Neutral Citation Number: [2006] IEHC 448

This judgment is circulated in redacted form to avoid identification of the parties

THE HIGH COURT

[2006/8 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
AND IN THE MATTER OF COUNCIL REGULATION 2201/2203
AND IN THE MATTER OF S. C. C., A CHILD

BETWEEN

FOYLE HEALTH AND SOCIAL SERVICES TRUST

APPLICANT

AND
E. C. AND N. C.

RESPONDENTS

AND
BY ORDER HEALTH SERVICE EXECUTIVE.

Judgment of Ms. Justice Dunne delivered on the 7th day of September, 2006.

1. The applicant herein is Foyle Health and Social Services Trust. It claims to be the corporate parent of S.C.C. who was born in January, 2005, in Co. D. The first and second named respondents are his parents. They were married in July, 1996.

2. S. has six siblings, the eldest having been born in August, 1996 and the youngest having been born in March, 2003. It is not necessary to outline the full background of the family. Suffice it to say, all of S.'s siblings are the subject of care orders in this jurisdiction. A full summary of the circumstances giving rise to this situation is set out in the affidavit of F. L., sworn herein on 16th May, 2006. He is a social worker employed by the third named respondent. It is sufficient to note that the first and second named respondent have a volatile relationship, that they both have engaged in criminality, alcohol abuse is a factor in their lives and the children of the marriage have suffered neglect and in some instances physical abuse.

3. North Cork Community Services were responsible for the care of the six children of the first and second named respondents. They held a case conference to consider what steps should be taken in respect of the child then expected by the first named respondent. It was decided that there were serious concern as to the health and welfare of the child and it was concluded that the child would be at risk of significant harm and that an emergency care order would be sought following the birth of the child with a view to applying for a full care order thereafter. On 30th November, 2004, the first named respondent was informed of this decision. She indicated that she would give birth to the child elsewhere to avoid the child being taken into care.

4. Subsequently on 21st December, 2004, the first named respondent notified North Cork Community Services that she was residing in Northern Ireland. On 15th January, 2005, S. was born in A. Hospital in Northern Ireland. Staff of the first named applicant monitored the first named respondent and S. from 24th January, 2005, to 9th February, 2005. On 10th February, 2005, it was found that there were difficulties where the first named respondent was residing involving alcohol and tensions and that there was an absence of appropriate adult care for S. The first named respondent attempted an act of self harm and indicated that S. would be injured if anyone tried to remove him. Accordingly the applicant took S. into care and he was placed in foster care with trice weekly visits by the first named respondent. The second named respondent arrived in Derry having been released from prison in this jurisdiction in March, 2005.

5. The situation thereafter was that interim care orders were made on a regular basis in Northern Ireland in respect of S. S. continued in the care of foster parents and access visits took place during that period. The position continued to be monitored by the applicant.

6. It was proposed to make a final care order in respect of S. and the same was listed for hearing before the High Court in Belfast on the 13th day of February, 2006. In an affidavit sworn herein on 5th April, 2006, M. S., a solicitor attached to the law centre at F., the solicitor for the applicant herein with the authority of the applicant herein, exhibited a number of reports that had been prepared for the purposes of child care litigation in Northern Ireland in respect of S.. Those reports set out the history of the matter from the time S. was made the subject of interim care orders in Northern Ireland until the date of his abduction. Those comprehensive reports set out details in regard to contact between S. and his parents and contain assessments of the family situation as a whole. On 13th January, 2006, (wrongly dated 13th January, 2005), a court report prepared for the final hearing was prepared by Ms. F. and Ms. McC. That report considered all of the possible options available in relation to the future of S. including a placement with S.'s parents or with other extended family members. Ultimately the view reached was that S.'s care required stability and security which could best be achieved through adoption. The views of the first and second named respondents were sought and it is clear that throughout the process the fist named respondent has made it clear that she is opposed to the adoption of S. Clearly the fact that an application for a final care order was listed for hearing was the catalyst that led to the abduction of S. by his mother on 3rd February, 2006, during an access visit.

7. Replying affidavits were furnished by the first and second named respondent. In her replying affidavit, the first named respondent takes issue with a number of matters. In the first instance, she denies that the infant, S., is habitually resident in Northern Ireland. She states this on the basis that the birth of the child occurred in Northern Ireland without the knowledge or consent of the second named respondent and that the detention of the child in Northern Ireland militates against such a finding. She further denies that the removal of the child from the jurisdiction of the Northern Ireland courts to this jurisdiction was wrongful. She alleges that the habitual residence of the child is within this jurisdiction. She refers to the proposal for adoption and contends that a return of S. to the jurisdiction of the courts of Northern Ireland would breach the constitutional rights of her family, those of S. and S.'s siblings. She also alleges that the return of the infant to the jurisdiction of Northern Ireland would expose him to psychological harm or otherwise place him in an intolerable situation in that it is "the intention of the said courts to place the infant for adoption thereby severing his family ties". (The reference to "courts" in that sentence is obviously intended to be a reference to the applicant.)

8. In her affidavit she also referred to an application made to the courts in Northern Ireland pursuant to the provisions of Article 15 of Council Regulation EC 2201/2203 to transfer the care proceedings to this jurisdiction as being the courts best place to hear the case. That order was refused. She stated that the judge hearing those proceedings placed great emphasis on the wish of S.'s foster parents to adopt him. Finally she stated that the only connection which the infant S. had to Northern Ireland was the fact of his birth in that jurisdiction. She also contended that it was contrary to the purpose of the Convention and regulations to return an infant summarily to another jurisdiction solely for the purpose of severing his family relationship. Finally she contended that the release sought herein should be refused.

