THE HIGH COURT

FAMILY LAW

[RECORD NO. 2017/3 HLC]

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

AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980

AND IN THE MATTER OF C.M., A MINOR

BETWEEN

A.M.

APPLICANT

AND

S. McG.

RESPONDENT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 2nd day of October, 2017

Nature of the case

1. This is an application for a declaration that the respondent wrongfully removed her son from the State of Illinois, in the United States of America within the meaning of article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (hereafter the 'Hague Convention') and/or a declaration that the respondent wrongfully retained the child in Ireland, together with an order pursuant to article 12 of the Hague Convention for the return of the child to the State of Illinois. The applicant in the proceedings, who resides in Illinois, is the father of the child. The respondent, an Irish national, is the child's mother and both she and the child they are currently living within the jurisdiction. The case raises issues, not for the first time in this jurisdiction, concerning the interaction between the position of unmarried natural fathers and applications for the return of children pursuant to the Hague Convention. More particularly, the case raises questions as to (1) whether the father had 'custody rights' for the purpose of article 3 of the Convention at the time of the child's removal to Ireland; and/or (2) if not, whether the father or an Illinois court could and/or did acquire 'custody rights' for the purpose of article 3 of the Hague Convention by virtue of an application made to an Illinois court on a date after the mother had come to Ireland with the child.

Relevant Facts/Chronology

2. The child the subject of these proceedings was born on 9th March, 2015 and is currently two years and six months old. He was born in the State of Illinois to the applicant and respondent, who were not married to each other. Both in the affidavits and the oral evidence, there was considerable disagreement about a variety of matters, including allegations and counter-allegations of abuse and assault, the details of the daily care of and financial arrangements concerning the child while he was still in Illinois, as well as the condition of the premises in which the parties lived when they were together, but I propose to confine myself to the facts which appear most relevant to the issues I have to decide.

3. The following facts are primarily relevant to the issues arising in the case as to whether the applicant father has custody rights for the purpose of the Convention sufficient to ground an application for the return of the child, and/or to found a declaration of wrongful removal/retention. The mother and father were not married and had been living together from December 2014. The applicant father executed a document known as a Voluntary Acknowledgment of Paternity ("VAP") on the 10th March, 2015, the day after the child's birth. There is a dispute as to whether the mother signed this document, which is discussed in further detail below. This document was lodged with the Illinois Department of Healthcare and Family Services, as a result of which the father's name was placed on the child's birth certificate. On the 2nd May, 2016 the parents signed and notarised a document described as a Parenting Plan in relation to the care of the child. This document was notarized but never made the subject of any court order. The child was brought to Ireland by the respondent mother on the 17th June, 2016. It is not in dispute that this was without the consent of the father. There were, as of that date, no court proceedings in being in Illinois. On the 28th June, 2016, the applicant filed an *ex parte* application with the circuit court of Cook County, Illinois, seeking "temporary allocation of parental responsibility" and return of the minor child, and exhibiting the VAP. On that date, the Illinois court (Judge Durkin) made *ex parte* orders granting the applicant "emergency temporary possession" of the child and requiring the respondent immediately to return the child to Illinois and to the possession of the father. The proceedings were physically served on the respondent in Ireland on the 2nd July 2016. It appears that the matter came before the Illinois court again on the 19th July 2016, and the court noted that the respondent had failed to return the child to Illinois or to the father, and the matter was 'continued' to the 10th August 2016. A 'body attachment order' was made on the same date in respect of the respondent. The matter was again before the Illinois court on the 10th August 2016 although it is not entirely clear what transpired on that date except that the matter was further adjourned to the 27th September 2016. On the 27th September, the Illinois court, in the absence of the respondent, granted the applicant judgment in default and allocated to him the sole custody of the child and directed that the child reside with him. An application was made for the return of the child by the applicant through the Central Authority in Illinois to the Irish Central Authority on the 22nd December 2016. The special summons in the present proceeding was issued on the 26th January 2017 and served on the respondent on the 1st February 2017. On the 3rd May 2017, the Court acceded to an application for leave to serve an amended special summons and a judgment setting out the basis for this decision was delivered on the 5th May 2017. This was the subject of an appeal, which was dismissed by the Court of Appeal on the 28th June 2017. The matter came on for hearing before me between the 10th to the 12th July 2017 inclusive.

4. The following facts are of greater relevance to the issue of habitual residence in the case. The applicant and respondent had become engaged to be married in December, 2015. The respondent alleges that the applicant engaged in a serious physical assault on her in April of 2016, as a result of which the wedding was cancelled. This allegation is denied by the applicant. He points out that there was assault by the respondent upon him in April 2015 which was the subject of a police report, which was exhibited to the Court together with photographs of the applicant's injuries. I do not propose to reach any conclusions on allegations of various kinds of abuse alleged by the respondent and think it sufficient to rely upon such facts as are not in dispute. It seems clear that the wedding was in fact cancelled in April 2016. The Court has seen a letter from the respondent to the wedding florist dated the 22nd April, 2016, emails from the respondent to the supplier of the wedding dress dated the 20th April, 2016, and a cancelled reservation for a wedding banquet at a country club dated the 22nd April, 2015. All indicate that the wedding was cancelled at that time. The respondent averred that she told the applicant she was leaving him and intended to move away from their shared accommodation

towards the end of April, 2016. As noted above, the parenting plan was signed by them on 2nd May, 2016. The respondent makes a further allegation that there was a serious sexual assault upon her by the respondent on 8th May, 2016. She avers that in the immediate aftermath of that incident, he insisted that she leave their shared accommodation and live elsewhere with the child. The allegation of serious sexual assault is denied by the applicant. Again, I do not propose to rule on this. It seems that the respondent at that time moved to rental accommodation at a particular address in Chicago and signed a one- year lease. She says that if she had not, she would have had difficulty in securing the accommodation as the landlord would not rent for less than one year. She moved into these premises on 15th May, 2016 with the child. The amount of financial contributions from the applicant to the respondent after their relationship deteriorated was disputed, but I do not think it is necessary to make findings of fact in that regard. It seems that at around May 2016 the respondent gave notice to her employer in the fitness firm where she worked part time as a personal trainer. It also appears that she was making enquiries about legal advice, as the Court has seen a screenshot of a document which shows that her brother sent her details for a lawyer in the United States on 20th May, 2016. On the 25th May, 2016, the respondent requested a copy of her leaving certificate results from her former secondary school in Ireland. She averred that she did this with a view to preparing her C.V. because she was planning to leave the United States permanently. The respondent says that she contacted the United States lawyer recommended by her brother on the 6th June, 2016 to ascertain her legal position prior to leaving the United States. Around this time the applicant left for military school in Springfield, Illinois. On or about the 12th June, 2016 the respondent collected the child's vaccination records from his doctor, which she stated was in order to streamline the child's change in healthcare provider from the United States to Ireland. The respondent also stated that having formed an intention to re-settle in Ireland permanently, she realised she would need to transport her and her child's belongings from Illinois to Ireland. In this regard, the respondent liaised with her sister, who arranged for her and her child's belongings to be removed from their accommodation and transported to Ireland. The respondent stated in her affidavit that on the 12th June, 2016 the same sister helped her place her belongings in boxes and that on the 16th June, 2016 she deposited the belongings at the shipping depot for transport to Ireland. The Court has seen a text message dated the 15th June, three days before her departure in which the respondent is discussing the location of the storage facility of the boxes to be shipped. The Court was also provided with an invoice billed to the respondent and her sister from the shipping company dated the 25th July, 2016 which states that 19 boxes were due to be shipped on the 27th June to Galway with an estimated arrival time of the 30th July, 2016. The Court was also provided with a screenshot of messages between the respondent and her sister from the respondent's phone with a timestamp of the 15th June which discusses a storage location for the respondent's possessions. On the 15th June, 2016, the applicant returned from military school. Two days later, on the 17th June, 2016, the respondent travelled to Ireland with the child. At this stage, she had closed her bank account in the United States, and an email has been exhibited in this regard. The 18th June, 2016 was a date of scheduled access between the applicant and the child. The respondent telephoned him and told him that she had taken the child with her to Ireland and said that she had not asked for his permission because she knew he would not give his consent. On the 19th June, 2016 the respondent left a voicemail on the phone of the applicant's sister, saying that she and the child were 'at home on vacation' and that she was confused as to why he was sending threatening messages to her siblings. The Court has seen a transcript of this voicemail message. Around this time there was a text (which the Court has seen) from the respondent's sister stating that the respondent was on vacation and had to 'get out of here for a while as all the stress that has occurred', and which referred to the cancellation of the wedding. On the 22nd June, 2016, the applicant engaged services of an American lawyer. On the 28th June, 2016, as noted above, application was made to the Illinois court on his behalf. On the 1st July, 2016, the respondent informed her United States landlord (from Ireland) that she had left and would not be returning because she was living in Ireland. In August, 2016 the child was allocated an Irish PPS Number. In September, 2016 the child was enrolled in a local crèche which he currently attends five days per week. In the same month the respondent obtained an Irish passport for the child. She stated that in order to do this she had lied to the applicant before her departure in order to procure his signature for the passport forms. She states this was necessary as the applicant had overheard a conversation in a post office where the respondent acknowledged she was going on a trip, and another telephone conversation between her and an aunt who resided in Chicago which related to both her intention to return permanently to Ireland and the best way to effect this. She stated that the applicant, on foot of these conversations, threatened to forcibly prevent her from leaving the United States and said he would not sign any passport forms for their child. The respondent stated in cross examination that she was afraid of what the applicant might do to her if she had told him the truth. The applicant states in his affidavit that he was lied to and that the only reason he signed the forms for a passport was because they had come to an agreement regarding access, and that the respondent had agreed not to leave on any visits without first consulting him. On the 17th February, 2017, the respondent moved away from where she was living with her parents to a new address in a housing estate in the West of Ireland. This is a two- bedroomed house beside a community park and near the creche, and also close to her workplace. The respondent is currently working as a personal trainer and fitness instructor, operating out of a hotel. She performs volunteer work within the community. She operates a personal bank account in Ireland. She avers that the child is deeply attached to both of his maternal grandparents, who live on a farm.

5. The respondent points out that she grew up in Ireland and is an Irish citizen with an Irish passport. She averred that she had a fixed intention to stay in Ireland at the time of her arrival here.

The factual issue relating to the Voluntary Acknowledgment of Paternity

6. An issue arose in relation to the signing of the Voluntary Acknowledgment of Paternity ("VAP"). It was alleged by the respondent that she had not signed this document, which was the document which led to the applicant's name being placed upon the child's birth certificate, and which was the foundation, in turn, for his application to the Illinois court referred to above. I will refer to the documentary VAP itself and then deal with the evidence before me concerning the document. The submission on behalf of the respondent was that it had effectively been forged by the applicant, on the basis that he had signed the document instead of the respondent mother.

