The child is currently living in Ireland with her mother. The primary legal issue arising is whether the father was, at time of the child's removal to Ireland by her mother, "exercising" custody rights within the meaning of the Convention. The mother has also raised a defence of grave risk under article 13(b) of the Convention.

**The facts**

2. The child in the proceedings, to whom I will refer as "N", was born on the 7th June 2014 and is therefore currently 4 years of age. The applicant is the child's father and is an English national. He described himself on affidavit as a company director, businessman, gas engineer and homeowner, but in response to complaints as to the paucity of maintenance paid by him, clarified that he had recently established his own heating and plumbing company and has derived only a modest income from it to date. The mother disputes the modesty of his income but that is not directly relevant for present purposes.

3. The mother is an Irish national who went to live in England in 2006, first to study, and thereafter to work as a teacher.

4. It appears that the parties commenced a relationship around 2010. They were never married to each other. It is in dispute whether the actually lived together; the applicant says that they lived together for 18 months, while the respondent says that they never lived together as such and that the applicant is painting a false picture of the situation in order to support his contention that he subsequently exercised rights of custody in respect of the child. It is clear that they retained separate apartment addresses, as appears from the birth certificate of the child, and it may be that the arrangement was more in the nature of regular or occasional "sleeping over" during a certain period, rather than living together as one unit. I do not think it necessary to make a factual determination in relation to the matter and I merely note the disagreement on this point. It appears not to be in dispute that the relationship broke down entirely shortly after the birth of the child. The reasons for the breakdown are in dispute and again I do not consider it necessary to reach a conclusion on this.

5. The applicant was named on the birth certificate of the child. Accordingly, under English law, he had rights of custody in respect of the child. This matter is not in dispute.

6. It is not in dispute that the mother has been at all times the primary carer of the child.

The mother averred that, throughout the child's young life, she regularly visited Ireland and stayed with her parents and that the applicant visited her there and was therefore aware of her parent's address. For example, the child was baptised in Ireland on the 10th December, 2014, and this was attended by the applicant and his mother. The respondent provided a list of dates on which she visited Ireland; it appears the child spent approximately 13 weeks in Ireland in 2014, 22 weeks in 2015, 14 weeks in 2016, and 9 weeks in 2017 before the removal. The mother says that these dates show that the child has actually spent more time in Ireland than in England and Wales since her birth.

7. The mother averred that after the birth of the child and the end of their relationship, the applicant exercised *ad hoc* limited access with the child and that this was always supervised by her or her mother, who had come over from Ireland to help her mind the child. In her second affidavit, she averred that the applicant, even in the early stages of the child's life, never tried to see his daughter regularly, did not concern himself as to her daily care, and left all daily and medical responsibilities to the mother.

8. The mother averred that the father became increasingly aggressive and threatening to her, was using alcohol and drugs, and that she was the subject of an assault in April 2016. The applicant denies that he ever had an alcohol or drug problem, denies that he ever assaulted the respondent, and says that he always sought to be an active and engaged parent to the child. He exhibits an order of the English High Court dated the 14th May 2018 (two months ago), in proceedings brought after the mother removed the child to Ireland, in which it was explicitly stated that there is no evidence filed in court which substantiates any finding that the applicant represents any risk of harm to his daughter, and that "no findings have been made in relation to any allegations of domestic violence or alcohol or drug abuse" and the court saw no evidence upon which such findings could be made. The order continues by saying that any suggestions contrary to this in any CAFCASS reports "reflects poor practice and has been disregarded by this court". The mother relies upon the following evidence.

9. It is clear from the documentary exhibits that the mother made a complaint to the police as a result of which the applicant was charged, and as part of his bail conditions, a non-contact order was made (apparently in mid-June 2016). The trial was listed for hearing on the 11th August, 2016, and the mother failed to attend, as a result of which the charge was dropped or resulted in an acquittal. The mother averred that she was in Ireland at the time and "could not cope with returning to face the applicant at that time.... I was also concerned about potentially incarcerating the applicant for his actions, which he may have deserved but I was seriously conflicted as he was still [N]'s father".

