Neutral Citation Number: [2010] IEHC 9

THE HIGH COURT

HAGUE CONVENTION MATTERS

2009 1 HLC

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 2201/2003

AND IN THE MATTER OF A.B.

AND S.B. (CHILDREN)

BETWEEN

NOTTINGHAMSHIRE COUNTY COUNCIL

APPLICANT

AND

K. B. AND K. B.

RESPONDENTS

HEALTH SERVICE EXECUTIVE

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of January, 2010

1. In these proceedings, the applicant seeks an order, pursuant to Article 11 of Council Regulation 2201/2003 ("the Regulation") and Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, ("the Convention") for the return of the children named in the title to the proceedings to the jurisdiction of the Courts of England and Wales.

2. The applicant is a local authority with child protection responsibilities. It initially contended that on 6th November, 2008, it had rights of custody (within the meaning of the Convention and the Regulation) to the children and did not consent to their removal from England. Subsequently, the applicant did not pursue that contention.

3. The applicant also contends that the Courts of England and Wales had rights of custody (within the meaning of the Convention and the Regulation) in relation to the children which it was exercising on 6th November, 2008, and that the children were removed from England in breach of those rights of custody.

4. It is common case that until 6th November, 2008, the children were habitually resident in England, and that on the evening of 6th November, 2008, the respondents, who are the parents of the children and married to each other, removed them from England to Ireland. The respondents state that this was with the intention of residing in Ireland.

5. Subsequent to their arrival in Ireland, the children have been in foster care, pursuant to interim care orders made in separate proceedings in the District Court. By reason of those proceedings, and the fact that the children are in care, the Health Service Executive has been on notice of these proceedings. They have not taken an active part in these proceedings.

6. These proceedings were commenced by special summons on the 2nd January, 2009. They have taken an unusually long time for Hague Convention proceedings to come to full hearing. This was not by reason of any default or delays by either party, or the Courts in either jurisdiction, but rather, by reason of both the issues raised and, in part, by the fact that the first named respondent has never been legally represented in these proceedings, and the second named respondent was only so represented for a short period. The respondents have probably been given greater latitude by the Court to permit them defend the application than would respondents who are legally represented.

7. The respondents have, at all times, disputed that the Courts of England and Wales had rights of custody (within the meaning of the Convention and the Regulation) on 6th November, 2008. The submission was in part based upon disputed facts relating to proceedings commenced by the applicant in England on 5th November, 2008, and the service of those proceedings on the respondents. By reason of that dispute, I gave an interim decision on 27th May, 2009, in which I decided that I should request the applicant, pursuant to Article 15 of the Convention, to obtain from the Courts of England and Wales a reasoned decision as to whether or not, in accordance with the laws of England and Wales, the removal by the respondents of the children from England on 6th November, 2008, was wrongful, within the meaning of Article 3 of the Convention.

8. The Courts of England and Wales facilitated an early hearing and determination of that issue, and on 23rd September, 2009, in the High Court of Justice, Family Division, Macur J. gave a judgment in which she determined that rights of custody (within the meaning of the Convention) were vested in the Courts of England and Wales at the time of the children's removal from the jurisdiction and, further, that those rights of custody would have been exercised, but for the children's removal. It was common case that the Courts of England and Wales did not consent to the children's removal, and that the children were habitually resident in England at the time of their removal and, accordingly, she determined

that their removal from the jurisdiction of England and Wales was wrongful, subject to any 'exception' to summary return pursued by the respondents.

9. When the matter came back before this Court, in accordance with earlier directions, the first issue to be determined was whether or not there was a wrongful removal of the children from England and Wales on 6th November, 2008, contrary to Article 3 of the Convention, as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act, 1991. That issue was heard and determined by me on 27th November, 2009, in these proceedings. On that day, having heard the parties and considered the submissions, oral and written, affidavits and exhibits, I indicated, in an *ex tempore* ruling, that I had concluded that the removal by the respondents of the children from England on 6th November, 2008, was wrongful within the meaning of Article 3 of the Convention as implemented in this jurisdiction, in that it was in breach of rights of custody as defined by Article 5 of the Convention then vested in the Courts of England and Wales, and which rights of custody would have been exercised by those Courts but for the removal of the children from England to Ireland on that date. I also indicated that I would give my reasons for that conclusion at a future date. This judgment includes those reasons. I then gave directions for the preparation of submissions and further affidavit evidence which had been requested in relation to the defences raised by the respondents to the application for an order for return. The final hearing date was fixed for 18th December, 2009.

10. On 18th December, 2009, neither respondent appeared. There had been email communication between the respondents and the solicitor for the applicant and the HLC Registrar in the High Court, indicating that the second named respondent was ill and a medical certificate was furnished in relation to the second named respondent. I concluded that the second named respondent was excused from attending on that day, and notwithstanding the absence of any objective excuse of the first named respondent, I determined that the hearing should be put back to 15th January, 2010, (which was the next available date) to give her a final opportunity to attend.

11. On 15th January, 2010, the first named respondent appeared and indicated that she was appearing to make submissions on behalf of both respondents, as the second named respondent was still not well enough to come to Court. I permitted her to do this. Written submissions had been furnished by both parties in relation to the defences raised by the respondents. One further defence was raised by the first named respondent pursuant to Article 13(a) which I permitted her to pursue.

Reason for decision on wrongful removal

12. Article 3 of the Convention provides:

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

A similar provision is contained in Article 2(11) of the Regulation.

'Rights of custody' is defined by Article 5 of the Convention as including "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". An identical provision is contained in Article 2(9) of the Regulation.

13. It is well established, in this jurisdiction and others, that it is for the requested Court, in this case the Irish High Court, to determine whether or not there was a wrongful removal from the State of habitual residence within the meaning of Article 3. Further, that such question potentially requires a determination, *inter alia*, of the following questions:

> (i) What rights did the relevant person hold under the law of the State of habitual residence?
>
> (ii) Are those rights, however described, 'rights of custody' within the meaning of Article 5 of the Convention?

14. Whilst each of the above questions are for determination by the requested Court, the first question is one which must be determined in accordance with the laws of the State of habitual residence; whereas the second question is determined in accordance with the Convention, as implemented into the law of the requested State *i.e.*, in this instance, Ireland. Further, the term 'rights of custody' within the meaning of Article 5 of the Convention must be given an autonomous meaning in accordance with the case law on the Convention.

15. Notwithstanding that the Convention requires the requested Court to make a determination as to whether or not there has been a wrongful removal, it also includes, at Article 15, a provision under which the requested Court may ask an applicant to obtain a decision from the authorities of the State of habitual residence whether the removal was wrongful, within the meaning of Article 3 of the Convention. Article 15 provides:

> "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

16. A significant issue at the hearing on 27th November, 2009, was the status to be given by the Irish High Court to the Article 15 decision of the English High Court. Counsel for the applicant submitted that the decision of the English High Court should be considered by this Court to be conclusive as to the existence of rights of custody in the English Courts prior to the removal of the children, unless there exist exceptional circumstances preventing the Irish Court doing so. She submitted that no such exceptional circumstances exist on the facts of this case. She made that submission in reliance upon the decision of the House of Lords in *Re D. (A Child) (Abduction: Rights of Custody)* [2007] 1 A.C. 619. I am not aware of any consideration given by the Supreme Court to the manner in which the Courts in this jurisdiction should treat a decision given, pursuant to Article 15, by a Court of habitual residence.