7. The documents exhibited to the Court included not only the VAP itself but also instructions for completing that document. I note that it states the following as its purpose:

> "The Voluntary Acknowledgement of Paternity (hereinafter called VAP) legally establishes the biological father and child relationship (when the biological father is not married to the child's mother) and allows the biological father's name to be placed on the birth certificate. The biological father becomes the legal father of the child when the VAP is properly signed and witnessed, creating certain legal rights and responsibilities for the child and the parents."

8. Among the instructions, it is stated as follows:

> "Each person must sign and date all forms in front of a witness. A witness must be an adult aged 18 or over but cannot be the parents or the child named on the VAP."

9. The instructions go on to say that if the VAP is completed at the hospital where the child was born, hospital staff will add the biological father's name to the birth certificate.

10. The VAP itself is a printed form with handwritten entries. At the top of the document, the following printed instruction is set out:

"The document must be completed and signed by both parents in front of a witness who must also sign the form".

11. The form then contains in handwriting the details of the child, mother and father. Underneath that there are seven numbered points on the pre-printed form. The first indicates that by signing the document, the party understands that it is a legal document and that the VAP is the same as a court order determining the legal relationship between a father and a child. It also states that the party understands that the VAP does not give custody of visitation to the father, but gives the father the right to ask the court for custody or visitation. At the bottom of the page there are then two signatures boxes for each of the father and mother of the child. The applicant signed and printed his name and his address and the signature of a witness appears with this. The mother's signature box contains a signature in her name together with her printed name, and the same witness also appears to have signed. It may be noted that at the foot of the document there is a record or instruction that the original is to be sent to a particular address, and that there are a number of copies; yellow for the hospital, pink for the mother, and orange for the father.

12. The respondent mother, having already sworn three affidavits in the case without mentioning this issue, swore a fourth affidavit on the 6th July, 2017, four days before the hearing before this Court, in which she dealt with a large number of matters, and raised the signature issue in her final paragraph, saying as follows:-

> "Further and for the purposes of clarity I wish to make it clear that I did not sign the Voluntary Acknowledgment of Paternity. The signature thereon is not mine, and in fact I believe that it was the applicant who signed my name."

13. On the respondent's behalf, there was also a report of a Sean Lynch, a forensic document examiner, who was of the opinion that the signature on the VAP was probably not that of the respondent.

14. An Illinois attorney employed on behalf of the respondent to swear an affidavit of laws in the case swore an affidavit dated 7th July, 2017, in which he sought to deal with the implications of the signature issue. He said that a VAP must be signed and witnessed by both parties in order to be valid and enforceable under the relevant statute. He said that the process is a two-step one in which the trial court first makes a determination of parentage, and only then can proceed to additional determinations regarding child support, custody and visitation rights if requested by a party. He says that if a valid VAP is filed with the Illinois Department of Healthcare and Family Services, this is equivalent to an adjudication of the parentage of the child. The legal effect of the adjudication of parentage is to give an unmarried father the standing to seek an order vesting custody rights in him. He says that if the VAP was fraudulently executed, then he did not have an adjudication of parentage and without that adjudication, the court had no rights of custody. He says that the "applicant's claims for custody and the court's rights of custody were not vested as there was no actual controversy". He says that further, if the VAP was invalid, the ensuing September 2017 ruling of the court was void. He cites authorities dealing with the question of a void judgment or order where a court lacks jurisdiction or where the order was procured by fraud. He concludes that a fraudulently executed VAP of paternity would void the 27th September judgment and divest the applicant in the Illinois court of any custody.

15. The applicant father gave oral evidence before me. His evidence in chief in relation to the signing of the VAP was as follows. He said that the form was signed at the hospital, in the room in which the child had been delivered, the day after he was born. He said that to the best of his recollection, a lady came in with the paperwork and asked if they were ready to sign it. This was a worker at the hospital who dealt with records. He recollected that she said that this was a VAP and that his name would not be on the birth certificate unless he signed here. He recollected that the respondent's mother was breastfeeding the baby at the time and he said that it was possible that he signed it but that if he did, she was in the room at the time. He said he just could not recall. He says that he, the respondent, the baby and the witness (being the staff member) were all present at the time.

16. In cross examination, when asked whether the respondent's purported signature was in his handwriting, he said that he was not sure whether he put in her signature. He said that the signature was never an issue in the present proceedings until very recently. When it was pointed out to him that he had told the United States court that she had signed the VAP (by signing a verification by certification supporting his *ex parte* application), he said he had done so because that was to the best of his knowledge at the time and that he had not seen the form since that day in the hospital. He was pressed on why he had not told his attorneys about the signature issue even though he realised the significance of the VAP, and he said he did not tell them because "to this day still" he did not remember whether or not she or he had signed her name. He said that if he signed her name, he did not sneak off to do so, that they were in the same room and she would have given him verbal consent to do so. He said the court in Illinois was not told that because he did not remember signing it and he was not using any subterfuge. He said at that point in time, he probably did not realise how important that was. He was pressed on whether the Illinois Court was told about this matter and he said he would have told his attorney and the court if he had known but that he was still not fully convinced that he did sign it. He said the court was never told one way or another who had signed it. He again described the lady coming into the room with the form. He said that he was handed a copy of the form at the bedside. When asked if the respondent was given a copy of the form, he said no, but he remembered sitting at her bedside. When it was put to him that the respondent would say that he signed everything without reference to her, he answered that there was consent, that they were going to be married and they had a child together and there was no question with regard to any verbal consent, that they were "on the same page" and were going to be a family. He said he disagreed entirely with the suggestion that she did not even know this form had been signed. When pressed about whether he had a recollection of a witness seeing him signing the form on behalf of the respondent mother, he said he did not recollect signing her name onto the form and therefore could not say that he saw someone witnessing him signing her name, and that he was "just putting two and two together".

17. The respondent mother gave evidence to the Court, *inter alia*, in connection with this issue. She said she remembered a person, perhaps a nurse, dressed in green or blue, like scrubs, and that she had left a "load of forms". She said that the applicant "just took over the forms". She says that it simply did not happen that the lady came in and that there was a conversation about the VAP. She said that he also dealt with another form called the "baby feet" form and the discharge form when she left the hospital, and that he had signed for her discharge even though she did not feel well. In cross examination, she said that she just remembered forms coming in and him taking control and that she did not know what was happening. She said that she did not see or read any forms and that he took them, and she did not know what happened then. She said "he was just going around signing forms". Asked if she saw him signing the forms, she said no. She did not see him take the forms out of the room. She did not ask him what the form was "because he was in control of everything". Significantly, she said she had no problem that he was named as the father in the birth certificate. She accepted that the applicant must have filled out the forms while he was in the room and in her presence, but she said that he had the forms the whole time and it was not a small room. She said the person who collected the forms did not discuss the contents. She did not remember getting a colour copy from the hospital. He said that she had never really looked at the VAP and it was only a few weeks ago that she looked at it and realised that the signature was not hers. She had not been disputing that he was the father so she did not really look at it in the meantime.

18. Having considered the evidence, I have reached the factual conclusion on the balance of probabilities that Mr. M probably signed

the form in the room in the presence of Ms. McG, but that this was not fraudulent in the sense of intending to deceive her to her detriment. At the time, they were still planning to get married and Ms. McG herself acknowledged in evidence that she had no problem, then or now, about his being acknowledged as the father of the child. I find it unlikely that the member of hospital staff would not have given even a cursory explanation as to what was a legal document with legal implications, but I suspect that the respondent mother was preoccupied with all the matters that go with having recently given birth and having a new-born baby, including breast-feeding, and did not pay close attention to any such explanation and has forgotten it, if she ever took it in, because she had no difficulty with Mr. M being named on the birth certificate in any event. I suspect she may have authorised him to sign it in a very casual way.

19. This is my view regarding the factual aspect of this matter. Where this leads the Court from a legal point of view is a different matter. It is not appear to me that the circumstances amount to 'fraud', which was the legal situation focussed upon by the attorney on behalf of the respondent. The applicant relied upon *Dundalk ASC Interim Company Limited v. SAI National League* [2001] 1 I.R. 434, for the proposition that at common law, a person sufficiently signs a document if it is signed in his name and with his authority by somebody else and that in such a case the agent's signature is treated as that of his principal. This was in the context of proceedings concerning whether or not a player taken on by a sports club had been properly registered with the club in accordance with the defendant's rules, which provided that to be properly registered, a player had to sign a registration form that had to be witnessed and the form sent to the registration security. The player had not personally signed the form but had given his authority to the notice party's manager to sign on his behalf. The plaintiff issued proceedings challenging the registration of the player and the High Court dismissed the plaintiff's claim, applying the common law principle described above.

20. What I am not in a position to say is whether an Illinois court would apply the above common law principle to the facts in hand. The question of a father's name being placed on a birth certificate is a very particular and sensitive situation with life-long implications for the parties, and the Illinois provisions appear to place considerable emphasis upon the mother signing the form personally, for obvious reasons. I have considered whether it would be appropriate to seek clarification from the Illinois courts on whether they would treat the VAP as valid in such circumstances, but, given the importance of disposing of Hague cases as speedily as possible, I am taking the view that I should not refer this question to the Illinois court if the case can be disposed of without this matter being resolved. As shall be seen below, I am of the view that the case can be dealt with without the necessary of resolving this particular matter and in the circumstances, I have decided that it unnecessary to seek clarification on this question of law from the Illinois courts.

Whether there was an unlawful "removal" of the child from the jurisdiction of Illinois on the 18th June 2016

21. There is no dispute in the present case that the child C was habitually resident in Illinois up to the date of his removal, the 18th June 2016, and that the respondent removed him on that date. The dispute concerns whether the removal was in breach of any rights of custody on the part of the applicant father.

22. Article 3 of the Hague Convention provides that the removal or the retention of a child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. It goes on to provide that the rights of custody mentioned in sub-paragraph (a) 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. It is well established that the onus is on the applicant to establish all matters set out in article 3 and that proof is on the balance of probabilities. It is also well established that it is necessary in the first instance to establish whether the applicant in an article 3/article 12 case has custody rights under the law of the requesting State, which a pre-condition to a finding that he has custody rights within the meaning of the Hague Convention.

23. I should perhaps say, for the avoidance of doubt, that the evidence establishes to me that the applicant father in this case was *de facto* behaving as a father, both in terms of providing and arranging care for his son, and providing financial support. There is dispute between the parties as to the precise extent to which he was doing so, but I have no doubt that he was in fact making considerable efforts in this regard. The first issue for the Court, however, is a legal one; what was his legal status in Illinois, and under the Hague Convention, at the time of the child's removal to Ireland?