10. The mother averred that the applicant then made a threat to kill her on the 16th September 2016 over the phone, and she filed a further complaint with the police. The applicant was arrested and charged with "harassment without violence" and again a non-contact order was made as part of the bail conditions. It may be noted that one of the exhibits was a police memo of an interview with the father in September 2016, in which he said that the mother had "*taken his children (sic) to Southern Ireland and had not returned"*, that "*prior to the mother going to Ireland the father had not seen his daughter for 5 months*" (which would be April 2016), and that "*the father was aware that the children (sic) were being taken to Ireland and that this was something that occurred every year and he did not have an issue with it [but] he has the issue with the fact that the mother has now made contact with him and has now stated that she has no plans to return to the UK".* The memo in question records that the author of the note had spoken with him and "*explained the routes available to him and the station officer is going to supply him with the phone number for Reunite*". The office took the view that this was not an abduction (at that time). So, it is clear that not only did the applicant not have a particular problem with the mother going back and forward to Ireland generally, but that he was informed around that time of the options available to him if he wanted to prevent a relocation.

11. The mother averred that the applicant then bombarded her with text messages, and she sought and obtained a restraining order on the 26th January 2017 with a duration of 1 year. This order has been exhibited and says that the applicant was "not to contact directly or indirectly [EO'D] save through Social Services". She averred that he never took any steps to pursue the question of access to the child, whether through the social services or through the courts. She says he continued to bombard her with phone calls and that the police are continuing to investigate. The applicant admits that he pleaded guilty to sending text messages which constituted "harassment without violence". He says that this was in circumstances where she was denying him access to the child and that in response he referred to her in a derogatory manner. The respondent averred in her second affidavit that it was not a question of single text but rather 55 texts, and that the police interview shows that he was shown 23 texts during the interview (she exhibits the police interview), and that a further 22 were located after this interview.

12. The mother averred that she contacted the applicant in June 2017 because the child was in hospital and she felt that he should know. She says that did not attend the hospital and did not follow up with social services in any way. In her second affidavit, she averred that the child was also in hospital in 2015 and 2016, and again the applicant failed to attend on either occasion despite her having telephoned him to inform him.

13. As to the circumstances of her departure from England with the child, the mother averred that she gave notice on her flat on the 13th June 2017, having been served with a claim for arrears and repossession. She says she had decided prior to that that she would return to Ireland to live with her child because she had no financial support from the applicant, had arrears of rent, and was out of work. She says she started moving her personal belongings back to Ireland around March 2017. One of her exhibits was a document indicating that she had given the required 4 weeks' notice on her tenancy on the 13th June, 2017 (four weeks to expire on 10 July 2017). On the 26th June, 2017, the mother advised the English medical practice where the child had been registered shortly after she was born that "she would soon be relocating out of our catchment area". This is clear from a letter from the medical practice in question which was exhibited in the case. Another document from an Irish County Council shows that the respondent had made application on the 10th March 2017 for social housing in Ireland.

14. In his second affidavit, the applicant averred that the last time he saw his daughter was on the street in London on the 6th July 2017. He describes it as a "chance encounter" and yet also seeks to characterise it as an exercise of his access.

15. In his first affidavit, the applicant averred that he discovered that the respondent had vacated her accommodation in London when he visited her property "to exercise access" on the 12th July 2017. The mother pointed out in her first affidavit that for him to do so would have been a clear breach of the restraining order. In his second affidavit, the applicant averred that he did not go to the mother's address on the 12th July 2017 and provides no explanation for this stark change in his sworn evidence.