17. In *Re D.*, the father of the child sought an order from the English Courts for the return of the child to Romania. The father contended that the removal by the mother of the child to England was in breach of his "rights of custody" within the meaning of the Convention. The mother contended that the father had rights of access only. The English Courts requested the applicant to seek a determination from the Romanian Courts, pursuant to Article 15 of the Hague Convention, as to whether the removal of the child was wrongful within the meaning of the Convention. A Romanian Court of first instance held that the father did not have rights of custody, and therefore the removal was not wrongful within the meaning of the Convention, which determination was upheld by the appeal court in Romania. When the matter came back before the High Court in England, the applicant challenged the Romanian Courts' determinations and the trial Judge found she was not bound by the determinations of the Romanian Courts. She admitted evidence from a jointly appointed expert on Romanian law and, following its consideration, found that the father did enjoy rights of custody within the meaning of the Convention, that the removal was wrongful and that the child should be returned to Romania. This decision was upheld by the Court of Appeal. On appeal to the House of Lords, it was held that there had been no grounds for the trial Judge not to follow the determinations of the Romanian Courts that the father did not enjoy rights of custody and, accordingly, there was no obligation to order the return of the children.

18. The speeches of Baroness Hale and Lord Carswell, in particular, identify two separate legal questions to be addressed in an Article 15 determination, having regard to the terms of Article 3. The first question is "what rights does that person have under the law of the home country?", and the second question is "are those rights 'rights of custody' within the meaning of the Convention?" (Baroness Hale, para. 39). Baroness Hale, at para. 43 of her speech, in relation to the first question, concluded that, "[s]ave, in exceptional circumstances, for example where the ruling has been obtained by fraud or in breach of the rules of natural justice, it must be conclusive as to the parties' rights under the law of the requesting State". I would respectfully agree with this approach and her reason therefor. The Courts of the requesting State, *i.e.* the State of habitual residence, are clearly best placed to determine what rights vested in the person alleged to have rights of custody in accordance with the law of that State. Accordingly, where the requested Court has asked for an Article 15 determination, it appears appropriate, save in exceptional circumstances, including those referred to by Baroness Hale, that it should accept, as conclusive, the determination of the Court of habitual residence, as to rights which exist under the law of that State.

19. As pointed out, both by Baroness Hale and Lord Carswell, the second question is not a matter only of the domestic law of the State of habitual residence, but rather, whether the rights which exist under that law do or do not constitute rights of custody within the meaning of the Convention. As already stated, the term "rights of custody" must be given an autonomous Convention meaning. Nevertheless, as pointed out by Baroness Hale at para. 44 of her speech, "[t]he foreign court is much better placed than the English to understand the true meaning and effect of its own laws in Convention terms". She is of the view that "[o]nly if its characterisation of the parents' rights is clearly out of line with the international understanding of the Convention's terms . . . should the court in the requested state decline to follow it".

20. Lord Carswell, at para. 71 of his speech, stated:

> "The synthesis in English law is to be found in the practice, exemplified in *Hunter v. Murrow (Abduction: Rights of Custody)* [2005] 2 F.L.R. 1119, of regarding the foreign courts' determination of the content of a parent's rights as binding, but not necessarily accepting as definitive any conclusion whether those rights amounted to rights of custody in the autonomous Convention sense. I think that it is desirable that the courts of the requested state should be able to reach their own decision on the latter issue, which they will wish to ensure is consistent with the proper interpretation of the Convention. I agree, however, with the view expressed by Baroness Hale in para. 44 of her opinion, that those courts should be slow to reject a conclusion on the existence of rights of custody expressed by the court or administrative authority of the foreign state. As she there points out, the foreign court is much better placed than the court of the requested state to understand the true meaning and effect of its own laws in Convention terms. For this reason the determination of the foreign could should ordinarily be accepted, unless it clearly runs counter to the conclusion which would flow from applying to the parental rights set out by the foreign court the autonomous Convention meaning of such concepts as rights of custody."

I would also respectfully agree with the above.

21. I would only wish to add the following which is relevant to the request for the Article 15 determination in these proceedings and to the submissions made by the respondents following the decision of Macur J. in the English High Court. As appears from the interim decision given by me on 27th May, 2009, part of the reason for which I requested an Article 15 determination was the existence of disputed facts between the applicant and the respondents relevant to the determination as to whether or not the Courts of England and Wales had rights of custody within the meaning of the Convention prior to the removal of the children. Those facts all related to proceedings before the English Courts and matters which took place in England. In such circumstances, where relevant facts are determined by the Courts of habitual residence as part of an Article 15 ruling, it appears to me that, absent fraud or breach of the rules of natural justice (neither of which apply in this instance), this Court should treat as conclusive any finding of fact made by the Court of habitual residence.

22. The judgment of Macur J., at para. 22, indicates that she was satisfied that the respondents had notice of the proceedings before her and an opportunity to attend the hearing. She also indicates that she had regard to their submissions provided in writing.

23. Accordingly, I propose considering, as conclusive, the findings of fact made by Macur J. in her judgment. Those include: facts in relation to the proceedings which had been issued by the applicant on 4th November, 2008, for an interim supervision order/interim care order/care order, as set out in para. 28; and the steps taken within the relevant

Courts and the service of those proceedings on the first named respondent. I also treat as conclusive Macur J.'s decisions, as a matter of English law, as to the rights vested in the English Courts on 6th November, 2008. These include her determination that the service on the first named respondent was sufficient to give constructive notice of the proceedings to the second named respondent who accepted that he had knowledge of same. I also accept the determination at para. 29 of her judgment that the notice of application raised "matters of custody", in the sense she explains at the end of that paragraph as meaning that "the court has jurisdiction to determine, amongst other things, the residence of the child, subject to the application". This is a determination of the rights then vested in the English Courts under English law by reason of the application issued by the applicant herein and served on the respondents.

24. In accordance with the above set out principles, I consider that I should be slow to reject the further conclusion of Macur J. that the rights conferred on the English Courts, by the issue of the application dated 4th November, 2008, and its service on the first named respondent on 5th November, 2008 and thereby the giving of constructive notice of the proceedings to the second named respondent, mean that as of that date rights of custody within the meaning of the Convention were vested in the Courts of England and Wales. I have concluded that there is no reason to reject that conclusion in these proceedings and, further, that its acceptance is consistent with two decisions of the Supreme Court in relation to the Convention as implemented in this jurisdiction.