9. As referred to above a replying affidavit was also sworn by the second named respondent. The same was in very similar terms to that of the first named respondent save that he indicated that while he understood the reasons why the first named respondent travelled to Northern Ireland to give birth he did not consent to the same.

10. A replying affidavit was sworn by M.F., a social worker employed by the applicant herein. She disputes the contention that the first named respondent moved to Northern Ireland to give birth without the consent of the second named respondent. She expresses the belief that the second named respondent was aware that the first named respondent had moved to Northern Ireland prior to the birth of S. In that regard she exhibits a note from the Probation and Welfare Service in which Mr. C. had expressed his wishes for his unborn child. It states as follows:-

> "I want the unborn child to stay with his mother, E.C. I will cooperate in every way. The mother's heart will be broken and my heart if the child is taken. E.'s mother and brother are staying with E. to help her."

11. I should state at this point that I do not think that that expression of views by the second named respondent goes as far as contended for by Ms. F. but I note that he was at the time in custody and obviously had nothing to do with the removal of the first named respondent to Northern Ireland. However it is noteworthy that up to 3rd February, 2006, there was nothing done by the second named respondent to suggest or indicate that he had not consented to or had expressly objected to the removal of the first named respondent to Northern Ireland for the purpose of giving birth.

12. Ms. F. in her affidavit goes on to aver that there is no reality to any assertion that S. had been at any time habitually resident anywhere other than Northern Ireland. Prior to his removal he was in the care of the applicant and she argued that his removal was in breach of the rights of custody vested in the applicant and was wrongful. She pointed out that S. was and remains subject to care orders in Northern Ireland.

13. Ms. F. then takes issue with a number of other averments contained in the affidavits of the first and second named respondent. She takes issue with the suggestion that any delay in the making of an application pursuant to the Hague Convention was to do with waiting for S. to be presented to the adoption panel on 16th March, 2006. That procedure could not take place because S. was no longer in the jurisdiction.

14. She disputes the allegation that there is a risk that the return of S. would expose him to psychological harm or place him in an intolerable situation. She points out that the first named respondent gave no consideration to his welfare when abducting him. She refers to a report of Dr. L.McL., child psychologist, that the child experienced trauma in being separated from his foster carers as a result of the abduction. She ends that if adoption was considered in the best interest of the child a post-adoption contact plan would be put in place to facilitate contact between the first and second named respondents and S. suitable to his needs. Finally she exhibited a transcript of the judgement of the High Court of Northern Ireland in the context of the first and second named respondents' unsuccessful application pursuant to Article 15 of Council Regulation EC 2201/2203. She states that the primary concern of the applicant herein has always been to secure for S. a care plan in his best interests and which will provide future and permanent security and stability of care for him. She denies that the return to Northern Ireland is sought solely to sever his family relationships.

15. At the outset of the hearing in this matter an application was brought on behalf of the applicant to amend the special summons herein. Having heard arguments in relation to that I granted that application.

16. Counsel for the applicant then made the point that once it was established that the removal of S. from Northern Ireland was wrongful and that S. at the time was under 16 years of age that the applicant was entitled to a mandatory order directing the return of S. This was of course subject to the first and second named respondents contention as to certain matters put in issue by them – namely, they challenged the habitual residence of S. in Northern Ireland, they deny that the removal of S. was in breach of the applicant's right of custody, they contended that the proposed adoption of S. was a breach of their fundamental rights under the Constitution and indeed the fundamental rights of S. and his siblings and finally that a return to Northern Ireland in the circumstances exposed him to a risk of harm or would otherwise place him in an intolerable situation in that it is proposed to place S. for adoption thereby severing his family ties.

17. C. C. S.C., on behalf of the applicant referred to the judgment of McLaughlin J. in the proceedings between the applicant and the respondents in respect of the application pursuant to Article 15(2)(a) of Council Regulation EC 2201/2203. That judgment was delivered on 19th May, 2006 and sought the transfer of the care proceedings to the jurisdiction of the courts of Ireland. For an application under Article 15 to succeed it was necessary in those proceedings for the Northern Ireland court to be satisfied as to certain matters, namely that the child has a particular connection with the courts of another Member State, that the courts of that other Member State would be better placed to hear the case and that that was in the best interests of the child. I think it would be helpful at this point to refer briefly to one passage from that judgment at p. 3, para. 5, where McLaughlin J. stated as follows:-

> "It is accepted by the parties, and it is my own reading of Article 15(1), that before I may consider exercising any discretion vested in me, I must be satisfied that the courts of Ireland 'would be better placed to hear the case' and that it 'is in the best interests of the child' to do so. To vest those courts with such jurisdiction, however, it is necessary to establish that the child has 'a particular connection with another Member State'. By reason of the family circumstances in this case it is agreed that S. has a particular connection, sufficient to satisfy the regulations, with Ireland. This arises from the fact that the child is entitled to enjoy dual nationality as it was born in Northern Ireland and both parents were born in Ireland. It is also agreed, however, that S., having been born in Northern Ireland, and having resided within this jurisdiction until the date of his abduction, is, for the purposes of the regulations, habitually resident here."