24. The applicant relies upon three matters to support his contention that he had rights of custody under the law of Illinois and the Convention; (1) the document entitled 'Voluntary Acknowledgment of Paternity', filed with the relevant State department (but not the subject of any court order); (2) the document entitled 'Parenting Plan' signed by both parties (but not made the subject of any court order) ; and (3) (as was claimed on his behalf) that his permission was required for the child to obtain a passport and that this was tantamount to a ne exeat power. Insofar as article 5 of the Convention defines 'rights of custody' as 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence', counsel on behalf of the applicant argued that what should be focussed upon is whether the father had a right to veto the crossing of jurisdictional boundaries, rather than custody rights in the broader sense in which that term is commonly used in domestic Irish law.

25. The suggestion that the applicant's permission was required for the child to obtain a passport and that this was tantamount to a *ne exeat* power was raised quite late in the day in the case, and did not, for example, feature in the written submissions on behalf of the applicant. There was no legislative provision or expert evidence concerning this matter. The evidence at its height was simply that the respondent had consulted a lawyer in Illinois before she left, and after that date, had asked the applicant to sign the form for the child's passport. I am not prepared, on the basis of this evidence, to infer that his consent was required as a matter of law to the extent that he had a ne exeat right on this basis. The case of *Abbott v. Abbott*, 560 U.S. 1, (2010) was referred to but is in my view clearly distinguishable on the basis that the father in that case was a married but separated father and had a clear court-ordered right of *ne exeat*, described as such.

26. Further, the affidavits filed by attorneys on behalf of each of the parties were not in dispute that the 'parenting plan' did not have any legal effect on the custody rights of the father, because it had not been made subject to a court order. This was also made clear by the case of *Martinez v. Cahue*, (2016) 826 F.3rd 983 (7th Cir.2016), discussed in detail below.

27. Thus, it appears to me that the pivotal question in seeking to resolve whether the applicant father had custody rights under Illinois law is whether the Voluntary Acknowledgment of Paternity ("VAP"), filed with a State department, conferred rights amounting to custody rights or not. In this regard, the opinions of the attorneys who filed affidavits on behalf of the applicant and respondent were in conflict with each other. To put their views in context, it is necessary in the first instance to refer to a decision of the United States Courts of Appeals for the 7th Circuit, *Martinez v. Cahue*, (2016) 826 F.3rd 983 (7th Cir.2016), concerning a situation in which the father also sought to based his rights upon a parenting plan and a VAP. The attorney for the respondent maintains that the principles in this case continue to apply, while the attorney for the applicant maintains that a change of legislation has altered the

legal situation.

28. I should of course acknowledge that if the respondent's counsel is correct in her submission that the VAP in the present was invalid because it was not signed by the mother, this entire argument would fall away. However, because I am not certain what the position would be under Illinois law as regards a VAP signed by the father on behalf of the mother in circumstances other than fraud, I think it necessary to consider the following, on the basis that the VAP might be valid.

29. In *Martinez v. Cahue* (2016) 826 F.3rd 983 (7th Cir.2016), the child in question lived for the first seven years of his life with his mother in Illinois. His father lived nearby, though he and the mother had never married. The father had acknowledged his paternity and was named on the child's birth certificate. The mother and father entered into a private arrangement for custody and visitation rights but this was never formalised through a court order. To that extent, the facts were similar to the present case. In 2013, the mother moved to Mexico and took the child with her. After the mother and child had arrived in Mexico, they settled into a new life. The mother began working and the child enrolled in school. He played soccer on several elite teams and earned a scholarship. He had friends at school and on his sports teams, spoke Spanish fluently, attended church regularly and spent time with his extended family in Mexico. About a year later, the father persuaded her to send the child to Illinois for a visit, which she did. He then refused to return the child to Mexico. The mother petitioned for his return under the Hague Convention. The father had sought the protection of the Illinois courts only after the child's return to Illinois. The District Court found that Illinois remained the child's habitual residence and dismissed the mother's petition. The Court of Appeal reversed the decision of the District Court and ordered the return of the child to the mother in Mexico on the basis that, at all relevant times, the mother had sole custody of the child under Illinois law. This meant that only her intent mattered, and she had intended to move the child's habitual residence to Mexico. The father's retention of the child in Illinois was therefore wrongful and the child must be returned to Mexico.

30. At para. 11 of its judgment, the court said that it would consider first the question of whether the mother's initial removal of the child to Mexico in July, 2013 was subject to any legal restrictions that might allow the father's intent to affect the analysis. The court noted that the mother argued that she had the exclusive right to establish his habitual residence because she was the parent with sole custody of the child. The court said that "this is not quite accurate". It said that in Illinois, a custodial parent's decision to remove a child from the State is not "completely unrestrained". In the absence of a custody order, she is not required to seek the court's permission to relocate outside of Illinois but nevertheless, a custodial parent may be enjoined upon the application by the other parent from relocating with a child outside of Illinois pending the adjudication of the issues of custody and visitation. At the conclusion of such a proceeding, even if the court order grants her sole custody, the custodial parent must show that moving is in the best interest of the child. However, no such application had been made in the case before it.

31. The court then went on to say that the father had never obtained rights of custody for Convention purposes under the legislation, nor was the mother's right to relocate the child constrained. In the absence of a court order, Illinois law presumes that the mother of a child born to unmarried parents has sole custody. Custody does not arise automatically; a court must award it. The court said "*Cahue* did not obtain a custody order during the time that mattered. His agreement with the mother provided him only with agreed visitation rights", something that the court described as "a right of access that does not trigger the remedy of return under the Convention", citing *Abbott v. Abbott*, 560 U.S. 1, (2010). The court also said: "and even if that agreement had spoken to custody, it would not have legal effect. Illinois courts generally do not respect private agreements affecting custody". The court also noted that Illinois law did not accord him the lesser right of *ne exeat* which is a joint right to determine a child's country of residence, again citing *Abbott*.

32. At para. 12 the court also noted:

> "While section 13.5(a) provides a mechanism to enjoin temporarily the removal from, or compel the return of a child to, the state of Illinois, it is not a right to veto the relocation. It merely requires that the removal be subjected to the scrutiny of a court. The court then determines whether relocation should be enjoined pending the adjudication of the custody question, considering the petitioner's previous involvement with the child, the likelihood of parentage, and the impact on the person being enjoined. The injunction lasts only until the adjudication of custody or visitation is completed. After that, the custodial parent may remove the child if a court finds that it is in the best interests of the child. The noncustodial parent has no right to determine the child's location; he or she has only the right to ask a court to supervise. *Cahue* never took the proper steps to secure the rights on which he was trying to rely; there was no existing custody order or even a pending custody proceeding relating to the child."

33. The court went on to note that the father asserted that because of the VAP completed upon the child's birth, and because statute 750 ILCS 46/305 (a) (2016) conferred upon him all the rights and duties "of a parent", he had rights of custody as a matter of law. The court rejected this argument in an important passage:

> "There are two problems with this theory. First, section 305(a) was not enacted until 2016. Second, even a judgment of paternity does not in itself confer any rights of custody or visitation… *Cahue*'s argument to the contrary finds no support in Illinois law. Nor are we persuaded by his criticism of our reliance on *Redmond*. It is true, as he points out that unlike the father in *Redmond*, whom Irish law did not recognize as a parent, *Cahue* is *A.M.*'s acknowledged father. We accept that for some purposes this has legal consequences. But the Convention insists on a particular right - the right of custody - and *Cahue* lacked that, both when *Martinez* moved to Mexico in July 2013 and when *Cahue* refused to return *A.M.* to his mother in August 2014. Neither did Illinois law restrict Martinez's movement of *A.M.* at either time. At both times that mattered, *Cahue* had no legal right to decide A.M's residence, and *Martinez* had an unrestricted right to do so.

When *Martinez* moved to Mexico with *A.M.*, she may have violated the terms of the couple's private custody agreement, but the move did not violate a right of custody for Convention purposes. Martinez's removal of *A.M.* to Mexico was therefore not wrongful. … nor did it violate Illinois law. Because only *Martinez* has rights of custody under the Convention, and Illinois law did not in any way restrict her right to move away from the country with her son, only her intent was of legal significance".

34. It is thus very clear from the decision in *Martinez* that, as regards the law as it stood at the time relevant to the determination of that case, (a) a private parenting plan or agreement had no effect on custody rights; (b) the existence of a VAP did not of itself confer custody rights; (c) a determination of parentage is a precondition to seeking and being granted custody rights, but did not itself confer custody rights.

35. The affidavits of law in the present proceedings are in conflict as to whether the decision still represents the law in Illinois, because of enactment of a statutory provision in 2015. An affidavit was sworn on behalf of the respondent by Mr. Jay Patrick Dahlin, an attorney practising in the State of Illinois and partner with the firm of Schiller Du Canto & Fleck. He stated as regards the present case, *inter alia*, that:-

"the applicant possessed an adjudication of parentage, but not an adjudication of custody. An adjudication of parentage is not sufficient to establish standing to determine habitual residence. A father must have an adjudication of custody to have standing to determine habitual residence. *Redmond* 724 F.3rd at 738; *Martinez v. Cahue* 826 F.3rd 983 (7th Cir.2016). In this case, the earliest possible date can be said that the applicant was awarded rights of custody by the Illinois court was on September 27th, 2016, four months after the respondent had already moved with the child to Ireland".

36. Mr. Dahlin goes on to explain the legal significance of a VAP in the following passage:

"A Voluntary Acknowledgement of Paternity is an administrative document which, if executed by both parties and filed with the State of Illinois administrative Co-ordination Unit, has the same effect as an adjudication of paternity. However, the Voluntary Acknowledgement of Paternity does not, nor can it, attribute rights of custody to an unwed father. Only an Illinois court can establish custody rights for an unwed father. Under the 2015 Act, there is a presumption that an unwed father who signs the Voluntary Acknowledgement of Paternity is the parent of the child. Under both the old Act and the new Act, that parentage can be challenged even whether the Voluntary Acknowledgement of Paternity is signed and filed … if there is no signed and filed Voluntary Acknowledgement of Paternity or, where there is a dispute as to parentage subsequent to the signing of a Voluntary Acknowledgement of Paternity, a court will have to determine whether the "father" is actually the father of the child … the legal affect of an adjudication of Paternity is to establish the standing of an unwed father to seek an order of asking custody rights in him, and similarly for the mother ta o seek an order of child support from him".