25. In the first of these, *H.I. v. M.G.* [2000] 1 I.R. 110, Keane J. (as he then was), delivering the majority judgment of the Supreme Court, set out the approach to be followed in this jurisdiction to the proper construction of the Convention. At p. 123, he stated:

> "It has been pointed out that, since the Hague Convention is an international treaty applying to states with different legal systems, it is desirable that it be construed in the same manner by the courts of the various states who have ratified or acceded to the Hague Convention: *Re. H (Minors) (Abduction: Acquiescence)* [1998] A.C. 72. and the observations of Lynch J. in *K. v. K.* (Unreported, Supreme Court, 6th May, 1998).
>
> However, since the Hague Convention has the force of law in this State solely by virtue of the Act of 1991, and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Hague Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Hague Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the *travaux preparatoires* which accompanied its adoption may legitimately be used as an aid to its construction. (See the decision of this Court in *Bourke v. Attorney General* [1972] 1.R. 36.)."

26. Further, in the above decision, and in its decision in *T. v. O.* [2008] 3 I.R. 567, the Supreme Court has recognised the existence of rights of custody within the meaning of the Convention in a Court before which proceedings had been commenced and served on the relevant parties which related to the custody of the child, in the sense of giving to the Court a jurisdiction to determine, at least during the continuance of the proceedings, the place of residence of the child. Accordingly, the conclusion of Macur J. in this case, that the rights attributable, as a matter of English law, to the Courts of England and Wales prior to the removal of the children on 6th November, 2008, are rights of custody within the autonomous meaning of the Convention, is consistent with the meaning given by the Irish Courts to rights of custody in relation to Courts in accordance with the Convention as implemented in this jurisdiction by the Act of 1991.

27. The respondents also submitted that the applicant was not entitled to rely on an alleged breach of rights of custody of a person, other than the applicant, in order to pursue an application for an order for return under the Convention. This submission is not well founded. There is nothing in the Convention which requires the application for the order for return to be made by the person whose rights of custody are alleged to have been breached. The entitlement of a personal applicant to rely on rights of custody vested in a Court of the State of habitual residence was expressly recognised by the Supreme Court in *H.I. v. M.G.* [2000] 1 I.R. 100, where, at p. 132, Keane J. stated:

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

28. Accordingly, I have determined that the Courts of England and Wales had, prior to the removal of the children on 6th November, 2008, rights of custody within the meaning of the Convention. Further, that such rights would have been exercised were it not for the removal of the children and that, in the absence of the consent of the Courts to the removal of the children, such removal was in breach of the English Courts' rights of custody and, accordingly, wrongful, within the meaning of Article 3 of the Convention.

Defences

29. The respondents have raised four defences to the application for the order for return. Three of these are made pursuant to Article 13, and one pursuant to Article 20. They are:

> (i) The respondents were jointly the persons having the "care of the person of the [children]" and had consented to their removal and, accordingly, this Court is not bound to make an order for return, pursuant to Article 13(a).

(ii) That there is a grave risk that the return of the children would expose them to psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(b) and, accordingly, the Court is not bound to make an order for return.

(iii) That the elder child has attained an age and degree of maturity at which it is appropriate to take into account his views and he objects to being returned to England.

In relation to each of the three defences under Article 13, the respondents submit that if the Court accepts one or more of the defences and finds that it has a discretion, that it should exercise the discretion against returning the children, particularly by reason of the possibility of their adoption in England and the constitutional protection of the family pursuant to Articles 41 and 42 of the Constitution.

(iv) The return of the children on the facts herein is not permitted by "the fundamental principles of [Ireland] relating to the protection of human rights and fundamental freedoms" within the meaning of Article 20, having regard to the potential Court proceedings in England and the possibility of adoption of the children without the consent of the respondents and the constitutional protection of the family in this jurisdiction pursuant to Articles 41 and 42 of the Constitution.

30. I propose considering each of the above defences. The respondents, whilst not legally represented, in their joint written submissions and the oral submissions of the first named respondent, demonstrated a reasonable understanding of the legal principles involved. I have, however, having regard to their lack of legal representation, considered the defences raised in the context of all authorities which appear relevant in relation to the defences and the submissions made by counsel on behalf of the applicant thereto. Insofar as I have considered authorities not opened by either party, they do not appear to me to have raised any new or different issues in relation to which it was necessary to give the parties an opportunity of making further submissions.

Article 13(a)
31. Article 13 of the Convention provides:

"Notwithstanding the provisions of the preceding Article, 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 -

(a) 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, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

There has been much judicial consideration, both in this jurisdiction and the United Kingdom, of the correct approach to the application of Articles 3 and 13 of the Convention where the person whose rights of custody are alleged to have been breached, by the removal of the child, is alleged to have consented to the removal of the child from the State of habitual residence. In this jurisdiction, the Supreme Court in *B. v. B. (Child Abduction)* [1998] 1 I.R. 299 has decided that where a removal is *prima facie* in breach of rights of custody of a person, and it is contended that such person consented to the removal, that the issue of consent should be determined under Article 13(a), rather than as part of the determination of wrongful removal under Article 3 (see the judgment of Denham J. at p. 311-312). Whilst I am not concerned with that particular issue in these proceedings, those judgments shed some light on the difficult task of construing Article 13(a), having regard to the words used, and placing it within the context of Article 3 and the entire Convention.

32. The submission made by the respondents is that, at the date of removal of the children, they were the persons having the 'care of the person' of their children, and that no other person should be considered as having the care of the person of their children at that date within the meaning of Article 13(a). Accordingly, they contend that as they have consented to the removal (which is not in dispute), a defence under Article 13(a) is made out and the Court has a discretion as to whether or not to make an order for the return of the children.

33. The respondents make that submission primarily in reliance on a decision which I gave in London Borough of *Sutton v. R.M.* [2002] 4 I.R. 488. That case concerned an application for the return of three children by an English local authority. The respondents were the mother, father and grandmother of the children. The mother and father were married to each other. At the date of removal of the children from England to Ireland by the mother the children lived with their grandmother, pursuant to orders made by the English High Court. The applicant had advertised two of the children for adoption. The mother learnt of this and took all three children from the grandmother's home, unknown to her at the time or to the father, and brought them to Ireland. In that case, it was undisputed that, in addition to the mother, the father and the grandmother had rights of custody within the meaning of the Convention. I determined that *prima facie* the removal of the children was in breach of the rights of custody of the father and grandmother, and therefore wrongful. By the time of the hearing before me, the father and grandmother had acquiesced in the removal of the children to Ireland within the meaning of Article 13(a), and opposed their return.

34. The local authority pursued the application, also on the basis that the English High Court had rights of custody at the time of the removal of the children. I determined, as I have in this case, that the applicant was entitled to pursue the

application for an order for return based upon alleged rights of custody of a third party, namely, the English High Court. However, in that case, on the facts, I concluded it was improbable that the English High Court had a right of custody within the meaning of the Convention, but did not determine the issue by reason of the finding of wrongful removal in relation to the father and grandmother's rights. I then proceeded to consider the further issues, including the Article 13(a) defence, on that basis. In relation to the Article 13(a) defence, I stated at p. 496:

> "The first defence made was that under article 13(a) the third respondent was, at the date of removal of the children from England, 'the person . . . having the care of the person of the child . . .' and that she has 'subsequently acquiesced in the removal'.
>
> I have concluded that this defence has been made out. Under the terms of the English High Court order of February 2002, the children were to reside with the third respondent. The children were in her care on a daily basis. There is no other person who, on the facts of this case, could be considered to be 'the person . . . having the care of the person of the child' in respect of the three children in these proceedings at the date of their removal from England. Accordingly I find a defence under article 13(a) has been made out."