16. It was accepted in the written pleadings and in the written submissions of the applicant that the mother left for Ireland with the child on or about the 10th-12th July 2017. At the hearing, a submission was made orally that this date had not been proved by the mother. Counsel for the mother objected that evidence of the flight ticket could have been produced but was not, because it had been assumed that the date was not in issue as a result of the manner in which the applicant had pleaded his case. It is the case that the applicant in his pleadings and written submissions accepted the 10th-12th July 2017 as the departure date, and in any event, the other evidence suggests a departure around this time, especially the expiry of her tenancy on the 10th July. Accordingly, I will take the date of departure as a matter of fact to be approximately the 10th-12th July 2017.

17. The applicant made an application for a prohibited steps order and a child arrangement order before an English family court in London. The applicant averred that he made this application on the 20th July 2017, and a court order dated the 21st July 2017 seems to confirm that this is so; the court on the 21st July 2018 adjourned the matter until the 30th August 2017 for a FHDRA (first hearing dispute resolution appointment). I have also been furnished with a documentary exhibit which is an application completed in handwriting. Some unusual features of his application may be noted. One is that one particular page is signed by the applicant and dated the 14th February 2017, while another page on the same application is signed and dated 12th July 2017. These are inconsistent with each other, and also the court order which indicates that the application issued on the 20th July 2017. Further, the 12th July 2017 coincides with the date he initially averred had visited her at her flat. Another feature of this application is that the applicant wrote that the matter was urgent because "*the respondent has removed the child from the United Kingdom several times unlawfully, without my permission, and made threats not to return. On one occasion I've had to contact Family Unite to aid with the return of the child who was being unlawfully held outside of England*". This is inconsistent with the version of events he gave to the police in September 2016. Thirdly, the application sets out the mother's connections to Ireland and there is an ambiguous response, with both boxes "yes" and "no" being ticked in response to the question on the form: *"Has a request been made or should a request be made to a Central Authority or other competent authority in a foreign state...?".* The response then names the Irish Central Authority and says that the mother had taken the child and threatened to migrate back to Ireland "*on many occasions*" and that "*many times she has disappeared without notifying me. When I find out she insists that she won't be returning to England. A request should be made to the relevant authority to register and enforce any court orders that may be granted by the courts in the UK*". This appears to me to be misleading, in light of the evidence discussed earlier. My conclusion, having regard to the contents of this document and the overall circumstances, is that the applicant at the time of the application in late July 2017 knew or strongly suspected that the mother and child were already in Ireland and brought the application precisely because he feared that this time, they were not coming

back. However, it was repeatedly submitted on his behalf that he did not know she was in Ireland until the 7th December 2017.

18. The matter appeared before the relevant English court on a number of dates (30th August 2017, 11th October, 2017, 20th October, 2017, and 25th October 2017) at which the respondent was not present. The respondent avers that she did not know about the proceedings until she was notified by email in November 2017. She was represented by counsel at a hearing on the 7th December, 2017. The applicant averred that he did not know where the respondent was until this particular hearing date in December 2017. The respondent averred that he had her contact (phone and email) details, and in any event was well aware of her parent's address in Ireland, and yet never sought to serve her. She exhibited emails between them from January 2015 onwards, including emails attaching images, which she says were photos of the child. One of these emails included information about her parents' address in Ireland. She says she did not appear at the early dates in the English courts proceedings because she was not aware of them. She says that the first time the applicant appears to have told the English court that she may be living with her parents in Ireland was in October 2017 and furnished her contact details, but that nothing had occurred between July and October to give him this additional information, demonstrating that he had the relevant information all along. From the evidence before me, it seems that the applicant was clearly aware that she frequently went to her parents in Ireland and that he had her email and mobile phone details since at least 2015, and I find it not credible that he did not at least strongly suspect, at least after her first non-appearance in the English court, that she might be in Ireland; and further, that he appears to have failed to inform the English court of this history and of the fact that he had contact details for her in Ireland, which might have facilitated earlier service of the English proceedings upon her. The fact that the respondent instructed counsel for the December 7th hearing in the English court is consistent with her having received notification of the proceedings in November 2017; it was not a situation where she had chosen to ignore the English proceedings. In those circumstances, I fail to see how she would have ignored earlier communications about the proceedings, and I therefore find the applicant's averments that he tried to contact her by phone not credible.