37. Mr. Dahlin goes on to say that the 2015 Act did not substantively amend any provisions concerning the rights of custody under Illinois law. The amendment clarified the effect of a VAP once signed and filed, namely that the person is to be treated as the parent unless or until adjudicated otherwise. An unmarried father who seeks to be vested with custody rights may file a "petition for the allocation of parental responsibilities". Mr. Dahlin says that the language in s. 305(a) of the Illinois Parentage Act that adjudication of the parentage of a child conferred upon the acknowledged father "all of the rights and duties of the parent" is not an order vesting the parties of custody rights. It simply permits the acknowledged father to become vested with those rights without the need to first establish paternity. It also allows the mother of the child to sue the father for child support without first establishing his paternity. Further, by exactly the same method that applied under the previous Act, the establishment of parentage gives the father standing to request to be vested with rights of custody.

38. Mr. Dahlin points out that in the present case, the applicant filed a petition under the relevant legislation entitled "petition for the allocation for parental responsibilities". Until a court allocates a parental responsibility to the father, he had no right to determine where the child should live or make any other decisions in respect of the child. He concludes:

"in those circumstances, it is clear that at the time that the child was removed from the jurisdiction of the Illinois courts on 17th January, 2016, the applicant does not have any right to determine where the child should live; his consent was not necessary to a removal and he had no custody rights within the meaning of the Hague Convention and the Abduction of children 1980".

39. Mr. Dahlin says that *Martinez v. Cahue* sets forth the correct analysis to be applied in the case and was not modified by the 2015 Parentage Act. He says that the case of In *re the Parentage of J.W.* as cited in *Martinez* is still good law and was not impacted by the 2015 Act. The lower court in Martinez, he says, attempted to employ the same analysis the applicant seeks to employ in the present case, which analysis was overturned by the 7th Circuit Court of Appeals. He points out that on March 20th, 2017, the United States Supreme Court denied the father's request in *Martinez* that it review the 7th Circuit's decision, thus confirming the decision of the 7th Circuit.

40. An affidavit was sworn by an Illinois attorney on behalf of the applicant by the name of Michael R. Hudzik, employed in the firm of Sullivan Taylor & Gumina PC. He differed fundamentally from the view of the attorney, Mr. Dahlin, insofar as he was of the view that the 2015 legislation directly conferred all the rights and duties of a parent upon the applicant. The affidavit includes the following core passage:-

"The respondent incorrectly alleges that the petitioner had no rights as a parent due to the fact that there was not a court order providing for same. The voluntary acknowledgment of paternity granted the respondent all of the rights and duties of a parent. Section 305 of the Illinois Parentage Act of 2015 states in pertinent part:

'(a) except as otherwise provided in ss. 307 and 308 of this Act [750 IL CS 46/307 and 750 IL CS 46/308], a valid voluntary acknowledgment filed with the Department of Healthcare and Family Services as provided by law, is equivalent to an adjudication of the parentage of a child and confers upon the acknowledged father all of the rights and duties of a parent.'

750 IL CS 46/305 (West, 2017)

The Illinois Parentage Act of 2015 became effective on January 1 2016. The Illinois Parentage Act of 2015 applies to all voluntary acknowledgements of paternity and does not distinguish between voluntary acknowledges of paternity that were enacted before or after January 1 2016. The exceptions of ss. 307 and 308 of the Illinois Parentage Act of 2015 relate to the challenge of a voluntary acknowledgment of paternity neither of which are applicable to the instant case.

Therefore, upon executing the voluntary acknowledgment of paternity, the petitioner was granted all of the rights and duties of a parent."

41. Mr. Hudzik said that the prior version of the Illinois Parentage Act provided in pertinent part:-

"(a) a parent and child relationship may be established voluntarily by the signing and witnessing of a voluntary acknowledgment of parentage in accordance with s. 12 of the Vital Records Act, s. 10 – 17.7 of the Illinois Public Aid Code or the provisions of the Gestational Surrogacy Act. The voluntary acknowledgement of parentage shall contain the social security numbers of the persons signing the voluntary acknowledgment of parentage; however, failure to include the social security numbers of the persons signing a voluntary acknowledgment of parentage does not invalidate the voluntary acknowledgment of parentage.

750 IL CS 45/6 (West, 2017) (Repealed).

> The prior version of the Illinois Parentage Act did not include a section referencing the rights of the father upon execution of the voluntary acknowledgment of paternity.
>
> The intent of the legislature is clear from the plain reading of the language in the statute, and the language would be rendered superfluous if the court did not acknowledge the distinction between the two statutes."

42. Mr. Hudzik then goes on to discuss the obligations and rights of parties with regard to the removal of a child from Illinois under the Illinois Parentage Act of 2015, the Illinois Dissolution of Marriage Act, Federal and State kidnapping laws, and the Uniform Child Custody Jurisdiction and Enforcement Act.

43. Mr. Dahlin says that these statutory provisions have no bearing or relevance at all to the present inquiry because these statutory sections do not apply to unmarried fathers who are not vested with custody rights. He says that as such the affidavit of Mr. Hudzik confuses the positions of two legally distinct categories of unmarried fathers under Illinois law:-

> (i) an unmarried father who has the benefit of a signed and filed voluntary acknowledgment of parentage or a court order adjudicating him a father but who has *not* pursued and secured his custody rights; and
>
> (ii) an unmarried father who has the benefit of a voluntary acknowledgment or parentage or a court order adjudicating a father and who has gone on to obtain custody rights either by entering an agreed allocation judgment of parental responsibility with a court of competition jurisdiction or by having a custody judgment entered by a court of competent jurisdiction after an evidentiary trial.

44. The situation presented to the Court is not unlike that which arose in *H.I. v. M.G.* [2000] 1 IR 110, in which the High Court (Laffoy J.) had to decide the position under New York law in the face of conflicting evidence from two New York attorneys. It seems to me that, as in that case, the Court can only do its best to decide what the correct position is as between the conflicting evidence. My conclusion is that the view of Mr. Dahlin is the correct interpretation of Illinois law. In particular, it seems to me that the very petition made by the applicant Mr. A.M. to the Illinois courts for 'allocation of parental responsibility', which was not granted until the 27th September 2016, is entirely inconsistent with the notion that the VAP in and of itself automatically conferred custody rights upon him. No such court application would have had to have been made if his custody rights were as described by Mr. Hudzik in his affidavit.

45. Accordingly, I am of the view that the applicant Mr. A.M. did not have custody rights, even to the limited extent of a *ne exeat* right, at the time of the removal of the child from Illinois on the 18th June 2016, and therefore had no custody rights for the purpose of articles 3 and 12 of the Convention. If I am correct in this regard, it follows that there was no wrongful 'removal' in this case.

46. For the purpose of this determination, it has not been necessary to resolve whether an Illinois would accept a VAP which was not signed personally by the mother, or whether the court orders made by the Illinois courts in the present case are valid or void; this is because my conclusion is that even if there were a valid VAP in being, this would not have conferred custody rights on Mr. A.M. prior to the removal of the child from the jurisdiction.

Whether there was an unlawful "retention" of the child in Ireland after a certain date

47. The applicant maintains that even if there was no wrongful removal of the child, there was unlawful retention of the child after a certain date. It is contended that the relevant date is the date of the *ex parte* petition of the applicant dated the 28th June, 2016 to the Illinois court; or alternatively, the date on which the respondent was served with the proceedings, the 2nd July, 2016. It is argued that the child's habitual residence had not changed by these dates and therefore any retention of the child in Ireland beyond those dates was a wrongful retention within the meaning of article 3 of the Convention. It is argued, in the alternative, that either the Illinois court seized of the applicant's proceedings for allocation of parental responsibility had acquired custody rights in respect of the child or the father did so.

48. Again, I refer to the submission on behalf of the respondent that the VAP itself was invalid because the father signed it, which in turn, it is argued, would render void any of the court orders founded upon it. As noted earlier, I am not in a position to say what Illinois law would make of this situation, and I think it necessary to proceed to address the issues on the basis that the VAP and subsequent court orders might be valid to see where this leads the Court.

49. It seems to me that a number of inter-related questions are raised:

> (a) In principle, can custody rights ever be acquired by a parent or court for the purpose of making an application under the Convention for return of a child by virtue of an application to a court, or a court order granted *after* a lawful removal has taken place?
>
> (b) If the answer to this is in the affirmative, were custody rights *acquired by the applicant or the Illinois court in this case* by virtue of his court proceedings initiated by the applicant father in Illinois after the child came to Ireland, and if so, precisely when were those rights acquired?
>
> (c) Was the child's habitual residence in Illinois lost and if so, when; and how does this issue interact with the answers to questions (a) and (b).

50. I turn in the first instance to question (a).

> *In principle, can custody rights be acquired by a parent or court for the purpose of making an application under the Convention for return of a child by virtue of an application to a court, or a court order granted, after a child has been lawfully removed from the jurisdiction by the other parent?*

51. If, in principle, the Hague Convention simply does not recognise an applicant's domestic custody rights for the purpose of articles 3 and 12 where those rights have been acquired under domestic law subsequent to a lawful removal of a child from the jurisdiction, that would dispose of the entirety of the second part of the applicant's case, which is based on 'retention'. It was argued on behalf of the respondent that the Convention does not recognise such after-acquired custody rights, and that cases of *retention* under the Hague Convention are limited to cases where the applicant parent had custodial rights at the time of the physical removal of the child from the jurisdiction, and that the concept of retention is designed to deal with cases of 'over-holding' i.e. where there was consent by the non-removing parent to the child leaving the jurisdiction for a limited purpose and duration (for example for a holiday, or family visit), but the removing parent has kept the child on past the agreed period. It was argued on behalf of the applicant that the concept of retention was not so limited, and that a number of Irish cases led to orders for return where the applicant parent had

made application to court for custody after the date of lawful removal of the child by the other parent.

52. A starting point for the discussion may be the views of Professor Perez-Vera, who authored the Explanatory Memorandum to the Hague Convention itself. It may be noted that in the conclusion and recommendations of the Fourth Meeting of the Special Commission to review the operation of Hague Convention in 2001, it was stated at para. 4.2, that the Special Commission "emphasises the continuing importance as an aid to the interpretation and understanding of the Convention of the explanatory report by Elisa Pérez-Vera". At para. 11 of the Perez-Vera explanatory report itself, dealing with the issue of retention, it is stated as follows:

> "With regard to the definition of the Convention's subject matter, we need only remind ourselves very briefly that the situations envisaged are those which derive from the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child. The variety of different circumstances which can combine in a particular case makes it impossible to arrive at a more precise definition in legal terms. However, two elements are invariably present in all cases which have been examined and confirm the approximate nature of the foregoing characterization.
>
> Firstly, we are confronted in each case with the removal from its habitual environment of a child whose custody had been entrusted to and lawfully exercised by a natural or legal person. Naturally, a refusal to restore a child to its own environment after a stay abroad to which the person exercising the right of custody had consented must be put in the same category. In both cases, the outcome is in fact the same: the child is taken out of the family and social environment in which its life has developed. What is more, in this context the type of legal title which underlies the exercise of custody rights over the child matters little, since whether or not a decision on custody exists in no way alters the sociological realities of the problem."