35. The above is the entire of what I said in relation to the defence sought to be made out under Article 13(a). I took, what I now consider to be, a very narrow view of the meaning of the phrase "the person . . . having the care of the person of the child . . ." It is not clear to me what, if any, submissions contrary to this narrow view, were made to me in those proceedings. The father had rights of custody and the removal was held in breach of those rights but he had also acquiesced in the removal. On the facts of the case there was no person with rights of custody which had been breached by the removal who did not consent to or acquiesce in the removal and hence the narrow or wider construction may not have been in issue. The decision was not the subject of an appeal to the Supreme Court.

36. In these proceedings, counsel for the applicant submits that such a narrow view is not the correct view and would be inconsistent with the objects of the Convention and certain of its provisions. She submits that the phrase "the person . . . having the care of the person of the child" must include any person who has a right to the care of the person of the child and, in particular, includes any person who has a right of custody within the meaning of Article 5 of the Convention in relation to the child.

37. On a reconsideration of this Article, the explanatory report of Ms. Perez-Vera, the judgments of the Supreme Court in *B. v. B.* and the English Court of Appeal in *Re. P.* [2005] 2 W.L.R. 201, I have concluded that whilst the narrow construction which I previously placed on this Article is clearly one that is open on the wording of Article 13(a), it is not one which is consistent with the objects of the Convention as set out in Article 1 namely, "(a) to secure the prompt return of children wrongfully removed or retained in any Contracting State; and (b) to ensure that rights of custody … under the law of one Contracting State are effectively respected in the other Contracting States". Rather, it appears to me that the phrase "the person . . . having the care of the person of the child" must be given the wider meaning contended for by counsel for the applicant in order that the essential purpose of the Convention be given effect.

38. The need for this wider meaning is demonstrated by an example of common facts in an application for an order for return under the Convention, but which do not apply in this case. Applications under the Convention frequently arise in the following types of circumstances. Parents are or have been married and, indisputably, jointly have rights of custody in relation to the child. The child may be living with one parent, for example, the mother, either by agreement or pursuant to a Court order. The father, with whom the child does not live, again indisputably, continues to exercise his rights of custody and to take an active role in relation to the child, with the child even staying with the father from time to time. However, again indisputably, on a daily basis the mother is the person having the care of the child. The mother then leaves the country of habitual residence and takes the child to Ireland. This is done without the consent of the father. *Prima facie* it is a wrongful removal, in breach of the rights of custody of the father. These facts are a very typical scenario, and absent any defence under Article 12, Article 13 or Article 20, the Court is bound to make a summary order for return pursuant to Article 12.

39. If the Court were to apply Article 13(a) taking the narrow and possibly literal construction of its provisions, and confining its application to the person in whose daily care the child lived, then it would be sufficient for the mother to establish that she consented to the removal of the child in order to establish the requisite facts for the purpose of Article 13(a), and thereby give to the Courts of Ireland a discretion as to whether or not to return the child. This appears to me contrary to the well established approach to the application of the Convention, not only in this jurisdiction, but also in other jurisdictions. On such facts, where both parents have rights of custody which are being exercised, albeit that the child is cared for on a day-to-day basis by one parent, it is not sufficient for the parent who opposes an order for return, simply to establish that he or she consented to the removal. The consent of the left-behind parent, who is probably the applicant for return, is required in order to establish an Article 13(a) defence. If not, it would be possible to establish a defence, pursuant to Article 13(a) in the vast majority of applications under the Hague Convention. This is not the intention of the Convention and such an approach would be plainly inconsistent with its objectives as stated in Article 1 of the Convention.

40. A similar view to the one which I am now taking appears to have been taken by the Court of Appeal in *Re. P.* [2005] 2 W.L.R. 201. In that case, the parents of the child were habitually resident in the State of New York. Following their separation, a New York Court granted the mother sole custody of their child but allowed the father contact and ordered that, save for holidays, the child could not be removed from the State of New York without his agreement. The mother took the child to England where she intended to stay for a considerable time. The father claimed that he had not consented to the child's removal, that it was in breach of his rights of custody and therefore wrongful for the purposes of Article 3 of the Convention. The Court of Appeal held that the removal of the child was wrongful within the meaning of Article 3. In that case, the mother was "the person having the care of the person of the child" and she attempted to rely on Article 13(a) of the Convention to resist the order sought for the return of the child. At p. 215, of his judgment Ward L.J. said:

> "34. Mr. Nicholls is, however, a spirited advocate. He submits that article 13(a) can have no application in this case because it is confined to consent being given by 'the person institution or other body having the care of the person of the child' and this father never had the care of the person of the child. All he had, he submits, was a right of

access. We reject that argument. As will be seen, we conclude that this father did have rights of custody. Pursuant to article 5, those rights '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'. Where there is an order in force that the child should not be removed from New York without the father's consent, or order of the court, he has the right to determine that the child should not reside outside New York unless the court orders otherwise. The right to determine the child's place of residence is included within and is part of the rights relating to the care of the person of the child. That phrase in article 13 must be given a wide meaning in order that the purpose of the Hague Convention to protect rights of custody be fulfilled."

41. The Court of Appeal appears to have rejected a literal interpretation of the phrase "having the care of the person of the child" in Article 13(a), and instead favoured a purposive interpretation of the term consistent with the purpose of Article 3 of the Convention (and the rights protected thereby) and the definition of "rights of custody" in Article 5 of the Convention. Similarly, I now consider that the phrase 'having the care of the person of the child' in Article 13(a) includes a person with a right to the care of the person of the child, in the sense in which that term in also used in Article 5 of having "rights of custody" within the meaning of Article 5 of the Convention. Further, that to establish an Article 13(a) defence on grounds of consent, a person opposing return must establish consent of any person whose rights of custody were breached by the wrongful removal.

42. On the facts of this case, as it has been found that the English Courts had rights of custody within the meaning of the Convention, and there was no consent of the English Courts to the removal of the children to Ireland, I have concluded that the respondents have not established the facts which support a defence under Article 13(a) of the Convention.

Child's objections

43. Article 11 of the Regulation applies to this application. Article 11 (2) provides:

> "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

The elder child was born in November 2002, and the younger child in August 2005. On 18th March, 2009, in accordance with current practice, pursuant to Article 11(2) of the Regulation, I made an order that the elder child be interviewed by a suitably qualified person in relation to certain specified matters, including whether he had any objection to returning to live in England, and also that the interviewer express her professional view to the Court in relation to the maturity of the child, whether he is capable of forming his own views and, if so, to give a general description of the type of matters about which he appears so capable. No similar order was made in respect of the younger child as this was inappropriate having regard to her age.