19. On the 1st February 2018, there was a hearing in the English High Court and it was held, *inter alia*, that the English courts were seized of the matter because the child had been wrongfully removed from her habitual residence in England and Wales, and giving directions, *inter alia*, as to access by Skype and related matters.

20. The applicant submitted a written request for the return of the child to the Central Authority of England and Wales, who in the normal way, sent it to the Irish Central Authority. By document dated the 11th February, 2018, the applicant authorised the Central Authority in Ireland to act on his behalf.

21. The special summons commencing the present proceedings issued on the 7th June, 2018 grounded on an affidavit sworn by the applicant on the same date. In his grounding affidavit, the applicant averred that he believed that the child was wrongfully removed to Ireland on the 12th July, 2017 without his consent.

22. One final matter to be mentioned is the question of financial provision provided by the applicant, a matter which is in dispute. The applicant averred that he always made a maintenance contribution of £60 per week in support of the daughter and that he also established a trust account in her name for her into which these and other lump sum payments were made. He exhibited bank statements in this regard which show a pattern of minimal payments into an account in the child's name (e.g. £10) between 2014 and late 2017, and thereafter a number of larger payments (e.g. £50) from late 2017 until July 2018, with an unexplained transfer on the 30th June, 2018 to himself of £1,000. He also provided extracts from a bank account in his name showing payments of £60 leaving the account every week by standing order to the mother during particular periods, such as April/May 2017, August/September 2017 and November/December 2016. It is not clear, but it may be that his position is that the regular maintenance was being paid directly to the mother by way of cash in earlier times. In March 2018, the English court ordered that maintenance could resume, provided the mother confirmed in writing that this would not be viewed as acquiesence on his part, which she refused, and he therefore made the £60 payments into the trust fund instead. The bank statements appear to support this. The mother averred that the applicant had provided almost no financial support for the child and that this had been a "bone of contention" between the parties because she was struggling financially while she was in England. She says that she could not afford childcare and had to seek the assistance of her mother who came to England for a period to help her and to enable her to continue to work. She averred that she had to stop working as a teacher because she could not afford childcare and ceased working in July 2016. She also accumulated arrears of rent. She pointed out that the trust fund in respect of the child was not accessible to her, and pointed out that the applicant had withdrawn the above-mentioned £1,000 in June 2018. She said that the total she had received from the applicant since the child's birth was £60 per week since the 23rd June 2016 to the 15th December 2017, with some intermittent contributions in addition. She submitted that increases in payments by the applicant in more recent years were linked with the various court proceedings in being.

23. I note that in his second affidavit, the applicant offered the following undertakings in the event that the Court made an order for return: (1) to provide sufficient finances to enable the mother and child to return to England, including a deposit for accommodation; (2) maintenance for the child for a number of weeks pending the determination of the English courts; (3) that he would not initiate or pursue a prosecution arising out of the taking of the child from England.

**Discussion**

24. Despite some minor skirmishes on certain factual matters relating to the following issues within the affidavits, it became clear at the hearing that there was no real dispute as to the following; (a) that the child was habitually resident in England prior to her removal to Ireland; (b) that the father had not consented or acquiesced with respect to her removal or retention in Ireland; (c) that the father's application under the Hague Convention pre-dated the expiry of one year from the child's removal to Ireland and therefore the settlement defence in article 12 of the Convention did not apply. As noted above, the issues in contention were (a) whether the father was exercising custody rights prior to and at the time of the child's removal from England and Wales; and (b) whether there was a grave risk within the meaning of article 13(b) of the Convention. I will deal with issue (a) first as it seems to me to be at the heart of the case.