Secondly, the person who removes the child (or who is responsible for its removal, where the act of removal is undertaken by a third party) hopes to obtain a right of custody from the authorities of the country to which the child has been taken. The problem therefore concerns a person who, broadly speaking, belongs to the family circle of the child; indeed, in the majority of cases, the person concerned is the father or mother".

53. At para. 15, the Perez-Vera report says:

> "To conclude, it can firmly be stated that the problem with which the Convention deals - together with all the drama implicit in the fact that it is concerned with the protection of children in international relations - derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial. In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision, especially one coexisting with others to the opposite effect issued by the other forum, will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about."

54. It is argued on behalf of the respondent that this clearly supports the view that the concept of 'retention' for the purpose of the Hague Convention is restricted to situations where the applicant parent had custodial rights at the time of the physical removal of the child from the jurisdiction, and is designed to deal with cases of 'over-holding' i.e. there has been consent by the non-removing parent to the child leaving the jurisdiction for a limited purpose and duration, but the removing parent has kept the child on past the agreed date. It is argued that the Convention concept of 'retention' does not envisage a situation where the applicant parent had no custody rights at the time of the physical removal of the child and subsequently acquires them with a view to 'chasing' the child pursuant to the Convention (a situation involving so-called 'chasing orders').

55. The respondent also relies upon a decision of the Supreme Court of Canada where the view was expressed that the Convention does not encompass 'chasing orders'; *A.T. v. P.T.* [1994] 3 Can. S.C.R. 551 (otherwise known as the *Thomson* case). The context was that of a baby boy born in Scotland of Scottish parents who was taken by his mother to Canada to visit her parents in Manitoba. Once there, she decided to stay permanently. At the time of the removal of the child, there were in existence orders from the Scottish courts granting her interim custody of the child following the breakdown of the marriage, while the father had been granted interim access. The Scottish court order also contained a prohibition against the child being taken out of Scotland. The date of these orders was the 27th 1992 and the date of her removal of the child to Manitoba was 2nd December 1992. The Supreme Court held that in this case the court which had made those orders was exercising rights of custody within the meaning of the term contemplated by the Convention. La Forest J. said:

> "it seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention."

Accordingly, it was held that the child had been wrongfully removed from Scotland within the meaning of the Convention. The *ratio decidendi* of the case is therefore that where the courts of the place of habitual residence have seisin of the custody issue, a *removal* of the child from that jurisdiction by one spouse is a wrongful removal for the purposes of article 3 of the Convention. However, the court went on, *obiter*, to consider the issue of wrongful *retention* because of what it described as the importance of the issue. In this context, it was relevant that an order had been made on February 3rd, 1993, two months after the mother had left for Manitoba, by the Scottish court, which granted custody to the father. La Forest J. said that the lower courts had assumed that this custody decision was made solely for the purpose of bolstering the father's application under the Hague Convention and that this type of order was known internationally as a "chasing order". He said that while the Hague Convention's reference to "wrongful retention" was "somewhat ambiguous", it must be read in light of the background to the Convention. He said that the drafters of the Convention did not wish to follow the approach of the Council of Europe Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, which bases the return of children and the recognition of custody decisions on orders of the requesting state, thus necessitating the requesting state to issue a chasing order. Referring to the Hague Convention, La Forest J. said:-

> "There is nothing in the Convention requiring the recognition of an ex post facto custody order of foreign jurisdictions. And there are several statements in the supplementary material to support the view that "wrongful retention" under the Hague Convention does not contemplate a retention becoming wrongful only after the issuance of a "chasing order".

56. He went on to quote from the report of Professor Pérez-Vera, set out earlier in this judgment, and continued as follows:

"to paraphrase, wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child. This interpretation is repeated in the "Commentary on the Draft" in the Report of the Special Commission, which states:

> In the first place, the reference to wrongfully 'retained' children tends to cover the case of a child who is in a different place from that of his habitual residence, with the consent of the rightful custodian, and who has not been returned by the non-custodian parent.

(Actes et Documents, supra, at p. 187.)

Similarly, the Explanatory Report on the Convention states:

> The fixing of the decisive date in cases of wrongful retention should understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence.

(Actes et Documents, supra, at p. 458-59)

At page 429, it adds: "The Convention . . . places at the head of its objectives the restoration of the status quo . . ."

Accordingly, I conclude that the order granted by the Scottish court in favour of the father on February 3, 1993, standing alone, would not have been sufficient to ground an application under the Hague Convention, as it could not, in itself, make the retention wrongful."

57. La Forest J. said that he was aware of a number of cases like the present, where the British authorities appeared to have assumed that a chasing order issued after the child has been taken out of the jurisdiction could by itself make unlawful what was otherwise not contrary to Convention, and cited them. He said that in particular, a number of British and Australian cases had come to his attention where wardship proceedings in England had been used as chasing orders, after the removal of a child, to establish wrongful retention whether by or against the person having the right of custody at the time of the removal and again he cited examples. He commented: -

> "I refrain from commenting further about these cases, but I simply observe that such an approach taken against a custodial parent (other than one acting on an interim basis, as here) appears at first blush to be directed to protecting interests other than custody rights, to which the remedy of return of the child is confined under the Convention. Should such a situation arise here, it would have to be very carefully scrutinized to see if this conformed to the letter and spirit of the Convention. I observe that in a recent United States case, the court there refused to honour a request for return under such circumstances; see Meredith v. Meredith, 759 F. Supp. 1432 (D. Ariz. 1991)."

58. As can be seen from the above, therefore, there appears to some divergence internationally as to whether and when 'chasing orders' can ground custody rights for the purpose of an article 12 application under the Hague Convention. Against this background, I was referred to three important authorities of the Irish courts; *AS v. EH* [1999] 4 I.R. 504, *H.I. v. M.G.* [2000] 1 IR 110, and *G.T. v. T.A.O.* [2008] 3 IR 567. Unfortunately, there does not appear to be a consistent approach to this issue across the three cases, and accordingly, it is necessary for me to examine them in some detail in order to determine precisely what was decided and by what I am bound in terms of precedent.

59. The first of these cases, chronologically, is *AS v. EH* [1999] 4 I.R. 504, which the applicant's counsel describes as an example of a case in which an Irish court recognised the validity of a "chasing order". In this case, the child was born in England to unmarried parents. They stopped living together in 1995, but the father maintained regular contact with his child. The mother died unexpectedly on the 10th March, 1996 in London. On the day after her death, the 11th March, 1996, the defendants, being the maternal aunt and maternal grandmother of the child, took the child to Ireland without informing the plaintiff father. On the 13th March, 1996, two days later, an order was made by the English High Court giving interim care and control of the child to the plaintiff father, and ordering the second defendant to return the child to England. On the same day, an application was made in the Dublin Circuit Court and a temporary order made making the first defendant a guardian of the child, given her custody of the child and granting an order prohibiting the plaintiff from moving the child from Ireland. The plaintiff brought proceedings in the High Court seeking the return of the child pursuant to the Hague Convention. The High Court (Geoghegan J.) held that the expression "rights of custody" under the Hague Convention did not extend to what he described as the "inchoate rights" of an unmarried father and that the father of a non-marital child in England had no custody rights unless and until he obtained such rights from a court. Therefore, the *removal* of the child to Ireland by the defendants had been lawful because at the time of the removal, the father had no custody rights. However, he also held that the removal of the child to Ireland did not terminate the child's English habitual residence, because the guardian appointed in this jurisdiction on foot of the Circuit Court interim order was not entitled to determine the residence of the child, and if the order of the Circuit Court had any effect on residence, it could only be temporary residence and not habitual residence. Since the father had acquired rights under the English orders on a date subsequent to the lawful removal, the High Court made an order for the return of the child to England on the basis that there had been an unlawful *retention* of the child in Ireland after the date of the English court order granting him custody.

60. A number of points might be made. First, there is no discussion of the concept of 'chasing orders' in the case, or reference to cases such as the *Thomson* case, or the Perez-Vera report. Secondly, considerable emphasis appears to be have been laid on the question of the habitual residence not having changed before the father acquired custody rights in England. Thirdly, the persons who had removed the child to Ireland did not have rights of custody or the right to decide the child's place of residence on a permanent basis.

61. In contrast, the judgment of Keane J, delivering the majority judgment of the Supreme Court in *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110, does explicitly address 'chasing orders' and expresses the view that rights thereby conferred do not fall within the Hague Convention. The case of *A.S.* is not referenced in the judgment and therefore may not have been cited to the ourt. Counsel on behalf of the applicant father argues that the comments of Keane J. in relation to retention and 'chasing orders' are *obiter* because the only point under appeal to the Supreme Court related to unlawful removal, not unlawful retention. This is debateable: at page 117 of the report, Keane J. says that it was agreed between the parties that the question 'as to whether the *removal* of H was wrongful' should be determined as a preliminary issue; but later on the same page he says that the preliminary issue before the trial judge was whether *'the removal or the retention* of H was wrongful…'. He also, at page 132, described the issue as 'whether the removal, at the time it occurred, was in breach of rights of custody attributed to the defendant or any other institution or body under the law of the state of New York'. His discussion, as we shall see, encompassed *removal* as well as retention.

62. The facts were as follows. The plaintiff and the defendant, father and mother of a child respectively, met in the United States and lived together in New York from 1990 until 1996. They entered into a Muslim wedding ceremony in 1991 but under the law of New York State this was not recognised as a valid marriage. They had one child, H., who was born on 13th July, 1991. The plaintiff was named on his birth certificate as the father and the defendant acknowledged him to be such. When the relationship between them broke down, the defendant applied to the family court in New York for a temporary order of protection, the equivalent of a barring order, and she was granted this order together with interim custody of the child, H. The plaintiff then filed a petition in the family court asking that visitation be awarded to him and a petition was then filed on behalf of the defendant requiring that custody or visitation be awarded to her. The proceedings in the New York court were adjourned. The reason for the adjournment was that the judge said there had been no proof of paternity and the matter was adjourned to enable paternity papers to be filed by the plaintiff. After the adjournment, the defendant left the United States with the child, on 3rd February, 1997, without informing the plaintiff, and went to Ireland, being herself an Irish citizen. On the 26th February, 1997, at a hearing where both parties were represented by their lawyers, the New York court ordered by consent of all the parties that H. should be produced before the court on 26th March, 1997, i.e. an order akin to an order of *habeas corpus* was made in relation to the child. A point which should be noted in relation to the facts is that the mother had a clear right of custody and power to determine the child's place of residence, as in the case before me, and unlike the case of *AS v. EH*, discussed above.