44. Counsel for the applicant submits that to establish the defence of child objections the Court must be satisfied of facts in relation to the objections and maturity of the child in accordance with the law as stated by the Supreme Court in T*.M.M. v. M.D. (Child Abduction: Article 13)* [2000] 1 I.R. 149. In that case Denham J. said at pp. 161 - 162:

> "I agree with the approach in *S. v. S. (Child Abduction) (Child's Views)* [1992] 2 F.L.R. 492, where it was determined that the part of art. 13 which relates to the child's objection to being returned is completely separate from para. (b) which referred to the grave risk of physical or psychological harm and that there is no reason to interpret that part of the article as importing a requirement to satisfy para. (b) or to interpret the word 'object' to mean something stronger that its literal meaning. However, this is an area where the exercise of the discretion of the judge must be done with great care. I agree with the approach of Balcombe L.J., in *S. v. S. (Child Abduction) (Child's Views)* where he stated at pp. 500 and 501:-
>
> '(2) The establishment of the facts necessary to 'open the door' under article 13
>
> (a) The questions whether:
>
> (i) a child objects to being returned; and
>
> (ii) has attained an age and degree of maturity at which it is appropriate to take account of its views;
>
> are questions of fact which are peculiarly within the province of the trial judge.'"

45. Ms. Anne O'Connell, a consultant clinical psychologist, interviewed the elder child on 8th April, 2009, and furnished her report of her interview and assessment to the Court. At the date of the interview, the elder child was six years and four months old. In her report of the interview, Ms. O'Connell states that the child, when asked about his future, stated that he hoped he could live with his mummy and daddy again. He indicated that he would be going back to them in a few days, and in relation to England, stated, "We're never going back to England, but I don't mind because I love Ireland and there's lots to do here". The respondents, in their affidavits of 7th December, 2009, state that the elder child has a strong desire to remain in Ireland and does not wish to go back to England. Even taking into account the respondent's averments, I am not satisfied that there is evidence that the elder child objects to returning to England. I am satisfied, in the interview conducted by Ms. O'Connell, from her report, that he was given an opportunity of expressing his views about his future. These did not include an objection to returning to England. He appears to have been told that he was not returning to England and expressed himself happy to remain in Ireland. Even, if during the subsequent months, he has developed a desire to remain in Ireland, that is quite different to an objection to returning to England. Accordingly, I find that this defence has not been made out. It is not strictly necessary, therefore, to consider the maturity of the elder child as reported by Ms. O'Connell. However, if I had to do so, I could not be satisfied, on her report, that he has attained a degree of maturity at which it is appropriate to take account of his views.

Article 13(b) grave risk and intolerable situation

46. There is no dispute that the law to be applied is as stated by the Supreme Court, *inter alia*, in *A.S. v. P.S.* [1998] 2 I.R. 244. In that case, Denham J. confirmed that the test for grave risk is an extremely high one, where she stated at p. 259:

> "The law on 'grave risk' is based on art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.
>
> This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.
>
> The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

47. The respondents submit that the present proceedings before the English Courts may result in an order for adoption of the children without the consent of their parents, and that even such a possibility constitutes grave risk for the children or may place them in an intolerable situation.

48. It is not in dispute that, pursuant to the English Adoption and Children Act 2002, as a matter of practice, local authorities, including the applicant herein, are enjoined to consider twin-tracking care and placement applications so that the Court considers adoption at the same time as determining the application for a care order. Further, that such an approach forms part of the present proceedings before the English Courts. I have had the benefit of an affidavit of Mr. Paul England, an experienced solicitor employed by the applicant, who was, until June 2009, the applicant's principal legal advisor in relation to adoption. Whilst the respondents, on affidavit and in submissions, queried some aspects of the procedure in practice, as described by Mr. England, they did not adduce any evidence from a lawyer practicing in England and the first named respondent, at the final hearing, indicated that she did not dispute the procedure as described by Mr. England. For the purposes of this defence, I am satisfied that whilst the Act of 2002 permits the English Court to make an order dispensing with the consent of a parent to adoption, it may only do so in accordance with s. 52 thereof where the welfare of the child requires the consent to be dispensed with. Mr. England, in his affidavit, confirms at para. 6.3 that the "primary ground for dispensation is now that the welfare of the child requires the consent to be dispensed with".

49. The respondents submit that they oppose adoption of their children. I am satisfied that their consent to adoption may only be dispensed with by the English Courts if the Court forms the view that the welfare of the children so requires. They further submit that they and their children are a close family unit and that adoption of the children and separation from the respondents would constitute a grave risk of psychological harm or would place the children in an intolerable situation. On the explanations given of the English law and procedure by Mr England I am satisfied that any decision to place the children or for their adoption will be taken in accordance with their best interests and in accordance with what their welfare dictates. The possibility of such decisions does not constitute a grave risk for the children or place them in an intolerable situation. A similar view was taken by Dunne J., albeit on different facts, in *Foyle Health and Social Services Trust v. E.C. and Another* [2007] 4 I.R. 528 at p. 548. Accordingly, I find that this defence has not been made out.

50. As none of the defences pursuant to Article 13 have been made out, the question as to how the Court should exercise its discretion under Article 13 does not arise.

Article 20

51. Article 20 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."

52. The defence of the respondents, in reliance on Article 20, raises difficult issues of law. This Article has had limited judicial consideration. The Supreme Court does not appear to have had to consider it on the facts of any previous case. In the High Court, the only written judgment on an application for the return of a child in which Article 20 has been considered and applied is that of Dunne J. in *Foyle Health and Social Services Trust v. E.C.* [2007] 4 I.R. 528. Article 20 was also considered by the High Court in the context of a challenge to the constitutionality of the Act of 1991 in *A.C.W. v. Ireland* [1994] 3 I.R. 232, referred to below.

53. The United Kingdom has not implemented Article 20 in its implementing legislation. There appears to have been very limited case law on the application of Article 20 from the Courts of other countries which have acceded to the Convention. Counsel for the applicant relied upon a decision of the Full Court of the Family Court of Australia in *The Director General Department of Family, Youth and Community v. Rhonda May Bennett* [2000] Fam. C.A. 253. In that case, the mother of the child was of ill health, and she contended that she would be unable to travel to the United Kingdom if the child was ordered to be returned there, and would therefore be denied an opportunity to participate in the proceedings in that jurisdiction and this would be a denial of natural justice. She also submitted that an English Court could not properly understand the ramifications of the child's native Australian cultural heritage as there was no equivalent in the English Family Law Acts to s. 68F(2)(f) of the Family Law Act 1975, which specifically required a Court in Australia, when determining what was in a child's best interest, to consider native cultural heritage, and this would be a violation of the rights of the child. On the application of Article 20 of the Convention (implemented by Regulation 16(3)(d) of the Australian implementing regulations), it was held by the Court at para. 56 of the judgment that:

> "The Reg. 16(3)(d) exception is extremely narrow and is limited to circumstances in which the return of the child ought not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms. There is nothing demonstrated whatsoever in respect of a return of an English born child to

England which would resemble any breach of any human right or fundamental freedom which this child possessed. Regulation 16(3)(d) derives from Art 20 of the Convention. According to the Report of the Second Special Commission meeting to review the Convention's operation, Art 20 was inserted because the Convention might never have been adopted without it, and it was intended as a provision which could be invoked on the rare occasion that the return of a child would utterly shock the conscience of the court or offend all notions of due process."