**Exercising Custody Rights**

25. Article 5(a) of the Convention provides that "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". In contrast, article 5(b) says that "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

26. Article 3 of the Convnetion provides that 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 the removal or retention *those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.* (emphasis added)

27. Article 13(a) of the Convention provides that the judicial or administrative authority of the requested State is not bound to order

the return of the child if the person, institution or other body which opposes its return establishes that the person, institution or other body having the care of the person of the child was not "*actually exercising the custody rights at the time of removal or retention*...".

28. In *M.J.T. v.C.C.,* [2014] IEHC 196, Finlay Geoghegan J. dealt with various aspects of the requirement that the applicant must not only have legal right to custody of the child in question, but also must have been exercising those rights. She discussed the burden of proof and the interaction between article 3 and article 13 on the issue, and she also considered whether the payment of maintenance may suffice to establish the exercise of custody rights. In that case, the mother and father had been living together in England, during which time the child was born there in 2005. After the mother and father's relationship broke down in 2007, the child lived with the mother. They moved to Ireland in 2011. Sadly, the mother died in 2012 and the father then sought the return of the child to England. The deceased mother had provided that her own mother would care for the child upon her death. The High Court (Finlay Geoghegan J.) dealt as a preliminary matter with the question of whether the father had put before the court sufficient *prima facie* evidence that he had actually been exercising the custody rights (that he undoubtedly had as a matter of law) prior to the child's removal to Ireland, pursuant to article 3(b) of the Convention. Because this was dealt wtih as a preliminary matter, for the reasons set out in the judgment, the issue was dealt with, not in the usual way as a matter of defence under article 13(a) of the Convention, but rather whether there was *prima facie* evidence under article 3. In the course of her judgment, Finlay Geoghegan J. said as follows:-

> 20. There appears to have been limited consideration by the courts of this issue and as to what facts will be considered as preliminary evidence of the actual exercise of custody rights for the purposes of Article 3(b) of the Convention. Nevertheless, it is possible to discern from the decisions to which my attention was drawn by counsel and one other that, firstly, the courts take a very liberal view as to what will constitute the exercise of custody rights, and, secondly, that it does require the demonstration by an applicant/parent that he either did or attempted to maintain contact or a relationship with his child.
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> 21. In *Re H.; Re S. (Minors) Abduction*: *Custody Rights* [1991] 2 A.C. 476, Lord Brandon observed at p. 500:-
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> > "In my view article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control."
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> 22. In *Re W. (Abduction: Procedure)* [1995] 1 F.L.R. 878, Wall J. in the context of considering a defence raised pursuant to Article 13(a) of non-exercise of rights of custody, rejected a contention that the agreement of a mother who held sole rights of custody that the child live with his father was not a continuing exercise of the mother's rights of custody. He considered that the approach he took was supported by the observation of Lord Brandon to which I have referred.
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> 23. In *Friedrich v. Friedrich* 78 F. 3d 1060 (6th Cir. 1996) in the U.S. Court of Appeals for the Sixth Circuit, Boggs J. put it thus:-
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> > "Enforcement of the Convention should not to be made dependent on the creation of a common law definition of 'exercise'. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child."
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> 24. In this jurisdiction, McGuinness J. in the Supreme Court again considered the actual exercise of rights of custody in the context of a defence raised pursuant to Article 13(a) of the Convention in *M.S.H. v. L.H.* [2000] 3 I.R. 390. The applicant father in that case had been imprisoned in England. During the period of imprisonment, the children had been brought to see the father from time to time. In upholding the High Court Judge's conclusion that the respondent had not established that the applicant was not exercising his rights of custody at the time of removal of the children to Ireland, McGuinness J. at p. 403, stated:-
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> > "Whether or not the plaintiff was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition his application to the Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody."