18. The case before McLaughlin J. then proceeded on the basis that S. was habitually resident in Northern Ireland and therefore the questions that were considered by him were related to (a) the best interests of the child. The court went on to hold that S. had a particular connection with another Member State but decided that the court was not satisfied that the Irish courts would be better placed to hear the case as opposed to the courts of Northern Ireland. It was added by McLaughlin J. at p. 6, para. 11:-

> "Secondly, I am satisfied it is in the best interests of S. that he should have his future welfare determined by the courts of Northern Ireland which were already vested with all necessary jurisdiction and were in a position to conduct a full hearing within a few days of the date of the abduction."

19. On that basis he refused to transfer jurisdiction to the courts of Ireland.

20. In his submissions, C.C. S.C., referred to the applicable laws in relation to the Hague Convention. In the preamble to the Hague Convention it is provided that the interests of children are of paramount importance in matters relating to their custody. The objects

of the Convention are to secure the prompt return of children wrongfully removed to or retained in a contracting State; and to ensure that rights of custody and of access under the law of one contracting State are effectively respected in the other contracting States. Mr. C. pointed out that in the proceedings under Article 15 of Council Regulation 2201/2203 the first and second named respondents had argued that the best interests of the child lay in this jurisdiction but their argument in that regard was rejected by the court in Northern Ireland. Counsel then went through a number of tests that have been enunciated at different stages in attempting to determine the habitual residence of children. He referred to the dependency test which is no longer regarded as the appropriate test. The second test is the parental rights test which now is no longer regarded as being appropriate in that it focuses on the right of the parents as opposed to the child. The next test considered was the child centred test and finally there is the fact based test. Counsel pointed out that the first named respondent went to Northern Ireland with a settled purpose, namely to avoid S. being taken into care in this jurisdiction. She remained there for a long period. The father, whilst he may not have known that the first named respondent was going to Northern Ireland to give birth, wanted the child to stay with his mother. He pointed out that a child can have the habitual residence of the parents or one or other of them or indeed no habitual residence. Equally a child can have habitual residence notwithstanding that of the parents. He referred to the decision in the case *of B. v. H. (Habitual Residence: Wardship)* [2002] 1 F.L.R. 388, a case relied on by counsel on behalf of the first and second named respondents in her written submissions in which it was held by Charles J. in the family division, inter alia, that a baby was and remained habitually resident in England even though she had never been to England. That case was further considered in the case of W. and *B. v. H.* [2002] 1 F.L.R. 1008. In his judgment Hedley J. commented on that case as follows (at p. 1015):-

> "That case concerned four children but it is only the circumstances of the youngest that are relevant here. The parents were Bangladeshi who had acquired habitual residence in this country. Between conception and birth the family went to Bangladesh for a holiday but the father did not let allow the family to return home. In due course the mother managed to do so on her own and sought the assistance of the English courts, hence the issue of habitual residence. Charles J. held that neither the mother nor the elder children had lost their habitual residence in England. He then went on to conclude that the youngest, who had of course never left Bangladesh, was habitually resident in England. I respectfully agree with Charles J's. conclusion (based on his extensive review of authority) that he was not precluded on the authority from making that finding of fact in his case."

21. In reliance on the judgment of Charles J., counsel in the case then argued that:- "As in California law the only parent is W. and as at the date of the birth W. was habitually resident in California, therefore the court should find that these twins are habitually resident in California."

22. Hedley J. went on to comment as follows:-

> "I am not convinced by that at all. My reason for that is that I think there is a potential fallacy in the assumption on which it is based. Whilst I would not assert that as a matter of fact no child can have an habitual residence where he has never been and whilst certainly I cast no doubt on the factual conclusion in *B. v. H. (Habitual Residence: Wardship)* [2002] 1 F.L.R. 388, I remain hesitant. It seems to me that Charles J.s. proposition cited above, if taken out of the context of his particular case, run the very risk against which the Court of Appeal have repeatedly warned mainly confusing a legal and factual proposition. If Charles J. is asserting as a matter of law that a child takes the habitual residence of its parents then that is to confuse domicile with habitual residence and I would have respectfully to disagree. If what he asserts is a proposition of fact, then, by definition, it cannot be good for all cases. Each one must stand alone."

23. Having referred to those two authorities, Mr. C. asserts that it is not correct to say that a child takes the habitual residence of his parents. He points out that a person may have no habitual residence under the Convention. He contended that both parents should be held to have been habitually resident in Northern Ireland in January, 2005, when S. was born. He also questioned the concept of the common intention of the parents if in fact, as is now the case, the second named respondent says he did not consent to the first named respondent going to Northern Ireland. Finally he made the point that there was residence in Northern Ireland for a period of some 13 months by S. and indeed by his mother. If the position of the parents has some bearing on the question of habitual residence counsel argued that the second named respondent had in effect ceded whatever rights he may have had to the first named respondent and if that contention was not so then he argued that there was no common intention on the part of the parents and they could not jointly confer habitual residence on S.. Notwithstanding those arguments he noted that in the Article 15 proceedings before the courts of Northern Ireland the parents agreed that S. had habitual residence or presence in Northern Ireland.

