Neutral Citation: [2015] IEHC 180

THE HIGH COURT

FAMILY LAW

Record No: 2014/19 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991 AND IN THE MATTER OF THE HAGUE CONVENTION AND IN THE MATTER OF COUNCIL REGULATION (EC) NO: 2201/2003 OF 27 NOVEMBER 2003 AND IN THE MATTER OF N.E, A MINOR.

BETWEEN:

D.E

APPLICANT

AND

E.B

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 4th day of March, 2015.

1. The applicant father is a French citizen and the respondent mother is an Irish citizen. The parties are not married but had co-habited in Île-de-France, France, since May 2008. In October 2013, the respondent gave birth to the parties' daughter, "N" in France, whom is now fourteen months old approximately. Prior to the birth of "N", the respondent was employed in the hotel industry but has since become unemployed and in receipt of social welfare in Ireland. At present, the applicant is in gainful employment in France.

2. On the 23rd March, 2014, the applicant, respondent and the minor arrived in Ireland to visit the respondent's family. On the 31st March, 2014, the applicant returned to France for work purposes but the respondent remained with the minor in Ireland. On the 18th April, 2014, the applicant returned to Ireland for "N's" baptism that was scheduled for the 20th April, 2014. On the 8th May, 2014, the respondent travelled with the minor to France and returned to Ireland on the 15th May, 2014. On a second occasion, the respondent travelled to France on the 12th June, 2014 and returned to Ireland on the 22nd June, 2014.

3. On the 18th July, 2014, the applicant sent an e-mail to the respondent outlining a formal request to return "N" to France by the 20th July, 2014. The respondent did not accede to the applicant's request and has remained with "N" in Ireland since the 22nd June, 2014.

4. On the 22nd October, 2014, the applicant commenced proceedings by special summons and sought (i) a declaration that on or about the 20th July, 2014, the respondent wrongfully retained the minor, "N", in the Republic of Ireland within the meaning of article 3 of The Hague Convention on Child Abduction and article 2 of Council Regulation (EC) No. 2201/2003 ("Brussels II bis") and (ii) an order pursuant to article 12 of The Hague Convention on Child Abduction (hereinafter referred to as the "Convention") and part II of the Act of 1991 for the return of the aforesaid minor to France.

5. The respondent resists the aforementioned application on the basis that that "N" was habitually resident in the Republic of Ireland immediately before the 20th July, 2014. Moreover, the respondent has raised the defence of "grave risk" under article 13(b) of the Convention.

6. On the 11th February, 2015, the matter was heard on the affidavits submitted by both parties. Oral and written submissions were received by the Court from both counsel for the applicant and the respondent.

Issues.

7. There are two core issues to be determined by this Court. Firstly, the habitual residence of "N" is in dispute. The respondent contests that "N" was habitually resident in France immediately before the 20th July, 2014. Rather, the respondent petitions that between the 23rd of March, 2014 to the 20th of July, 2014(i.e the date of the alleged wrongful retention), the habitual residence of "N" has been altered from France to that of the Republic of Ireland. There is no dispute between the parties that the applicant held rights of custody in respect of "N" on the relevant dates.

8. If this Court is to conclude that the respondent retained "N" wrongfully in Ireland within the meaning of article 3 of the Convention and article 2 of the Regulation, the Court must consider the second issue, that being, the applicant's reliance on the defence of "grave risk" as contained in article 13(b) of the Convention.

Applicable Law.

9. Article 3 of the Convention states:-

> "The removal or the retention of a child is to be considered wrongful where:
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> (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
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> (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".

10. As this case concerns an application for the return of a child between European member states, the Convention must be interpreted harmoniously with Council Regulation (EC) No: 2201/2003 of 27th November, 2003, on jurisdiction, recognition and

enforcement of judgments in matrimonial matters and matters of parental responsibility ("Brussels II *bis*"). In *G.T v K.A.O* [2008] 3 I.R 567, McKechnie J. stated (at p.597, para.41.):

> "It seems to me that Brussels II bis takes precedence only where there is a direct conflict between any of its provisions and the Convention or where the Regulation deals more extensively with rights or obligations than the Convention. In all other respects Brussels II bis and the Convention should be seen as complementing each other with the provisions of both instruments being read and applied in a consistent and harmonious way, if that is at all possible. On the question of child abduction, it seems to me that the objectives of both the Convention and the Regulation are the same and that the latter was adopted so as to buttress the Convention where that was thought necessary. I therefore believe that their relationship must be looked at in this light".

11. Article 2 of the Regulation defines the term "wrongful retention" as follows:

> "the term "wrongful removal or retention" shall mean a child's removal or retention where:
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> (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
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> (b) provided that, at the time of removal or retention, the rights of custody were actually exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility".