The Court dismissed both arguments made by the mother in reliance on Article 20 as follows:

"62. It may be open to a court in an appropriate case to refuse to order the return of a child where the personal circumstances of either parent prohibit that parent from returning to the country where it is sought to send the child. This was not such a case.

63. The return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country is not *per se* in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established."

54. The Full Court, prior to reaching the above conclusions, referred to the explanatory report of Ms. Perez-Vera to the Convention. Similarly, it is permissible for this Court to consider that report in accordance with *H. I. v. M.G.*

55. The Perez-Vera Report, states in relation to the origin of Article 20:

"31. Thirdly, there is no obligation to return a child when, in terms of article 20, its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'. Here, we are concerned with a provision which is rather unusual in conventions involving private international law, and the exact scope of which is difficult to define. Although we shall refer to the commentary on article 20 for the purpose of defining such a scope, it is particularly interesting to consider its origins here. This rule was the result of a compromise between those delegations which favoured, and those which were opposed to, the inclusion in the Convention of a 'public policy' clause.

The inclusion of such a clause was debated at length by the First Commission, under different formulations. Finally, after four votes against inclusion, the Commission accepted, by a majority of only one, that an application for the return of a child could be refused, by reference to a reservation which took into account the public policy exception by way of a restrictive formula concerning the laws governing the family and children in the requested State. The reservation provided for was formulated exactly as follows: 'Contracting States may reserve the right not to return the child when such return would be manifestly incompatible with the fundamental principles of he law relating to the family and children in the State addressed'. The adoption of this text caused a serious breach in the consensus which basically had prevailed up to this point in the Conference proceedings. This is why all the delegations, aware of the fact that a solution commanding wide acceptance had to be found, embarked upon this road which provided the surest guarantee of the success of the Convention.

32. The matter under debate was particularly important since to some extent it reflected two partly different concepts concerning the Convention's objects as regards the return of the child. Actually, up to now the text drawn up by the First Commission (like the Preliminary Draft drawn up by the Special Commission) had limited the possible exceptions to the rule concerning the return of the child to a consideration of factual situations and of the conduct of the parties or to a specific evaluation of the interests of the child. On the other hand, the reservation just accepted implicitly permitted the possibility of the return of a child being refused on the basis of purely legal arguments drawn from the internal law of the requested State, an internal law which could come into play in the context of the quoted provision either to 'evaluate' the right claimed by the dispossessed parent or to assess whether the action of the abductor was well-founded in law. Now, such consequences would alter considerably the structure of the Convention which is based on the idea that the forcible denial of jurisdiction ordinarily possessed by the authorities of the child's habitual residence should be avoided.

33. In this situation, the adoption by a comforting majority of the formula which appears in article 20 of the Convention represents a laudable attempt to compromise between opposing points of view, the role given to the internal law of the State of refuge having been considerably diminished. On the other hand, the reference to the fundamental principles concerning the protection of human rights and fundamental freedoms relates to an area of law in which there are numerous international agreements. On the other hand, the rule in article 20 goes further than the traditional formulation of 'public policy' clauses as regards the extent of incompatibility between the right claimed and the action envisaged. In fact, the authority concerned, in order to be able to refuse to order the return of the child by invoking the grounds which appear in this provision, must show not only that such a contradiction exists, but also that the protective principles of human rights prohibit the return requested.

Further, at paras. 113 and 118 of the Report Ms. Perez-Vera writes:

"113. In the first part of this Report we commented at length upon the reasons for, the origins and scope of, the exceptions contained in the articles concerned. We shall restrict ourselves at this point to making some observations on their literal meaning. In general, it is appropriate to emphasize that the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion - and does not impose upon them a duty - to refuse to return a child in certain circumstances."

. . .

"118. It is significant that the possibility, acknowledged in article 20, that the child may not be returned when its return 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms' has been placed in the last article of the chapter: it was thus intended to

emphasize the always clearly exceptional nature of this provision's application. As for the substance of this provision, two comments only are required. Firstly, even if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. Consequently, so as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles [emphasis added]. Secondly, such principles must not be invoked any more frequently, nor must their invocation be more readily admissible than they would be in their application to purely internal matters. Otherwise, the provision would be discriminatory in itself, and opposed to one of the most widely recognized fundamental principles in internal laws. A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view."

56. This Court, must, of course, whilst taking into account the above, when applying the Convention and Article 20 as implemented by the Act of 1991, do so in a manner consistent with the Constitution. *A.C.W. v. Ireland* [1994] 3 I.R. 232 was a challenge to the validity of the Convention as implemented by the Act of 1991, as being inconsistent, in particular, with the personal rights guaranteed to a child pursuant to Article 40.3.1 of the Constitution. Keane J., in the High Court, in rejecting that challenge, referred to the jurisdiction given to a Court to refuse an order for return pursuant to Article 13, and then stated at pp. 239-240:

" . . . That provision of itself presents serious obstacles to the argument on behalf of the first plaintiff that the implementation of the Convention in this State necessarily violates the personal rights of the child, but the matter is put beyond doubt, in my opinion, by the provisions of article 20.

It is clear that the reference in art. 20 to 'the fundamental principles of the requested State' must refer, in the context of this State, to the provisions of the Constitution. Articles 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 acknowledgement 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.

It may not be a coincidence that the wording of art. 20 echoes the title of the European Convention, since in the case of some of the signatory states the provisions of that convention form part of the domestic law of the state. That is not so in the case of Ireland but it is unnecessary for me to reach any conclusion as to whether the court would be entitled to have regard to the provisions of the Convention in a case where art. 20 was invoked. It is sufficient to say that in our case the 'human rights and fundamental freedoms' which are to be protected if that article is invoked include those set out, expressly or by implication, in Articles 40 to 44 of the Constitution. Had Morris J. been satisfied that those fundamental principles would be infringed by the return of the child, I have no reason to doubt that he would have refused to make the order sought."

57. From all the above, I derive the following principles in relation to reliance on Article 20 in this jurisdiction:

(i) The onus is on the person opposing the order for return to establish that Article 20 applies.

(ii) Article 20, similar to Article 13, is a rare exception to the general principle of return and, as such, must be strictly or narrowly construed.

(iii) A Court may only refuse to return a child where the fundamental principles of its law do not permit the return of the child. Where, as in this case, reliance is placed on the Constitution it must be established that the relevant article of the Constitution does not permit the return of the child.

58. The fundamental principles of Irish law, upon which the respondents rely, is the protection given to the family in Articles 41 and 42 of the Constitution. Of particular relevance, are the provisions of Article 41.1, Article 42.1 and Article 42.5, which provide:

Article 41

"1. 1o The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2 o The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Article 42

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

….

5. 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 to the natural and imprescriptible rights of the child."