24. In relation to one other point made on behalf of the respondents to the effect that the interim care orders did not survive the removal of S. from the jurisdiction, counsel made the point that that was a matter to be established by the respondents. In any event he argued that the question of whether or not the interim care orders were still extant was irrelevant in that at the time of the removal the care order was in force. Under the order that was extant at the date of the abduction the applicant enjoyed rights of custody. In those circumstances and in particular having regard to the specific terms of the interim care order the respondents were not allowed to remove the child from the jurisdiction of Northern Ireland without leave of the court. On that basis he contended that he had established that S. was under the age of 16 at the relevant time, that he had habitual residence in the jurisdiction of Northern Ireland, that the applicant had rights of custody and that the action in removing the child from that jurisdiction was in breach of those rights. Accordingly, he contended that he had met the required proofs under the provisions of Article 12 of the Convention.

25. I should also note that in his written submissions, counsel for the applicant referred to the decision of the High Court in the case of C.M., *a Minor v. Delegacion Provincial de Malaga* [1999] 2 I.R. 363, a judgment of McGuinness J. In the course of her judgment at p. 381 she stated as follows:-

> "Having considered the various authorities opened to me by counsel, it seems to me to be 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 would be that of the parent. However, the habitual residence of the child is not governed by the same 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.
>
> In the instant case the first plaintiff was born in Spain, was placed in the lawful custody of the first defendant in Spain, and has never left Spain. The mother has returned to Ireland and sought the return of her child. I cannot accept that the mother's decision can, of itself, result in the change of the child's habitual residence to Ireland when the child has never, at any stage, been present in Ireland."

26. Ms. M.W. S.C. appeared on behalf of the first and second named respondents. She argued that the child enjoyed the habitual residence of his parents. Although he was born in Northern Ireland, the physical presence alone does not vest habitual residence in the child. She argued that the issue of habitual residence could only be determined by the parents. She disagreed with the suggestion that she alone could unilaterally establish habitual residence. She referred to the view expressed by the second named respondent which was noted and to which I have already referred. I have already dealt with that issue and I don't think that it is necessary for me to deal with that matter further.

27. Counsel pointed out that the concept of habitual residence is not defined in the Hague Convention. She argued that a factual approach must be taken and that as the parents in this case are married the child takes the habitual residence of the parents notwithstanding that the child had not been in this jurisdiction at the time of its birth. She relied heavily on the decision of Charles J. in the case of B. v. H. cited above in support of this contention. On the basis of that authority she argued that one parent cannot change habitual residence unilaterally. She argued that there had to be a settled intention on the part of both parents in order to change the habitual residence of a child. She referred to the Supreme Court decision in the case of *P.A.S. v. A.F.S.* [2001] 1 I.L.R.M. 306 and in particular to the judgment of Fennelly J. at p. 316 in which he referred to the decision in the case In *Re B (Minors) (Abduction) (*No. 2) [1993] 1 F.L.R. 993 in which Waite J. stated at p. 995 as follows:-

> 1. "The habitual residence of the 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.
>
> 2. Habitual residence is a term referring, when it is applied in the context of married parents living together to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether of short or so long durations.

All that the law requires for a 'settled purpose' is that the parents shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

> 3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention… Logic would suggest that provided the purpose is settled, the period of habitation need not be long."

28. In considering the issue of whether a child could be habitually resident in a country where he or she has never physically been present Fennelly J. then referred to the authority cited by McGuinness J. to the contrary effect. He also referred to English authority to the contrary, namely the decision in *B. v. H.* cited above and the decision in *W. v. H.*, judgment of Hedley J., also referred to above. Having referred to those authorities he went on to say as follows:-

> "I do not say that the place of birth of a child is an irrelevant fact. Clearly it will be of prime importance in many cases. The facts of many cases will not be as benign as that of premature birth during a weekend break in France. I do say, however, that to exclude, in every case, the possibility of a child being habitually resident in a country where it has never physically been is to introduce an unjustified restriction into the open and flexible notion adopted by the Convention."

29. Although she referred to the involvement of the first and second named respondents in proceedings in Northern Ireland she said that they did so for the purpose of getting custody of the child back. She argued that it was incumbent on the applicant to show when the habitual residence of the child was established in Northern Ireland given that is their contention. Equally she argued that it must be shown that the parents concurred in the child's habitual residence being in Northern Ireland. Contrary to what was contended for by Mr. C. she argued that the issue of S.'s habitual residence was not considered in the judgment of McLaughlin J. Although the question of habitual residence was referred to in the context of the judgment of McLaughlin J. in the manner in which it was referred to therein she argued that insofar as there was an agreement as to habitual residence that that was solely for the purpose of the application under Article 15.

30. Counsel for the applicant then argued that there was no capacity on the part of the applicant to vary the status of S. on the basis of the interim care orders obtained herein. No full order had ever been obtained by the applicant and therefore she argued that the applicant is not the holder of "parental responsibility". On that basis she argued that only the parents could alter the place of habitual residence. She contended that interim care orders do not confer parental responsibility on the applicant. She argued that the core indice of parental responsibility is a right to determine the place of residence of a child. She argued that in order for the applicant to have the right to determine the child's place of residence it would have been necessary for the applicant to have a full care order.

31. Counsel then dealt with the concept of rights of custody within the meaning of the Hague Convention. Article 5 of the Convention provides as follows:-

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

32. She noted the form of interim care order and the provisions contained therein in relation to movement of the child and she contended that given the definition of rights of custody and the nature of the applicant as a corporate entity that it did not have the capacity to determine the child's place of residence.