12. In order for this Court to grant a declaration that "N" was retained wrongfully by the respondent on or about the 20th July, 2014, within the meaning of article 3 of the Convention and article 2 of the Regulation, the applicant must establish on the balance of probabilities that:

> (i). "N" was habitually resident in France immediately before the 20th July, 2014;
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> (ii). on the aforesaid date, the applicant had rights of custody in respect of "N" under the laws of France;
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> (iii). the respondent's alleged retention of "N" in the Republic of Ireland on or about the 20th July, 2014, was in breach of these rights of custody, and
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> (iv). the alleged custody rights of the applicant were exercised or would have been exercised but for removal or the retention.

13. If the Court concludes that the respondent has wrongfully retained "N", the Court must consider its obligations under article 12 of the Convention, which states;

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith".

14. In resisting the application to return "N" to France, the respondent raises the defence of "grave risk" under article 13(b) of the Convention. Article 13 of the Convention states as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
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> > (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

15. In considering the defence of grave risk in these proceedings, the Court must take cognisance of article 11(4) of the Regulation which stipulates:

> "A court cannot refuse to return a child on the basis of Article 13(b) of the Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

The applicant's evidence and submissions on the issue of "habitual residence".

16. The applicant outlines his position on the issue of "N's" habitual residence on the affidavit he has sworn and submitted to this Court. The applicant claims that he has never consented to the alleged alteration of "N's" state of habitual residence. He outlines that he believed that the respondent's trips to and from Ireland and France were not for the purposes of altering "N's" state of habitual residence. In particular, the applicant deposed that he believed that the respondent's first two trips to Ireland (23rd March,2014- 8th May, 2014, 15th May, 2014 - 12th June, 2014) were for the purposes of the respondent spending time with her family. Regarding the third trip (22th June, 2014- 20th July, 2014)(i.e. the date the applicant requested the respondent to return "N" to France)), the applicant claims that the respondent had assured him that she was travelling to Ireland for the purposes of obtaining her Irish driving licence.

17. The applicant deposed that he was never informed by the respondent that she was travelling to Ireland with the intention of residing there with "N" permanently. The applicant outlines that had he known that the respondent was travelling with "N" to Ireland for the purposes of residing in the state permanently, he would not have allowed "N" to leave France, and would have taken the necessary steps to ensure same. Rather, the applicant claims that he believed the respondent would return to France, as a large

portion of her personal effects remained in their apartment in France. The applicant deposed further that he was never informed by the respondent that she had applied to her local county council to place her name on the rent book of the premises in which she is residing currently, or that she had declared herself as a "single mother" with the Department of Social Protection, and was in receipt of social welfare and child benefit payments.

18. The habitual residence of a child is a factual concept which must be determined on a subjective analysis of the facts before the court. This proposition is well settled in Irish jurisprudence and has been accepted by both the applicant and the respondent. In *E.B. v A.G* (Unreported, High Court, Finlay Geoghegan J., 4th March, 2009) Finlay Geoghegan J. held at (para. 21):

> "..... the terms "habitual residence", or "habitually resident", as used in article 3 of the Convention, are not to be treated as terms of art with some special meaning, but, rather, to be understood according to the ordinary and natural meaning of the two words they contain (See, for example, *In Re J. (A Minor) (Abduction)* [1990] 2 A.C. 562, per Lord Bandon at p.578). The Court must assess on all the facts whether the habitual residence of the child giving those words their natural and ordinary meaning changed as a result of the applicant's decision".

19. The applicant submits that "N's" habitual residence lies in France, as "N" was born in France, and that this was the last state where both parents co-habited with "N". Moreover, the applicant outlines that where both parents are co-habiting with the child, neither parent can change the habitual residence of the child without the express and tacit consent of the other. Thus, the applicant claims that the respondent could not alter the habitual residence of "N" from France to Ireland without the applicant's consent. In support of this proposition, the applicant relies on the dicta of Macken J. in *A.S v C.S (Child Abduction) [2010] I.R 370* where the learned judge refers to the judgment of Fennelly J. *in P.A.S v AFS* [2004] IESC 95 and Waite J. in *Re. B: (Minors: Abduction (No.2*) [1993] 1 F.L.R on the issue of habitual residence (at pg.386):

> "It is for example, well established that habitual residence" is not a legal term of art but rather is a matter of fact to be decided on the facts established in a particular case. In *P.A.S v A.F.S* [2004] IESC 95, [2005] 1 I.L.R.M. 306 at p. 316, Fennelly J., in placing the issue of habitual residence in its real living context, stated:-
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> > "The Convention deliberately left the notion of habitual residence undefined. The court of the contracting states have to be free to apply it to the facts, having considered all the circumstances of the case. Human situations are infinitely variable. Habitual residence will be perfectly obvious in the great majority of cases. It is an obvious fact that a new-born child is incapable of making its own choices as to residence or anything else. What the courts have to look at is the situation of the parents and their choices. Where the child, has for a substantial period, been resident in one country with both its parents, while they are in a stable relationship particularly if they are of the same nationality, the answer will usually be fairly obvious. This is the normal state of affairs described in a passage from a judgment in one English case, which has been widely quoted, cited in the High Court judgment and relied on by the applicant. Waite J in *In re B(Minors: Abduction)(No.2)* [1993] 1 F.L.R. 993 (at p.995) stated:
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> > > "1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.
> > >
> > > 2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether of short or long duration.
> > >
> > > All the law requires for a "settled purpose" is that the parent's shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.
> > >
> > > 3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention....Logic would suggest that provided the purpose was settled the period of habitation need not be long".