59. The respondents' submission is that, if an order for a return of the children to England and Wales is made, then in the English care proceedings already commenced orders may be made for adoption of the children without the consent of the respondents in accordance with a statutory scheme and legal principles which do not include a recognition that the family possesses inalienable and imprescriptible rights similar to the recognition given in Article 41, or of the inalienable rights of the parents or natural and imprescriptible rights of the child in the family recognised in Article 42. They submit that the consequences of an order for return is that orders for the adoption of the children, without the consent of the respondents, may be made by the English Courts in circumstances which would not be permitted in this jurisdiction by Articles 41 and 42 of the Constitution.

60. The affidavit of Mr. England sets out the current law and practice in England in relation to adoption in the context of care proceedings by local authorities. As a matter of practice, local authorities are enjoined to consider twin-tracking care and placement applications. The local authority is required either to obtain parental consent to placement or judicial authority to place (overriding parental objection) in the form of a placement order. It is at this point that the issue of parental consent to adoption is addressed (paras. 6 and 7). Prior to issue of an application for a placement order, the decision making process before an autonomous statutory panel, known as the Adoption Panel, must be completed (paras. 9 and 10).

61. The approach to adoption in the English system is explained at para. 8 of the affidavit in the following terms:

"In general, the English courts are supportive of Local Authority adoptive plans where a clear case for adoption is made. This means that the Local Authority proposing adoption must demonstrate that all other means of providing for the needs of the child in a safe, enduring and legally stable environment have been explored and discounted. The 2002 Act does not create a hierarchy of placement choices but the judicial expectation is that adoption is to be treated as the outcome of last resort. This is considered to be consistent with the European Convention on Human Rights, especially Article 8. In short, the Court (following principles contained in the Children Act 1989 and the Adoption and Children Act 2002, as well as Article 8) applies the 'least interventionist' approach. Even if a parent has been ruled out as his child's carer, the Court is unlikely to endorse an adoption plan if there is an acceptable placement for the child within the extended family. The current judicial protocol on the case management of care proceedings, the Public Law Outline, emphasises the need for early consideration of the extended family, not only as a means of resolving care applications but also as a means of averting the need for such applications in the first place. Where parents and extended family are ruled out, an adoption plan will only be pursued if the Local Authority consider that adoption is a viable choice. For some children, it is not. There may be reasons why a complete severance of the legal tie between parent and child is not in the child's best interests, and for such children a long term foster care placement may be the preferred choice."

62. As appears, the Act of 2002 is applied in a manner consistent with Article 8 of the European Convention on Human Rights, with adoption being treated "as the outcome of last resort" and a "least interventionist" approach. The child's best interest is the paramount consideration.

63. Notwithstanding the above, counsel for the applicant did not dispute that an adoption order could properly be made in England in relation to children of married parents in accordance with criteria which would not be permissible in this jurisdiction by reason of Articles 41 and 42 of the Constitution. The Adoption Act, 1988, in this jurisdiction, does provide for the adoption of children of married parents, but only in exceptional and limited circumstances held by the Supreme Court in R*e Article 26 and the Adoption (No. 2) Bill 1987* [1989] I.R. 656 to be consistent with Article 42.5. The respondents, in support of these submissions, rely on the judgments of Dunne J. in *Foyle Health and Social Services Trust v. E.C. and Another* [2007] 4 I.R. 528, and my decision in London Borough of *Sutton v. R.M.* [2002] 4 I.R. 488.

64. Counsel for the applicant submits, first, that in accordance with the decision of the Supreme Court in *Sanders and Another v. Mid-Western Health Board* (Unreported, 23rd June, 1987), that the respondents and their children should not, in these proceedings, be entitled to rely on constitutional rights under Articles 41 and 42 of the Constitution. If they are so entitled, she submits that those Articles do not preclude an order for return of the children on the facts herein, pursuant to Article 20. She seeks to distinguish the decisions in *London Borough of Sutton and Foyle Health and Social Services Trust* on the facts and also, in relation to the former, the distinction between the exercise of a discretion under Article 13 and the potential defence under Article 20. She also submits, insofar as necessary, that *Foyle Health and Social Services Trust* was incorrectly decided in its application of Article 20 of the Convention.

65. The first issue is whether or not the respondents are entitled to assert constitutionally protected rights for their family, pursuant to Articles 41 and 42, in these proceedings. *Sanders v. Mid-Western Health Board*, is the unanimous judgment of a five-Judge Court delivered by Finlay C.J. (J.M. Kelly, *'The Irish Constitution'* 4th edition, at para. 7.1.33, refers to it as an *ex tempore* decision). This is not apparent from the copy furnished to the Court by counsel for the applicant. The appeal was against an order of Hamilton P. (as he then was) on an application made to him on behalf of Hampshire County Council in respect of custody of three children under Article 40 of the Constitution. The English High Court had made an order on consent of the parents that the three children should be put into the care of Hampshire County Council. The children were then unlawfully taken from the custody into which they had been put by the County Council by their parents and brought to Ireland. That was done in breach of the English High Court order. Two applications under Article 40 of the Constitution came before the High Court, one from the parents seeking custody, and the other from Hampshire County Council. On the parents' entitlement, it is implicit in the judgment that the order of Hamilton P. had been to accede to the application of Hampshire County Council in application of the general principle that, subject to exceptions in the interests of justice, the comity of the Courts and the question of the welfare of children requires or demands that disputes in matters affecting their custody and upbringing should be determined by the Courts of the jurisdiction in which they ordinarily reside and in which they were intended to be brought up. The decision, of course, predates the implementation of the Convention in this jurisdiction.

66. On the parents' entitlement to rely on constitutional rights under Articles 41 and 42 of the Constitution, Finlay C.J. stated at pp. 2-3:

> "In a habeas corpus application concerning the custody of children, the Court has jurisdiction not only to determine the legality of the questioned custody of the children, but also the alternative custody most consistent with their welfare. Where, as has happened in this case, parents having no connection with Ireland bring their children unlawfully from the country in which they are, into the jurisdiction of this Court, in breach of an Order made by the Court in the jurisdiction in which they were domiciled and in which the children were being reared, I do not accept that they can by that act alone confer on themselves and their children constitutional rights under Articles 41 and 42 of the Constitution. These parents do not claim any grounds for asserting constitutional rights under Articles 41 and 42 of the Constitution other than that they have arrived in this country in the circumstances which I have just outlined. I am accordingly satisfied that the submission made on their behalf that the existence of these constitutional rights prevents the making of the Order made by the learned President must be rejected."

67. That decision post-dates a decision of Hamilton J. in *Northampton County Council v. A.B.F.* [1982] I.L.R.M. 164, where he recognised the right of an English father who had removed his (legitimate) child to Ireland to avoid the consequence of an adoption order to rely on Article 41 and directed a full plenary hearing of the case on the merits. A contrary view had been reached by Finlay P. in the High Court in *Kent County Council v. C.S.* [1984] I.L.R.M. 292.

68. Counsel for the applicant acknowledged that unlike *Sanders*, in this case there was no breach of any English Court order by the parents in bringing the children to Ireland. However, she submitted that the removal of the children from England to Ireland was wrongful as being in breach of rights of custody of the English Courts. Further, that the only connection of the respondents and their children to this jurisdiction was their arrival here following a wrongful removal of their children from England.