33. Counsel also referred to the fact that under Article 15 of the Council Regulation EC 2201/2203 it would have been open to the applicant to seek an order under Article 15 by way of declaration that the removal from the jurisdiction of the courts of Northern Ireland was wrongful, in that regard she referred to the decision in the case of *London Borough of Sutton v. R.M. and Others* [2002] 4 I.R. 488, a decision of Finlay Geoghegan J. In that case, as in the present case, an application had been made for liberty to amend the special endorsement of claim therein to assert that the removal of the minors by the first named respondent therein was in breach of the rights of custody of the English courts rather than those of the applicant as originally pleaded. Such an order was granted permitting the amendment subject to the right of the respondents to challenge the right to rely on such amendment. It was decided in that case, having regard to a declaration made by the High Court of Justice in England that immediately prior to the removal of the

minors' rights of custody within the meaning of the Hague Convention in respect of the children were vested in the English High Court and in the third named respondent and in those circumstances the amendment was permitted. In the present case such an amendment was sought and granted. However, unlike that case, no such declaration had been sought in the courts of Northern Ireland prior to the removal of S. to this jurisdiction. Counsel for the first and second named respondents referred at length to the judgment of Finlay Geoghegan J. in particular at p. 491 and p. 494 of the judgment. In her judgment she noted that:-

> "The question as to whether the commencement of proceedings seeking orders which might ultimately give an applicant a right of custody within the meaning of the Convention does or does not vest in the court itself in the interim a right of custody has been discussed by a number of courts in different jurisdictions with differing conclusions. …I have concluded on the facts of this case that it is improbable that the English High Court had a right of custody within the meaning of the Convention at the date of removal of the children. For the reasons already stated, I am not setting out a full analysis of the Convention's explanatory memorandum and case law which led me to this conclusion. I simply draw attention to the definition of the right of custody in Article 5 of the Convention; the objects of the Convention; the requirement in Article 3(b) that rights are actually exercised; the nature of the jurisdiction being exercised in the English proceedings and the fact that no order had been made by the English High Court restraining the first named respondent from removing the children from the jurisdiction of the English courts."

34. She contended that the position of the courts in Northern Ireland is far weaker than that of the courts in England in the case of *London Borough of Sutton*. Accordingly, she argued that it could not be said that the courts of Northern Ireland have a right of custody. Insofar as her argument on that particular point is concerned I accept her view that the courts of Northern Ireland do not have rights of custody within the meaning of Article 5 of the Convention. It should be noted however that there is one distinction between the points made in that case and the effect of the amendment in the *London Borough of Sutton* case. For some unusual reason, the effect of the amendment in the *London Borough of Sutton* sought to amend the special endorsement of claim to the effect that the removal of the minors was in breach of the rights of custody of the English courts as opposed to those of the applicant itself. In the present case the amendment was to the effect as follows:-

> "The removal of the child from the place of his habitual residence is in breach of the applicant's rights of custody and/or the rights of custody of the courts of Northern Ireland as defined in the Hague Convention, and is therefore wrongful."

35. In other words the application of the applicant herein remains live.

36. By way of defence, counsel has also raised the issue of delay under Article 13 of the Hague Convention. She argues that the delay in instituting proceedings between 3rd February and 6th April is such that this is an unacceptable delay and that such delay amounts to acquiescence to S. being in this jurisdiction. She also pointed out that some 24 days elapsed before the request for return was made. The steps taken by the applicant in relation to this matter have been set out in the affidavits and on behalf of the applicant herein. The first step taken by the applicants' officials was to contact the police and to ascertain the whereabouts of the first and second named respondent. The authority for the institution of proceedings was then signed on 27th February, 2006. I cannot accept the proposition that this amounted to delay on the part of the applicant such as to amount to any kind of acquiescence in the removal of S. to this jurisdiction.

37. Counsel for the first and second named respondents also placed great reliance on the provisions of Article 13(b) of the Convention to the effect that there is a grave risk that the return of S. would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. In this regard she relies heavily on the fact that it was the intention of the care plan to provide permanence for S. by way of adoption. She contended that the applicant is pursuing the proceedings herein solely and exclusively for the purposes of procuring the return of S. to the jurisdiction of the courts of Northern Ireland in order to facilitate his adoption. She argued that S. is a member of a family which is constitutionally protected. She noted that according to the various reports exhibited herein that the approach being taken by the applicant was to reduce the amount of contact with S. and his parents and she contended that the care plan proposed to have been put to the courts in Northern Ireland had the full care order proceedings taken place was a violation of his constitutional rights. She argued that the care plan as proposed would not be permissible within this jurisdiction and thus she argued that the situation proposed amounted to an intolerable situation.

38. Counsel then referred to an argument under the provisions of Article 20. It provides:-

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

39. She argued that this was not an empty formula and in support of her argument in that regard she referred to the decision in the case of *A.C.W. v. Ireland* [1994] 3 I.R. 232. In the judgment of the High Court, Keane J. (as he then was) stated at p. 240 of his judgment as follows:-

> "It is clear that the reference in Article 22 'the fundamental principles of the requested State' must refer, in the context of this State, to the provisions of the Constitution. Article 40 to 44, inclusive, of the Constitution appear under the heading 'Fundamental Rights' and define, either expressly or by implication, rights of the citizen which cannot be modified or abridged by any of the organs of government except to the extent permitted by the Constitution itself. These provisions reflect an acknowledgment by the Constitution that there are rights regarded as of such importance in a democratic society such as Ireland as to warrant recognition in this manner by the fundamental law of society, in our case the Constitution. At the international level, rights of this nature are declared in documents such as the European Convention on Human Rights and Fundamental Freedoms, to which Ireland is a party. … I am, accordingly, satisfied that the personal rights of children under Article 40.3.1 of the Constitution are fully protected and vindicated by the provisions of the Convention. It can indeed be said that, in the case of children who are Irish citizens and are wrongfully removed from the jurisdiction of the Irish courts, it affords them an additional machinery for the protection and vindication of their constitutional rights which was not hitherto available."