29. The evidence in the case of *MJT* was that the father had paid maintenance through the Child Support Agency (CSA) in England in the period prior to the child leaving England and coming to Ireland and continued to make such maintenance payments through the CSA until shortly after the mother's death. The evidence was also that he did not seek to exercise access to the child or otherwise make any contact with her with a view to maintaining a relationship. There were some initial access visits. After the mother received advice that access should be supervised, a contact session was arranged but when the mother was informed that the father had made no arrangement to have the visit supervised, the contact did not take place. The father did not pursue the issue of contact thereafter, which was for a period of 3 years before the removal of the child from England. The court reached the conclusion that there was insufficient preliminary evidence that he was exercising the rights of custody he held in relation to the child as the holder of parental responsibility in accordance with the laws of England during a significant period of time prior to the child's removal to Ireland. Finlay Geoghegan J. commented:-

> "The authorities to which I refer simply require him to show that he kept or sought to keep regular contact or a relationship with his child. There is no evidence he did this during the three years prior to Sue's removal from England. In circumstances where the applicant was living in the same country as Sue, the payment of maintenance through CSA does not in my judgment suffice. In the words of Lord Brandon in *Re H.* he was not maintaining the stance and attitude of a custodial parent. The definition in Article 5 of the Convention of rights of custody as including 'care of the person of the child' [emphasis added] underlines the requirement for personal contact or seeking to maintain contact or a relationship as part of the exercise of rights of custody. There may, of course, be factual situations where there is evidence that personal contact is precluded by court order or other reason, despite attempts made. There is no such evidence herein."

30. It is clear from the above judgment and the authorities cited therein that while the courts must take a liberal view on the

question of whether a parent is exercising custody rights, the focus of the inquiry is whether the parent sought to have a relationship with the child, not merely whether, for example, he provided financial assistance in respect of the child. As the last sentence of the last quotation above makes clear, it may be that a court order precludes personal contact between the parent in question and the child, but that is something to consider as a matter of fact in each case. It is also clear from the authorities that where the issue of the exercise of custody rights under the Convention arises other than as a preliminary issue, the burden of proof lies on the respondent under article 13(a) to establish that the applicant was not exercisng his cutsody rights at the time of the removal.

31. It seems to me that the present case involves a situation where the father did not, at least from April 2016, in any serious way seek to maintain a relationship with the child or maintain the stance and attitude of a custodial parent. The provision of finance, through weekly payments, whether adequate or inadequate, or by lump sum payments into a trust fund for the child, is not evidence which satisfies this test as it does not support a finding that the father wished to maintain a personal relationship with the child herself. The accidental encounter between the applicant and his daughter on the 6th July 2017 is certainly not, in my view, the exercise of a right of access, contrary to what was contended for on behalf of the applicant. Since this was a chance encounter and not even initiated by the applicant, it could not possibly be characterised as an attempt to sustain a relationship with the child. Further, as between April 2016 and July 2017, a period of approximately 15 months, the applicant did not see his child. This does not appear to be in dispute, and certainly what the applicant himself said to the police in September 2016 corroborates this. The applicant's main argument appears to be that the respondent was preventing him from having access to the child. It is also true that two non-contact orders were made against him. However, the applicant brought no court application seeking access or any form of rights or decision-making power in respect of the child herself. It was not suggested that he made any attempt to make arrangements through the social services, notwithstanding that the order dated January 2017 specifically referred to the social services as the medium through which contact with the mother could be made. Nor did he make any request to the English courts to assist him in the face of what he considered to be unreasonable refusals on the part of the respondent. Further, he failed to do so despite his knowledge of the respondent's frequent trips to Ireland with the child, and having been advised by the authorities in September 2016 about what avenues to pursue if he were concerned about child abduction. The height of his case in support of his being an "active and engaged father" is that he was constantly making telephone contact with the mother, requesting access to the child and rebuffed, in circumstances where he took no concrete steps, using the relevant authorities, to secure access. Finally, although it is more minor than the other matters, the applicant does not contradict the evidence that on the three occasions he was informed that his daughter was in hospital, he failed to attend or make further inquiries as to her welfare. In all of the circumstances, it seems to me that it could not be said that at the time of the child's removal to Ireland, the applicant was "exercising" his rights of custody within the meaning of the Convention. Notwithstanding that I must adopt a liberal approach to the "exercise of rights of custody", I find myself unable to reach the conclusion, on the evidence before me, that this applicant was exercising rights of custody at the time of the child's removal to Ireland.