63. In proceedings brought by the plaintiff in Ireland pursuant to the Hague Convention and the Act of 1991, it was argued on behalf of the defendant mother, *inter alia*, that the removal of the child had not been in breach of any right of custody of the father as he would not have been entitled to such a right at the time of the removal, never having been married to the defendant and no declaration of paternity having been made in respect of him at that stage. This issue was decided as a preliminary issue and the High Court (Laffoy J.) decided in favour of the plaintiff, finding that the removal was in breach of the rights of custody within the meaning of article 3 of the Convention. On appeal to the Supreme Court by the defendant, the Supreme Court by a majority of four to one allowed the appeal. I consider it necessary to examine the majority judgment, delivered by Keane J, in some detail because of the question as to whether certain comments in it are obiter.

64. Having set out the facts, the evidence of the New York lawyers as to the relevant New York legal provisions, and the submission of the parties, Keane J. started by setting out the proper approach to construing the applicable law. He said that while the first task of the court must be to ascertain the meaning of the Hague Convention as enacted in the Act of 1991 as a matter of statutory construction, there were two qualifications to this general principle; first, that the Convention, being an international treaty to which the State is party, should be given a construction which accords with its expressed objectives and secondly, the *travaux preparatoires* may legitimately be used as an aid to its construction. It was in this context that he made several references to the report of Madam Eliza Verez-Pera's Explanatory Report to the Convention.

65. Keane J pointed out that article 3 specifies three possible legal origins of a right of custody and discussed each of them. In the course of this discussion, at page 125, he said that: "Depending on the circumstances of the particular case, it may be that the removal, in such a case, would be a breach of a right of custody vested in the court itself. If, for example, proceedings are actually pending before a court in the state of the habitual residence and an interim order has been made restricting a person entitled to lawful custody from removing the child from its jurisdiction without the consent of another person or of the court, there would be little difficulty in concluding that the child's removal without such consent constituted a 'wrongful removal'. Clearly, in such a case, the court could reasonably be regarded as having reserved to itself the right to determine where the child should reside until such time as the proceedings were finally disposed of and, having regard to the provisions of article 5(a) that, in turn, could be regarded as right of custody". He said, however, that this was not the situation in the present case since the plaintiff had no right of custody by operation of law; nor was there any agreement having legal effect under the law of New York between him and the defendant giving him such right; nor did the order of the New York court do any more than give him interim custody. There was no order requiring the defendant to obtain the consent of the plaintiff or a further order of the court before removing the child from the State of New York.

66. He then went to discuss the issue of 'inchoate rights' of a natural father, and the approach of the English courts in a number of cases: *Re B (A minor) (Abduction)* [1994] 2 FLR 249, favouring the view that the Convention protected the rights of persons carrying out duties and enjoying privileges of a custodial or parental character which were not formally recognised by the law; *Re J (A Minor) (Abduction: Custody Rights*) [1990] 2 AC 562, where the House of Lords refused to condemn as wrongful the removal of a child from Australia by his mother, in circumstances where the unmarried parents had previously lived together with the child. The mother brought the child to England with the intention of settling there permanently after the relationship broke down and at a time where there were no proceedings in being. After the removal the father was granted custody by an Australian court and made an application under the Hague Convention in England. The trial judge refused the application and this decision was unanimously upheld in the Court of Appeal and House of Lords. In the House of Lords appeal, counsel withdrew the submission that the *removal* by the mother was wrongful, but pursued the submission that the *retention* was a breach of the father's right of custody. Perhaps somewhat peculiarly, Lord Brandon rejected the argument, employing the word 'removal' rather than 'retention': (page 577)

> "So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention'.

67. Keane J. then went on to say, in the passage which is most important for present purposes, as follows:-

> "The argument advanced in *Re J. (a minor) Abduction: custody rights)* [1990] 2 AC 562, to the effect that even if the removal was not wrongful, the retention of the child in England after the Australian court had made an order giving the father custody was "wrongful" was rejected in the House of Lords on the ground that the latter order was made at a stage when the child was no longer habitually resident in Australia. In later cases, however, a somewhat different approach has been taken to what have come to be called "chasing orders", viz., that it was never intended that the Hague Convention should apply in such cases. In *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551, La Forest J. said that there was nothing in the Hague Convention requiring the recognition of an *ex post facto* custody order of a foreign jurisdiction. He cited in this connection the statement by Madam Pérez-Vera in the Explanatory Report that "retention" essentially consisted in a refusal to return the child after a sojourn abroad where the sojourn has been made with the consent of the rightful custodian of the child's person. Accordingly, on any view, the *habeas corpus* order made by the court of New York in the present case did not, of itself, render either the original removal or the continued retention of the minor wrongful in terms of the Hague Convention.
>
> Having regard to the facts of the present case, the position as to rights of access under the Hague Convention is of importance. It is clear from the wording of the preamble that a distinction was being drawn between rights of custody and rights of access and that is reflected in the different procedures provided for in the body of the Hague Convention for the two situations. Rights of custody are essentially protected under article 3, whereas the machinery for enabling

arrangements to be made for securing the effective exercise of rights of access appears in article 21. That was also the view of Madam Pérez-Vera in the Explanatory Report in which she said: -

> "Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the 14th session, the majority view was that such situations could not be put in the same category as the wrongful removals which it is sought to prevent … A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other. [Explanatory Report pp. 444/5]"

68. In the above passage, Keane J clearly was of the opinion that 'chasing orders' giving custody rights after a lawful removal could not ground an application for return under the Convention.

69. Keane J. then proceeded to his conclusions and at p. 132 he made it clear that custody rights for the purpose of article 3 can vest in a court: it would be wrongful to remove a child from a jurisdiction where there are court proceedings in being in which the natural father has sought custody of the child, and that the position would be the same even if no order for custody was being sought 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. He said "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.". He said that it could even be, that an order by the court granting a right of access to the dispossessed parent might, by implication, be treated as prohibiting the removal of the child without the consent of the dispossessed parent or a further order of court but this would fall to be determined in accordance with the law of the State of the habitual residence at the time of the removal, and a further question would then arise as to whether the appropriate machinery for enforcing the access right was article 21 rather than article 3. This was not the position in the present case and it was not necessary to express an opinion on it.

70. Keane J went on, however, to reject the concept of inchoate rights of custody of unmarried fathers saying, at page 132:-

> "it is going significantly further to say, however, that there exists, in addition an undefined hinterland of "inchoate" rights of custody not attributed in any sense by the law of the requesting state to the party asserting or to the court itself, but regarded by the court of the requested state as being capable of protection under the terms of the Hague Convention. I am satisfied that the decision of the majority of the English Court of Appeal in *Re B. (a minor) abduction* [1994] 2 FLR 249, to that effect should not be followed."

71. He went on to make a more general comment about the position of natural fathers:-

> "It is clear from the facts of the present case, and from the various authorities which have been discussed in the course of this judgment, that the rights of unmarried fathers under the Hague Convention present particular difficulties, given the unique relationship of the natural father to his children and the fact that in a number of jurisdictions, including our own, they do not have any automatic rights to custody equivalent to those of married parents. However, the appropriate method of addressing difficulties of that nature which may arise in the operation of conventions on private international law is through the machinery of Special Commissions in The Hague which regularly monitor and review the operation of conventions in the contracting states, rather than by innovative judicial responses to admittedly difficult cases in which upholding the Hague Convention as enacted may give rise to what seems a harsh or inequitable result."

72. He then expressed his conclusion in the following terms, and as will be noted, this is expressed in terms of "removal":-

> "I am, accordingly, satisfied that the decision of the learned High Court Judge that the removal was in breach of rights of custody within the meaning of article 3 was erroneous".

73. It is therefore clear that the Supreme Court in the case (1) disapproved of the concept of 'inchoate' rights for unmarried fathers in the context of the Hague Convention; (2) recognised that custody rights can vest in a court in appropriate circumstances; and (3) thought that so-called 'chasing orders' were not within the remit of the Convention. It seems to me that the comments regarding 'chasing orders' are probably, strictly speaking, *obiter*, although there is some doubt about the matter.

74. The third Irish case of relevance in this context is *G.T. v. T.A.O.* [2008] 3 I.R. 567. In that case, the mother and father, who were unmarried, were living with twin boys as a *de facto* family unit in Ireland. The mother took the children to England with the children in January 2007, and later decided not to return. The High Court held that she did not form this intention in April 2007, and this finding was upheld on appeal. The father instituted proceedings in both Ireland and in England. On 12th February, 2007, he instituted proceedings in the District Court under the Guardianship of Infants Act 1964, as amended, seeking appointment as guardian of the children, joint custody of the children, and directions concerning his access to them. This was *after* the mother had left Ireland with the children but before she had formed the intention to stay permanently in England. The return date was 9th March, 2007. The proceedings were adjourned on two occasions and then were adjourned generally by the District Court with liberty to apply, as a result of jurisdictional concerns and the court being informed of the applicant's intention to pursue a return of his children through the English courts. In England, he sought a return of the children under both the Hague Convention and Brussels II bis. He then instituted proceedings in the UK under the Hague Convention on the 3rd May 2008. On the 2nd July, 2007, the English High Court adjourned the proceedings with a request made under article 15 of the Hague Convention and/or Article 15 of Brussels II bis that an application would be made to the High Court in Ireland, seeking a determination as to whether or not the removal to and/or retention of the children in England was wrongful within the meaning of the Convention Regulation. These proceedings were commenced in the High Court approximately two weeks later. The High Court (McKechnie J.) granted a declaration that retention of the children in England was wrongful.

75. In the course of his judgment, McKechnie J. referred to the then ongoing debate as to what constitutes a right of custody when the natural father had not married the mother. He referred to a number of English cases on the concept of 'inchoate rights' of natural fathers but said that the issue had already been considered in depth in the decision of the Supreme Court in *HI v. MG*, supra. There, he said, Keane J had clarified that even where a parent has no custody rights, the removal of a child would be unlawful where court proceedings had been instituted by him and were pending; or where there was a court order preventing the child's removal without either the consent of the dispossessed parent or the approval of the court itself; and that in such circumstances the breach would not be that of the father's rights but rather of the court's rights as it had retained seisin of the case so as to determine issues of custody relating to the child, including either party's right to decide where the child should live. He concluded: 'In summary therefore circumstances can arise where a removal would be wrongful as being in breach of 'rights of custody' vested in the court itself". He then cited the view of Keane J that there was *no* further 'undefined hinterland of inchoate rights of custody not attributed in any

sense by the law of the requesting state …but regarded by the court of the requested state as being capable of protection under the terms of the Hague Convention'.