40. Having referred to that case, counsel for the respondents argued that the proposal to adopt S. does not accord with his rights as a member of the family. She also referred to a passage from the judgment in the *London Borough of Sutton* case referred to above at p. 496 referred to the rule of Article 13 and the exercise of the court's discretion. She then referred to a passage at p. 497 where it was stated as follows:-

> "The particular rights at issue in these proceedings are the rights of the family to which the three children and the first and second respondents belong. It was accepted on behalf of the applicant that this family is entitled to constitutional rights in accordance with Articles 41 and 42 of the Constitution. On the facts it may be that the father and children are

> Irish citizens. However, even if this is not so, it was accepted that as the children and mother are now present and living in Ireland they are entitled to such rights."

41. In the course of her judgment in that case, Finlay Geoghegan J. then went on to consider the provisions of Article 41.1, 42.2 and 42.5 of the Constitution. Of those provisions Article 42.5 may prove to be of most significance. It provides:-

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

42. Counsel in reliance on that provision emphasised the imprescriptible rights of the child. In this case, his right to belong to his natural family is in the process of extinguishment. The essence of her argument is based on the fact that under the Irish Constitution the child in this case and his family have certain protections and guarantees under Irish adoption law. Counsel made the point that similar guarantees are not available in Northern Ireland or if they are, it has not been established that this is so by the applicant.

43. In reply to those submissions, counsel on behalf of the applicant referred to *R.C. v. I.S.* [2003] 4 I.R. 431, a decision of the High Court in which Finlay Geoghegan J. considered the concept of rights of custody for the purposes of the Hague Convention. At p. 440 of the judgment she stated:-

> "It is further well established that the term 'rights of custody' within the meaning of the Hague Convention is to be given a broad interpretation in the sense explained in the judgment of Waite L.J. in Re *B. (a Minor) Abduction* [1994] 2 F.L.R. 249 and that it is not to be confined to rights which are a right of custody under the Domestic Law of a signatory State. Having regard to the significant rights attaching to a married parent who is the guardian of a child, albeit for non-custodial parent, under Irish law there appears to me to be an inescapable conclusion that, in the context of the Hague Convention and the distinctions made therein between 'rights of custody' and 'rights of access', that such person has rights of custody."

44. In this context he argued that an authority such as the HSE or in the present case the applicant herein has rights of custody under the Hague Convention and that those rights of custody include saying where the child lives and with whom the child lives. Ultimately, he argued that the question of habitual residence is a question of fact over which parental rights do not amount to a veto on reality. He conceded that a child can have an habitual residence in a country in which it has not been but he pointed out that in determining the issue parental intent is a factor but not the only one to be considered. Time spent in a jurisdiction must be considered. On this issue he also noted the distinction made by Hedley J. in the English case in which he referred to the judgment of Charles J. in *B. v. H.* and noted the distinction between habitual residence and domicile. The final point he made in relation to the issue of habitual residence was that the relevant time to consider the question of habitual residence was in the period immediately before the child's removal. It is fair to say that there was not an issue on that particular point between the parties.

45. On the question of parental responsibility he referred to the affidavit of M. S. grounding these proceedings in which she stated at para. 6:-

> "I say and believe that the applicant is the corporate parent of the child and that the said applicant has parental responsibility in respect of the child."

46. He pointed out that particular averment was not contested.

47. On the question of parental responsibility he pointed out that it has never been suggested by the applicant herein that the concept of parental responsibility was not exclusive to the applicant herein. He referred to the request for return document which referred to shared parental responsibility.

48. So far as a defence under Article 13 is concerned and in particular Article 13(b) he argued that the evidence fell far short of establishing a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. He pointed out that nonetheless even if there was a grave risk the court nonetheless has a discretion to return.

49. In relation to a defence under Article 20 counsel pointed out that the onus is on the respondents to establish that the return of the child is in breach of the fundamental rights and principles referred to in Article 20. He argued that that had not been done. One of the matters raised in this particular case was the fact that if S. was returned to Northern Ireland and was ultimately adopted the proposal was that he should be adopted by a family who are not a member of the travelling community. Nonetheless in this jurisdiction that has not been a bar to an adoption.