32. Counsel on behalf of the applicant referred to the authorities on habitual residence which emphasise that a unilateral decision by one custodial parent to relocate with the child is unlikely to result in a change of habitual residence without the consent of the other custodial parent, including *K v. J* [2012] IEHC 234, where Finlay Geoghegan said, *inter alia*: "*In general, one parent cannot unilaterally change the habitual residence of a child. It requires at a minimum the acquiescence of the other parent or a court order to the change of the place of residence*" (para 37). This is so, but this begs the question of whether the applicant in the present case was a parent exercising custodial rights at the time, and since I have found that he was not, those authorities do not seem to me to be on point. Those cases concerned a situation where the defence asserted was one of change of habitual residence, not the specific defence under article 13(a) in the present case which relates to the requesting parent's *exercise* of custody rights. This seems to me to be a defence even if there has been no change of habitual residence.

33. As a fallback position, counsel on behalf of the applicant submitted that the English courts had custody rights under article 3(b) of the Convention by virtue of the the applicant's application to them, relying upon cases such as *HI v. MG* [2000] 1 IR 110 and *GT v. KAO* [2007] 3 IR 567. It is true that in particular circumstances, it may arise that a removal could be wrongful as having been in breach of rights of custody vested in a court as distinct from a parent. However, since I have found as fact that the respondent left England on or about the 10th-12th July, 2017 and that the application to the English courts was not issued until the 29th July, 2017, and not served on the respondent until November 2017, I cannot see how this particular form of custody rights could possibly arise on the facts of this case, even leaving aside the question of whether the relevant starting point is the date of issue of proceedings, the return date, or the date of service. The respondent had already left the jurisdiction of England and Wales by the time the applicant issued the proceedings in the English courts.

34. My understanding of article 13(a) of the Convention is that, by reason of the words "not bound" therein, once the Court has made a finding that the respondent has proved that the applicant was not exercising rights of custody at the relevant time, the Court then has a discretion as to whether or not to order the return of the child. In the present case, I propose to exercise my discretion against ordering the return of the child because the mother has always been the primary carer of the child, the child is of tender years and had not yet, for example, started school before she arrived in Ireland, and because the primary carer (the mother) has family and other supports in Ireland whereas she appears to have been strugglying financially in England. Further, the mother has averred that she was in fear of the applicant and there is a history of complaints to the authorities in England against him, and a restraining order was made at one point. It seems to me that the best interests of the child would be served by having her primary carer in a situation where she has peace of mind and a stable environment in which to raise the child.

**Grave Risk**

35. The mother's case in respect of the "grave risk" defence is essentially that she, who has always been the primary carer of the child, is in fear of the applicant, that he causes her stress and anxiety (in support of which she submitted a GP report), and is without proper financial support from him, and that if she is forced to return to England to live, this will impact detrimentally upon her mental state and in turn upon the child which would be an intolerable situation for this particular child.

36. In the event that I am wrong in my conclusion above that the applicant was not exercising his custody rights at the time of the child's removal, I would conclude that the high threshold for the defence of grave risk is not made out as established by the authorities because it would be possible for the English system to provide sufficient structure and protection to the mother to enable her to live in that jurisdiction if she were to return. However, I do think the same factors should be factored into the exercise of my discretion in respect of the "exercise of rights of custody" issue.

**Conclusion**

37. My conclusion is that the applicant was not exercising his custody rights for a significant time prior to and at the time of the removal of the child from England to Ireland by the respondent mother. In the exercise of my discretion, I refuse to order the return of the child.