76. He went on to approve certain principles set out in the English case of *Re H (Abduction: Rights of Custody)* [2000] 1 FLR 201 and [2000] 2 AC 291, concerning the 'when and in what circumstances a court can have rights of custody for the purposes of article 3'. In that case, Lord Mackay said that for rights to vest in the court, there must be an application to the court which raises matters of custody, and the jurisdiction of the court only becomes established when the originating document has been served on all relevant parties. McKechnie J concluded that by a date not later than 9th March 2007, the District Court had rights of custody with regard to the twin boys, and: -

> "Given this court's finding that the children were habitually resident in this jurisdiction up to a date in April 2007, it must follow that in the absence of lawful excuse, their retention on and after the 9th March was wrongful within the meaning of article 3 of the Convention. As there is no such excuse the retention is wrongful."
>
> The High Court also granted other declarations, including a declaration relating to the position under the European Convention on Human Rights.

77. There is no emphasis by McKechnie J. in his judgment on the fact that the court proceedings were commenced by the father in Ireland on a date after the mother had lawfully left for England with the children. Thus, while the removal itself was lawful, the Court was finding that the retention was unlawful by reason of custody vesting in an Irish court on a date after a lawful removal of the children from the jurisdiction. McKechnie J. did not discuss the portion of Keane J's judgment in *HI v. GM* where 'chasing orders' were discussed. Another point may be noted: there is considerable discussion of when the mother decided to settle permanently in England and when the habitual residence changed. It therefore seems likely to me that McKechnie J. considered (although it is not stated explicitly) that the Irish court could acquire custody rights in respect of the children *for so long as the habitual residence had not changed*, which custody rights could then be relied on by the natural father to bring a Hague Convention application.

78. In *G.T. v. T.A.O*, the High Court also dealt with issues arising under the Regulation and under the European Convention on Human Rights. However, on appeal to the Supreme Court, the issues were narrowed to the sole issue of whether the retention of the children in England was a wrongful retention within the meaning of article 3 of the Hague Convention. The Supreme Court upheld the High Court's decision that there had been an unlawful retention.

79. Of considerable importance for present purposes is that Murray CJ, having quoted from Keane J in *HI v. MG* to the effect that the *removal* of a child would be wrongful if there are court proceedings concerning custody in being, commented at para 25:-

> "Clearly the same principle of law applies where there is *retention* of a child in another country where such proceedings have been brought and are pending. This is again not in issue in this appeal".

This is perhaps a surprising statement, given Keane J's comments concerning 'chasing orders', but there was no reference by Murray C.J. to that part of Keane J's judgment.

80. Further, at para. 47, Murray CJ said as follows: -

> "Finally, by way of addendum to the submissions made on behalf of the respondent, it was suggested that the High Court judge was not entitled to make a declaration by reference to article 3 of the Hague Convention because, having found that there was no 'wrongful removal' within the meaning of the Convention, nothing had happened to affect the status of the 'the persons covered by the Convention', as it was put, between the date of the removal of the children in January, 2007 and nothing should be considered to have occurred which affected that entitlement in the meantime.
>
> [48] This submission must also be considered unfounded. Clearly what happened in the meantime was that applications in relation to the custody of the children were made to the District Court in such a manner as to attribute custody of the infants concerned to that court within the meaning of article 3 of the Hague Convention".

Again, there was no reference to the views of Keane J. in *HI v. GM* concerning 'chasing orders'.

81. Accordingly, I find myself in the following slightly difficult situation from the point of view of following precedent. On two occasions, the Irish Courts (*AS v. EH*, and *G.T. v. T.A.O.*) have ordered the return of children to the requesting jurisdiction based upon a finding of unlawful retention in circumstances where the custody rights grounding the application were obtained by means of court application *after* the lawful removal of the child from the jurisdiction. On the other hand, one Irish decision (that of the Supreme Court in *HI v. GM*) expresses a strong view, although arguably and probably *obiter*, that the Hague Convention does not recognise custody rights acquired by the dispossessed parent after there has been a lawful removal. It is somewhat difficult to reconcile the cases with each other. However, one point does stand out. In both cases where the return was ordered, the habitual residence had not changed; in AS, the grandmother and aunt of the children did not have the right to decide permanent residence; and in *GT v. TAO*, the mother, who did have the right to decide place of residence, had not in fact done so at the time of the relevant application by the father to the Irish courts for custody as her intention to settle permanently in England did not fix until one month later, April 2007.

82. Accordingly, and notwithstanding the views of the Perez-Vera Explanatory Report, and the view taken by the Supreme Court in the *Thomson* case, it seems to me that under the Irish authorities which I am of course bound to follow, the view is not taken that 'chasing orders' can never be recognised for Hague purposes, but that the outcome may depend upon the relationship between the chasing order and the issue of habitual residence, namely whether the habitual residence has remained unchanged or not at the time the chasing order is obtained. Accordingly, it seems to me that I should proceed to consider the question of habitual residence, and whether and when it changed, in the present case.

Habitual Residence

83. Numerous authorities were cited to the Court concerning the issue of habitual residence under the Convention. All of them emphasise that the inquiry is essentially a factual one, based on the particular circumstances of each individual case. Many of them also emphasise the desirability of a consistent interpretation of the phrase "habitual residence" across cases involving the Convention only, and those involving both the Convention and Regulation 2201/2003 (Brussels Bis II). In addition to earlier pronouncements of the Irish courts of the meaning of habitual residence in cases such as *CM v. Delegacion de Malaga* [1999] 2 I.R. 363, *PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306 and *AS v CS* [2009] IESC 77, emphasis was laid upon the three leading CJEU cases, the *A Case*, case C-523/07 (2nd April 2009), *Mercredi v. Chaffe*, Case C-497-10 PPU (22nd December 2010) and *C v. M*, case C-376/14 PPU (9th

October 2014), the latter case being a reference from the Irish courts. Further, the effect of these CJEU decisions was analysed by the Court of Appeal (judgment delivered by Finlay Geoghegan J) in *DE v. EB* [2015] IECA 104. In the latter case, Finlay-Geoghegan J. rejected a submission that an overriding consideration must be where the centre of the interests of the child lies, by reference to her integration in a social and family environment. She said: 'It is rather the case that, as appears from the judgment of the CJEU in *C v. M* all of the relevant factors must be taken into consideration, including of course the centre of interests of the child at the relevant time and where relevant, one weighed against the other. The reasons for the child's move and conditions under which she came to be in the second Member State are also relevant factors." She also said: "It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given overriding consideration. The weight to be attached to each will depend on the facts of the individual case'.

84. In the present case, it was contended on behalf of the applicant that it takes time to acquire a new habitual residence and for a child to integrate into the new environment into which the child has been brought. Reliance was also placed upon judicial comments to the effect that the lack of consent of the other parent is relevant to an assessment of whether the former habitual residence has been lost. However, the latter factor, it appears to me, only arises if and when the other parent has rights of custody within the meaning of the Convention. For example, in *KW v. PW*, 25 November 2016, Court of Appeal, where Hogan J. said that a unilateral decision by one parent would militate against a finding of joint settled intention to change habitual residence, both parents clearly had rights of custody. Similarly, in *DE v. EB*, where Finlay Geoghegan J. referred to the lack of consent of one parent, this was also in a context where both parents had custody rights. In contrast, in *Mercredi v. Chaffe*, the father of the child had no custody rights when the mother took the child to La Reunion. In the *Mercredi* case, the European Court of Justice stated in respect of intention:-

> "50. In that context, the Court has stated that the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see A, para. 40).
>
> 51. In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."
>
> At para. 56 of the *Mercredi* judgment the following was stated,
>
> "It follows from all of the foregoing that the answer to the first question is that the concept of 'habitual residence', for the purposes of articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."

In *DE v EB* [2015] IECA 104 Finlay Geoghegan J. commented (at para. 27) on the passages as follows:-

> "I would agree with the trial judge as the importance of noting that *Mercredi* was a reference to the CJEU on the issue of determining habitual residence for the purposes of articles 8 and 10 of the Regulation and, more importantly, in the case of an infant who had left England, its habitual residence of origin, with its mother who had sole parental rights and the sole right to determine at the time she left England in which state the infant might live. This was common, in my view, an important consideration. It appears to be me that this must be borne in mind in considering what was stated by the CJEU in Mercredi at its conclusion at para. 46 of that judgment. [she quoted para. 56 as set out above and continued] hence the factors identified by the CJEU to be taken into consideration in the above passage must be understood by reference to the fact that the mother alone was entitled to make the definitive decision that she and the infant leave England and move to the territory of France. That fact must also be borne in mind when considering certain of the more general statements and principles set out in the earlier paras. of the judgment in *Mercredi* and complete in paras. 50 to 53 in *C v M*. "

85. In the present case, we are dealing with a very young child who was 15 months old at the time of his removal to Ireland. Accordingly, the question of his habitual residence is heavily dependent upon the intentions of his mother who was the only person with rights of custody on the 18th June 2016. I have no doubt (and indeed it was not in dispute) that prior to that date, the child's habitual residence was Illinois and that his father, together with members of his family, had a role in the care of the child. I have reached the conclusion on the evidence before me that at the time the respondent brought the child to Ireland, she had a fixed intention to settle here permanently with the child. I do not think she had any such firm intention prior to April 2016, not least because the wedding was still envisaged at that stage, but all the steps taken by her in the immediate period before her departure from Illinois on the 18th June 2016 suggest to me that she had made up her mind to move permanently to Ireland by the time she left Illinois. By this time, the wedding had been cancelled and she had moved out of the home she had shared with the applicant. She had given notice to her employer in the fitness firm where she worked part time as a personal trainer; she had closed her bank account in the United States; she had collected the child's vaccination records from the doctor; and she had requested a copy of her leaving certificate results from her former secondary school in Ireland with a view to preparing her C.V., I am satisfied she arranged for the shipping of her belongings and those of the child before her departure. On 1st July, 2016, two weeks after her arrival in Ireland, the respondent informed her United States landlord (from Ireland) that she had left and would not be returning. In August, 2016 the child C was allocated an Irish PPS Number, and in September he was enrolled in a local crèche.