69. The respondents, understandably, did not make submissions with authority on this aspect of the case. In the course of hearing, I raised with counsel for the applicant the existence of subsequent Supreme Court decisions indicating that a family, even if made up of exclusively non-Irish citizens, may be entitled, whilst in this jurisdiction, to the constitutional recognition and rights of a family pursuant to Articles 41 and 42 of the Constitution. I have not had the benefit of submissions of counsel on both sides in relation to this issue. There are a number of *dicta* (probably all *obiter*) in judgments of the Supreme Court which indicate that a family of non-Irish citizens, whilst in the State, may be entitled to rely on Articles 41 and 42, at least in certain circumstances. For example in *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, which concerned families, at least one member of which was an Irish citizen, Murray J. (as he then was), in giving one of the majority judgments, stated at pp. 82-83:

> "… in my view, the protection afforded by the Constitution to the family is not dependent entirely on whether it counts among one of its members a citizen of the State. ….
>
> When a family of non-nationals is within the State it has all the attributes which the Constitution recognises as a 'moral institution'. I do not think that there can be any question but that the non-national children of such a family have a constitutional right to the company, care and parentage of their parents within a family unit while in the State and that one or both parents could not be removed from that role on grounds any different from those which the Constitution permits as the basis for removing children from the custody of their parents who are citizens."

70. I am hesitant therefore to consider *Sanders* as authority for the applicant's submission that the respondents and their children should not be entitled to recognition as a family whilst in Ireland for the purposes of Articles 41 and 42 and, whilst here, to rely on the constitutional rights accorded to families and their members thereunder. The ratio of *Sanders* appears to be that the parents in that case, by bringing their children unlawfully into this jurisdiction in breach of an English Court order, were not, by that act alone, entitled to rely upon constitutional rights under Articles 41 and 42, so as to preclude the Irish Courts, pursuant to the principle of comity of Courts and the then principle that the welfare of children should be determined by Courts of the jurisdiction in which they ordinarily reside and in which they were intended to be brought up, making an order for their custody to be given to the person entitled in accordance with the English Court order and, in substance, an order for their return to England.

71. I have concluded that, having regard to the terms of Articles 41 and 42 of the Constitution, and the fact that the applicant accepts that the respondents are persons married to each other, that I should, for the purpose of this application, consider them as entitled to recognition as a family in this jurisdiction for the purposes of Articles 41 and 42 and the rights accorded to a family and its members by those articles. Hence having regard to the decision of the Supreme Court in *Sanders*, and the terms of Article 20 of the Convention, the primary issue to be determined in this case is whether Articles 41 and 42 do not permit the Courts to make an order for the return of the children in circumstances where they have been unlawfully removed from England to Ireland, in the sense of being wrongfully removed, and where the purpose of the order for return is to enable the Courts of their habitual residence, *i.e.* England, determine disputed matters affecting their welfare in accordance with the laws of England and Wales, even where such decisions might include the making of an adoption order which would not be permissible in this jurisdiction.

72. On the facts of this application, the making of an adoption order by the English Courts, in relation to the children the subject of the proceedings, is only a possibility. There is no current proposal for adoption. Care proceedings have been instituted, but adoption, as explained by Mr. England, is treated "as the outcome of last resort". Counsel for the applicant submits that, if Articles 41 and 42 were to be construed as not permitting the Court to make an order for return of children on the facts of this case, they would similarly prevent the Court from making return orders in many cases where children are wrongfully removed to this jurisdiction from the United Kingdom and other jurisdictions which permit adoption of the children of married parents according to less restrictive criteria than would be permissible in this jurisdiction pursuant to Articles 41 and 42. She submits that such an application would not give to Article 20 the intended exceptional construction, but rather one which would create a significant exception to the principle of mandatory return contained in Article 12 of the Convention. There is no evidence in relation to other jurisdictions in support of such a submission. However as the judge taking the HLC list for several years, I am aware of a significant number of wrongful removals from the United Kingdom where care proceedings are pending. Nevertheless I treat with caution her "floodgates" submission,

but of course accept the submission that Article 20 must be applied strictly as a rare exception in accordance with the principles set out above.

73. Article 19 of the Convention expressly provides that a decision under the Convention "concerning the return of the child shall not be taken to be a determination on the merits of any custody issue". This Court, in determining to make an order for the return of the children, is prima facie not making any decision which interferes with the inalienable and imprescriptible rights of the family comprising the respondents and their children, or of its members. If an order for return is made the respondents are free to return with their children. Articles 41 or 42 do not, in their terms, prevent the making of an order for return of children in a family, all of whose members are not Irish citizens and whose only connection to this country is arrival following a wrongful removal, to their State of habitual residence for the purpose of disputes relating to the welfare of the children being determined by the courts of and in accordance with the law of the children's habitual residence. I have concluded that this is so even where, following the order for return, there exists a possibility or a risk that orders may be made by such Courts in accordance with their applicable laws which would not be consistent with the respect and rights accorded to families under Articles 41 and 42 of the Constitution. On the facts of this application, the making of the order for return does not have, as a proximate or direct consequence, any interference with the rights of the family, comprising the respondents and their children, or any of them, contrary to Articles 41 and 42 of the Constitution. There is no current proposal for adoption of the children. It appears to me that the threshold requirement in Article 20 of the Convention that Articles 41 and 42 do not permit the making of an order for return, requires such a direct or proximate consequence of the making of the order for return.

74. Accordingly, I have concluded that, on the facts of this application, the respondents have not established that Articles 41 and 42 of the Constitution do not permit this Court to make an order for the return of the children to the jurisdiction of the Courts of England and Wales, pursuant to the Convention.

75. As the respondents sought to rely on my decision in *London Borough of Sutton*, I wish to make clear that in that case, as I upheld the defence of acquiescence under Article 13(a), I was then exercising a discretion given to the Irish High Court by the Convention as to whether or not to make an order for return. I was entitled to take a number of matters into account in exercising my discretion. The discretionary jurisdiction which I was exercising was quite different to the issue which had to be determined in this case, on the defence sought to made out under Article 20 namely, that Articles 41 and 42 of the Constitution do not permit the making of an order for return on the facts of this application.

76. In reaching the conclusion set out above, I have obviously considered carefully and taken into account the judgment of Dunne J. in *Foyle Health and Social Services Trust v. E.C.,* referred to above. That judgment is distinguishable on the facts as there was in that case in place a care plan proposing adoption for the child. Further, it appears that the judgment *in Sanders v. Mid-Western Health Board* was not opened to the Court in that case. Also, that on the construction and application of Article 20 of the Convention, the Court was not referred to the Australian decision, set out above, nor the relevant portions of the Perez-Vera Report. Insofar as I differ on the application of Article 20, I do so for the reasons set out above.

Conclusion
As the respondents have not established a defence under Articles 13 or 20 of the Convention the Court has no discretion and is bound under Article 12 to make an order for the return of the children to England. I will hear the parties prior to fixing the time or circumstances for the return.