Conclusions

50. As can be seen from the above, one of the key questions in this case is the issue of habitual residence. Having regard to the various authorities open to me it seems to me to be clear that the concept of habitual residence is ultimately a question of fact. There is an issue in this case as to whether the second named respondent consented to the removal of his child in the first instance to Northern Ireland. That question is relevant to the question as to whether one parent can unilaterally bring about an habitual residence in respect of a child without the consent of the other parent. It may be difficult to imagine circumstances in which a child borne to a married couple living together and having an on-going relationship could require habitual residence in a particular State as a result of the unilateral actions of one of its parents. The facts and circumstances of the case of *B. v. H.* clearly show the dangers that can arise. However, I take into consideration the judgment of McGuinness J. in the case of *C.M. v. Delagation de Malaga* referred to above in which she pointed out that the phrase 'habitual residence' is not a term of art but a question of fact to be decided on the evidence in a particular case. On the evidence in this particular case, I have come to the conclusion that the habitual residence of S. immediately prior to his removal from Northern Ireland was that of Northern Ireland. I have come to this conclusion for a number of reasons. First, I am satisfied that the second named respondent was not aware of the intentions of the first named respondent in terms of moving to Northern Ireland prior to the birth of S.. However, I am satisfied that subsequent to his removal and having been made aware of the situation, he acquiesced in the removal of S. to that jurisdiction. On his release from prison in this jurisdiction, he went to Northern Ireland to reside with the first named respondent. At that point in time, S. had been taken into care. Undoubtedly, it could be argued that there was no acquiescence in circumstances where the child was at that stage the subject of an interim care order but in coming to the conclusion that the second named respondent had acquiesced I am influenced by the fact that no steps were taken by the second named respondent on his release from prison to attempt to have S. returned to this jurisdiction. I am further satisfied that at all times up to the removal of S. both parents took no steps to attempt to have S. returned to this jurisdiction. Thus I am satisfied that indeed both parents acquiesced in circumstances giving rise to S.'s habitual residence in Northern

Ireland. I think I should make one final point. It is clear that in this case that from the date of his birth until the date of his removal from Northern Ireland in February 2006, S. had spent every moment of his short life in Northern Ireland. Just as the concept of habitual residence should not be confused with the concept of and principles of domicile, it seems equally clear to me that the fact that a child has only been resident in one jurisdiction for all of its life does not of itself necessarily amount to habitual residence. In some circumstances such presence could be involuntary, for example, in circumstances not dissimilar to the facts of the present case where a child has been taken into care. If the respondents in this case had not by their conduct in cooperating with the applicant and by taking no steps whatsoever to have the child returned to this jurisdiction but on the contrary had from the outset sought to have S. returned to this jurisdiction, it may have been necessary to come to a different conclusion on the issue of habitual residence.

Parental responsibility

51. Council Regulation (EC) 2201/2203 defines the term 'parental responsibility' as follows:-

> "The term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access."

52. In this regard, I am satisfied that the applicant herein comes within the definition of parental responsibility. As such, I am satisfied that the applicant had rights of custody in respect of S. at the time of his removal and that as such his removal was wrong. Although there was some considerable discussion in the course of argument as to the question of parental responsibility I have no doubt whatsoever that the applicant comes within the definition of a party having parental responsibility.

Article 13

53. Having regard to the provisions of Article 13 I am not satisfied on the facts of this case that the respondents have established that there is a grave risk that the return of S. would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. It seems to me that it is correct to argue that the onus is on the respondents to establish that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. In this regard, the respondents have relied on the care plan for S. which proposed that the level of his contact with his natural parents would be reduced. The fact that this would be done in the context of a proposal to adopt does not seem to me to vary the fact. On the contrary it is clear from the reports which were exhibited in the affidavits before me that the approach being taken by the applicant was one designed with the interests of S. very much to the fore. Accordingly, I am not satisfied that any case has been made out by the respondents that would engage the provisions of Article 13.

Article 20

54. Article 20 provides as follows:-

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

55. I was referred at length to the decision of the High Court in the case of *London Borough of Sutton v. R.M. and Others*. In the course of her judgment in that case, Finlay Geoghegan J. had to consider a situation in which the authorities seeking the return of the children was also in the process of considering the adoption of the children involved in that case. At p. 498 of her judgment she noted as follows:-

> "The evidence is that the proposals of the applicant to the English High Court include a proposal that the two younger children be placed for adoption. That such a proposal exists is not disputed. There were handed into court advertisements which had been prepared for placing in a publication in relation to the two younger children clearly identifying them as potentially available for adoption. On behalf of the applicant it was emphasised that the ultimate decision as to whether the children should be placed for adoption, if they were returned would be by the English High Court in the absence of agreement by the parents and there was no certainty that if the children were returned that they would be placed for adoption. In approaching this issue on the facts it appears to me that I must consider adoption of the two younger children as a possibility, but not necessarily a probability, if they are returned to England. It is common case that the criteria according to which an English court, under the Adoption Act, 1976, could ultimately make an order for the adoption of the children in the absence of consent of their parents are significantly different to the very limited circumstances in which a court in this jurisdiction may make an order permitting the adoption of legitimate children under the Adoption Act, 1988. The law of England and Wales does not contain any fundamental rights protecting the rights of a family analogous to the rights in Articles 41 and 42 of the Irish Constitution. The distinctive position under the Irish Constitution was emphasised by Hardiman J. in *North Western Health Board v. H.W.* where at p. 757 he stated:-
>
> > "The strength of the language in which, in Article 41 of the Constitution, the prerogatives of the family are acknowledged has often been remarked upon. The obligation of the State, set out in Article 41.1.2 'to protect the family in its constitution and authority' is entirely consistent with the restricted statement, in Article 42.5, of the circumstances in which alone the State 'may endeavour to supply the place of the parents'. Analogies or precedence from jurisdiction lacking this distinctive assertion of the position of the family are of a limited utility in the exposition of the powers of the State, or other public bodies, under the Irish Constitution."