86. The Court as informed that in February, 2017, the respondent moved away from where she was living with her parents to a new address in a housing estate in the West of Ireland, and that she is currently working as a personal trainer and fitness instructor, operating out of a hotel. She performs volunteer work of various kinds within the community. She operates a personal bank account in Ireland. She avers that the child is deeply attached to both of his maternal grandparents, who live on a farm. It is also of course relevant that the respondent is an Irish citizen who grew up in Ireland and therefore has pre-existing close connections with the

jurisdiction. This does seem to be all of a piece with a pre-existing intention to move to Ireland permanently, but strictly speaking, later events, such as the move to a housing estate in February, cannot be relevant to determining the position regarding habitual residence in the period of June to September 2016.

87. Having regard to the steps taken by the respondent before her departure, together with her pre-existing links to Ireland, and her narrative of a complete breakdown of the relationship, it seems to me that at the time she travelled to Ireland with the child C, she had a firm intention to settle in this jurisdiction. This was not a case in which there was a suggestion of coming to Ireland for 'respite' or a break from the relationship, to see where matters would go from there. She had no intention of returning to Illinois. Accordingly, it seems to me that this is one of the unusual cases where a child has lost his old habitual residence quickly by reason of the particular circumstances in which he was brought to the jurisdiction and that he had certainly lost his habitual residence in Illinois before the 27th September 2016, when the Illinois court order was made. I would also find that he had lost his Illinois habitual residence by the time the Illinois court was first petitioned on the 28th June 2016. As this is a Hague Convention case and not a Regulation case, it is not necessary for me to find that the child acquired an Irish habitual residence by those dates, (see McKechnie J in *GT v. KAO* [2008] 3 IR at 580-1), but I am of the view that in fact he did so within a very short time of his arrival in Ireland.

88. Counsel on behalf of the applicant argued that it takes time to acquire a new habitual residence and that the court should be wary of placing too much emphasis on the intention of one of the parents. However, as noted, it is not necessary for me to decide whether the child had acquired a new habitual residence in Ireland, but rather whether the child had lost the old one. In *G.T. v. T.A.O.*, McKechnie J did envisage the possibility that there could be an immediate loss of habitual residence in some cases, and noted the distinction between the Convention and the Regulation with regard to the issue of habitual residence:

> "[18] The expression 'habitual residence' which is not defined in either the Hague Convention or Brussels II bis must be given its ordinary and natural meaning. It is not a term of art but a question of fact, and must be decided by reference to the individual circumstances of each case. *It can be taken that if a person leaves country A* 'with a settled intention not to return to it but to take up long term residence in country B instead', then such a person may be said to have ceased being habitually resident in country A. That person however cannot become habitually resident in country B in a single day; an appreciable period of time and a settled intention will be necessary to enable him or her to do so; see in In *re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562; see also McGuinness J. in *C.M. v. Delegación de Malaga* [1999] 2 I.R. 363 and *Z.S.A. v. S.T*. (Unreported, High Court, Laffoy J., 26th August, 1996). Given the age of the children in this case, their habitual residence after the 2nd January, 2007, will at all times be that of their mother…
>
> The position under Brussels II bis (Article 10) is somewhat different, in that 'the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retained that jurisdiction until the child has acquired a habitual residence in another Member State'. Accordingly in a Brussels II bis case, a child's habitual residence for jurisdictional purposes can only be displaced on the acquisition of a new or different habitual place of residence". (emphasis added)

It seems to me that Ms. McG. was a person who 'left country A with a settled intention not to return to it but to take up long term residence in country B instead', and therefore abandoned Illinois as a habitual residence at the time of her departure. The evidence as to her intentions in the present case are very different from those concerning the mother in the G.T. case.

89. In those circumstances, it seems to me that it is not strictly necessary to resolve the question of whether the Illinois court became seised of a custody dispute on the 28th June, the 2nd July 2016, or the 27th September 2016, a matter upon which conflicting views were expressed by the attorneys on behalf of the parties. If I were to apply the views of the Irish courts in *G.T. v. T.A.O.*, the appropriate date would be the 2nd July 2016, being the date on which the application was served. I find that the habitual residence of Illinois had been abandoned by that date.

90. Finally, I wish to comment on one of the arguments made on behalf of the applicant to the effect that it would be unfair if a father such as the one in the present case found himself with less protection under the Hague Convention because he had trusted the mother of the child and had failed to go to court to seek legal protection for his relationship with his child, when compared with a father who had gone to court before she left Illinois. In response, counsel on behalf of the respondent referred to the cases of *Guichard v. France*, and *J.McB v. L.E.* in this regard. I agree that these decisions place the type of problem arising for the applicant father in the present case in a broader historical and international context.

91. In *Guichard v. France (Admissibility Decision)* (Application No. 56838/00), judgment of 2nd September, 2003, the applicant, an unmarried father, sought to argue before the European Court of Human Rights that the application of domestic law, which resulted in a refusal to intervene on his behalf in the application of the Hague Convention, violated his right to respect for family life under Article 8. While the court accepted that the concept of "family" within the meaning of Article 8 was not restricted to relationships based on marriage, and that Article 8 created certain positive obligations necessary for the effective protection of family life, it said that those positive obligations arising under Article 8 had to be interpreted in light of the Hague Convention. Applying the Hague Convention, the father's position under domestic law attributed parental authority to the mother but not to the father and accordingly the removal could not be considered wrongful as the applicant had no custody right for the purposes of the Convention. The court said that it was not its role to substitute its view for those of the domestic authorities regarding questions of custody and access rights of unmarried fathers. Provided that the domestic system provided an opportunity for an unmarried father to acquire such rights, Article 8 was complied with. In the present case, the applicant and the mother had never taken the opportunity during their relationship to share parental authority according to domestic law by placing a request before the relevant judicial authority. In addition to that the applicant had not appealed against the decision of a French Court rejecting his request that he and the mother should have joint custody of the child. His application was declared inadmissible. What is notable is that the court emphasised the importance and entitlement of the domestic legal systems in setting the boundaries and procedures for determining the custody rights of unmarried fathers.

92. The *Guichard* case was then relied on by the CJEU in *J.Mc.B. v. L.E.* Case C-400/10 PPU, 5th October, 2010, judgment of the Court (Third Chamber), in which the European Court of Justice ruled on a reference for preliminary ruling concerning Regulation 2201/2003. The Supreme Court had referred a question referred to the European Court as to whether the Regulation, interpreted pursuant to Article 7 of the Charter or otherwise, precluded a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court granting him custody in order to qualify as having custody rights which render the removal of that child from its country of habitual residence wrongful for the purposes of article 2(11) of the Regulation. The court said at para. 41, that since the phrase "rights of custody" is defined by the Regulation, it is an autonomous concept independent of the law of Member States. However, it said, at para. 42, that "an entirely separate matter is the identity of the person who has rights of custody". It said that the Regulation does not determine which person must have such rights of custody

as may render a child's removal wrongful, but refers to the domestic law, which determines the conditions under which the natural father acquires rights of custody, and the domestic law may provide that the acquisition of such rights is dependent on his obtaining a judgment from the national court. In response to the father's argument based on Article 7 of the Charter and Article 8 of the European Convention of Human Rights, and 'inchoate' rights of a natural father, the court relied on *Guichard v. France* and its decision that national legislation granting parental responsibility for such a child solely to the child's mother by operation of law was not contrary to Article 8 of the ECHR, provided the law gave the child's father the opportunity to ask the national court with jurisdiction to vary the award of that responsibility. The court continued:

> "58. That finding is not invalidated by the fact that, if steps are not taken by such a father in good time to obtain rights of custody, he finds himself unable, if the child is removed to another Member State by its mother, to obtain the return of that child to the Member State where the child previously had its habitual residence. Such a removal represents the legitimate exercise, by the mother with custody of the child, of her own right of freedom of movement, established in Article 20(2)(a) TFEU and Article 21(1) TFEU, and of her right to determine the child's place of residence, and that does not deprive the natural father of the possibility of exercising his right to submit an application to obtain rights of custody thereafter in respect of that child or rights of access to that child."

93. Thus, both the European Court of Human Rights and the CJEU have emphasised the role of domestic law in setting the parameters of custody rights of unmarried fathers and how this interacts with the Convention. Feelings of sympathy or instincts of fairness, unfortunately for such persons, cannot carry the day and I must interpret the Convention in light of the authorities. Cases where unmarried fathers who have cared for their children only to find the children removed suddenly from the jurisdiction and their own legal remedies restricted by reason of the fact that they are unmarried have often raised issues of fairness and feelings of sympathy down through the years. One can only echo what was said by Keane J., referred to at para. 67 above, that the problems in this area cannot be resolved by judicial innovation but rather by policy developments at an international level.

Grave Risk

94. For completeness, I should perhaps also say that I would not have found that the respondent had established matters sufficient to ground a defence of "grave risk" pursuant to article 13(b) of the Convention, having regard to the high threshold for establishing this defence as decided in cases such as *RK v JK* [200] 2 I.R. 416; *PL v EC* [2009] 1 IR 1; *ZD v KD* [2008 4 I.R. 751. As regards the matter of undertakings designed to ensure the smooth return of the child and to address any potential risks to the child falling short of the "grave risk" within the meaning of article 13(b), this does not arise in view of my conclusions that there has been no unlawful removal or retention of the child.

Conclusions

95. My conclusions may be summarised as follows:

> i. There was no unlawful removal of the child from Illinois when the mother came to Ireland on the 18th June 2016 because the applicant father, whose consent was not obtained for this removal, did not have custody rights in Illinois at that time and therefore no custody rights for the purpose of articles 3 and 12 of the Hague Convention;
>
> ii. At the time of her departure from Illinois, the mother had decided to re-locate permanently with the child to Ireland and therefore they had abandoned their former habitual residence of Illinois, if not immediately, within a few short days;
>
> iii. Even if (having regard to the AS case and *GT v. TAO*) the Hague Convention may sometimes allow for an unmarried father to make application for the return of children based on custody rights vested in courts by reason of a court application made after the mother has lawfully removed a child from the jurisdiction, this is not such a case because the habitual residence of the child had changed by the time those rights were vested in the Illinois courts and therefore the condition in article 3 requiring that the child be habitually resident in the requesting state immediately prior to the application has not been fulfilled.
>
> iv. In light of my conclusions above, I do not consider it necessary to seek clarification from the Illinois courts as to the precise status of the VAP, and the subsequent court proceedings based upon it, in light of my factual finding that the father probably physically signed the document but with the explicit or implicit authority of the mother in circumstances where she had and still has no objection to his being recognised as the father of the child.

96. In all the circumstances, I find that the removal of the child C was not wrongful within the meaning of article 3 of the Hague Convention. Further, I find that he was not wrongfully retained within the jurisdiction within the meaning of article 3. I refuse the reliefs sought.