56. It is also accepted on behalf of the applicant that the criteria according to which an English Court could quite properly in accordance with English law decide to make an order for the adoption of the children herein falls short of the requirement of proof of past failure of the parents in their duty towards the child and the likely future failure until the child attains 18 years such as to constitute "an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise with respect to the child" as required by s. 3 of the Adoption Act, 1988 and include criteria which would be considered to be in breach of the rights of a family under Articles 41 and 42 of the Constitution.

57. I conclude that it is appropriate in the exercise of this court's discretion under Article 13 of the Convention to have regard to the possibility of adoption of children according to criteria which would be contrary to the rights of the family under Articles 41 and 42 of the Constitution. Accordingly, in circumstances where there exists a risk to the constitutionally protected rights of the family by the return of the children I conclude that I should exercise my discretion against returning the children.

58. I note that in the case referred to above, Finlay Geoghegan J. relied on the provisions of Article 13(b) in relation to the possibility of the adoption of children as giving rise to circumstances which amounted to the 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. It is clear from the facts of that case that the circumstances in respect of the children involved were somewhat different. At p. 499 of her judgment she pointed out as

follows:-

> "The present position is that all three people whom indisputably have rights of custody of the children, namely their father, mother and grandmother and who are the people in whose collective care the children had been since birth until their removal from England, want the children to remain in this jurisdiction. It is clear from the psychiatric and social work reports that the children have very strong family links and in particular notwithstanding their mother's difficulties, which they recognise, have a strong attachment to her. She in turn has a strong bond with the children and when well has cared for them. It was urged that their mother is currently undergoing a very difficult course of treatment in Coolmine and that she is currently complying with the terms of treatment. It appears to me undesirable in the interests of the children that this be disturbed by the probable unsettling effect of the return of the children to England. Also it appears desirable that the children remain in the same jurisdiction as their mother with the possibility of having some links with her."

59. In the circumstances of the present case, the facts are somewhat different. It is clear from the psychological and social work reports in this case that S. has very limited links with his parents and has had no links whatsoever with siblings who are all in care in this jurisdiction. Contrary to the facts of the *London Borough of Sutton* case, it could not be said that the mother or indeed the father has a strong bond with S. and indeed, if anything, the evidence indicates that his removal to this jurisdiction would have resulted in trauma for him in circumstances where he was removed from his carers. Thus it seems to me that it would be inappropriate to have regard to the provisions of Article 13(b) as I have already indicated in the context of this particular case. One of the difficulties in this case in regard to Article 20 is that for reasons which I do not think it is necessary to dwell on, I do not have before me an affidavit of laws from appropriate counsel in Northern Ireland. Counsel for the applicant herein proposed to furnish the court with an affidavit of laws from counsel who acts on behalf of the applicant in Northern Ireland. The respondents objected to such an affidavit being proffered and in the circumstances I declined to accept such an affidavit. The exigencies of time in relation to the hearing of this matter were such that to adjourn the matter for the purpose of obtaining separate affidavits in relation to the law of Northern Ireland in respect of adoption would have involved a significant delay in dealing with this matter and in the circumstances having regard to the nature of the case it seemed to me to be appropriate to deal with the matter in the absence of affidavits of law. Having said that I do not think there is much disagreement between the parties that the position in Northern Ireland and in this jurisdiction in relation to adoption law is somewhat different. It is as Finlay Geoghegan J. recognised in the *London Borough of Sutton* case in the context of the laws of England and Wales clear that the Northern Ireland procedure likewise does not contain any fundamental rights protecting the rights of a family analogous to the constitutional rights referred to herein. It is clearly the case that the provisions of the Adoption Act, 1988, permitting the adoption of legitimate children are very limited. In such circumstances, I have little hesitation in saying that having regard to the difference in this jurisdiction in relation to the question of human rights and fundamental freedoms in the context of the family which are undoubtedly the subject of significant protection in this jurisdiction that it is necessary to consider whether in those circumstances the court should exercise its discretion to refuse the return of the child. Like Finlay Geoghegan J. in the case of *London Borough of Sutton* I can only view the question of the adoption of S. in Northern Ireland were he to be returned to that jurisdiction as a possibility. However I note that it was a possibility contemplated in that jurisdiction within a relatively short period of time after he was taken into care in that jurisdiction. In this jurisdiction having regard to the provisions of the Adoption Act, such a possibility could not be contemplated under the provisions of s. 3 of the Act unless it was shown to the satisfaction of the court that -

> "(a) For a continuous period of not less than 12 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under s. 2(1) relates, for physical or moral reasons, have failed in their duty towards the child,
>
> (b) It is likely that such failure will continue without interruption until the child attains the age of 18 years,
>
> (c) Such failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child, and
>
> (d) By reason of such failure the State as guardian of the common good should supply the place of the parents."

60. And the section then goes on to make other provisions in relation to the circumstances and ultimately requires the court to have regard to the best interests of the child. Obviously before an adoption can take place in this jurisdiction, very stringent criteria must be met. I find it impossible to ignore the constitutional rights protected by Articles 41 and 42 of the Constitution in relation to the family. It seems to me that the possibility of adoption which are less favourable to the rights of the family including S. in Northern Ireland are such that his return should not be permitted.

61. In the circumstances I am refusing to make the order sought.