20. Although the defence of consent was not raised by the respondent expressly under article 13(a) of the Convention, the applicant raises the concept of consent in addressing the proposition that "N's" habitual residence has been altered from France to that of the Republic of Ireland. The applicant claims that he did not consent to the respondent altering "N's" state of habitual residence. Moreover, the applicant relies on *S.R v M.M.R* (Unreported, Supreme Court, 16th February, 2006) to advance the proposition that the onus is on the respondent to establish, on the balance of probabilities, that the applicant consented to the alteration of "N's" habitual residence, and that such consent was clear, cogent and unequivocal. The applicant directed the Court to the dicta of Denham J. (as she then was), where she refers to the judgment of Hale J. (as she then was) in *Re K(Abduction: Consent)* [1997] 2 F.L.R 212 on the approach to be adopted by the courts on the issue of consent:

> "(i) the onus of proving the consent rests on the person asserting it; and
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> (ii)the consent must be proved on the balance of probabilities; and
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> (iii) the evidence in support of the consent needs to be clear and cogent;
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> (iv)the consent must be real; it must be positive and it must be unequivocal;
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> (v) there is no need that the consent be in writing;
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> (vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent".

Denham J. (as she then was) goes on to consider the issue of habitual residence and states (at part.6.2):

> "Submissions were made that once the mother had come to Ireland with the two minors they acquired a new habitual residence. However, absent the father's consent, or a court order, the mother may not unilaterally alter the minor's habitual residence. Given the decision of the trial court on the issue of consent, which I would affirm,

this issue does not arise. In the context of the facts of this case the habitual residence of the two minors is M., U.S.A".

This Court notes that the applicant's reliance on the aforesaid dicta is of limited relevance. The respondent did not raise the defence of consent under article 13(a) of the Convention. Rather, the respondent asserts that, as a matter of fact, "N" was habitually resident in the Republic of Ireland prior to the 20th July, 2014 and therefore, as a matter of law, there was no wrongful retention as of the date claimed by the applicant. However, the above dicta is relevant in proffering the proposition that, if both parents have recognised parental rights over the child, neither parent can alter the minor's state of habitual residence unilaterally.

21. The applicant must establish that on or about the 20th July, 2014, he held custody rights in respect of "N" and that the retention of the child in the Republic of Ireland was in breach of those custody rights. As stated above, the validity of the applicant's custody rights are not in dispute. Article 372 of the French Civil Code states;

> "The father and mother shall exercise in common parental authority. Where, however, parentage is established with regard to one of them more than one year after the birth of a child whose parentage is already established with regard to the other, the latter alone remains vested with the exercise of parental authority. It shall be likewise where parentage is judicially declared with regard to the second parent of the child. Parental authority may however be exercised in common in cases of joint declaration of the father and mother before the chief clerk of the tribunal de grande instance or upon judgment of the family causes judge".

A letter from the French Ministry of Justice dated the 4th September, 2014 was exhibited on the affidavit of the applicant's solicitor dated the 13th October, 2014. The aforesaid letter confirms that the applicant holds common parental authority with the respondent in respect of "N", as he claimed parental rights within one year of the birth of the child. Furthermore, the letter from the French Ministry of Justice outlines that the retention of "N" in Ireland without the consent of the applicant is wrongful, pursuant to article 3 of the Convention.

22. The applicant highlights that he continues to see the minor via Skype. However, he submits that he would be exercising his rights of custody to the fullest extent but for the respondent's wrongful retention of "N" in the Republic of Ireland.

The respondent's evidence and submissions on the issue of habitual residence.

23. The respondent submits that "N" was not habitually resident in France immediately before the 20th, July, 2014 (i.e. the date of the alleged wrongful retention) and, if the applicant cannot establish that "N" was habitually resident in France as of the aforesaid date, the application for the return of "N" must fail.

24. The respondent concedes that "N" was habitually resident in France up until the 23rd March, 2014. However, the current position of the respondent is that the habitual residence of "N" has changed from France to the Republic of Ireland prior to the 20th July, 2014. The respondent deposes that "N" has been living with her and her family in Ireland since the 23rd March, 2014, save for two short visits to France in the summer.

25. The respondent proposes that the Supreme Court's dicta on establishing the habitual residence of a minor in *A.S. v. C.S. (Child Abduction)* [2010] I.R. 370 and *S.R. v M.M.R.* (Unreported, Supreme Court, 16th February, 2006) is not the appropriate approach to be adopted in the present case, as the aforesaid decisions related to applications in which Brussels II *bis* did not apply.

26. The respondent correctly identifies that the concept of "habitual residence" is not defined in the Regulation. However, the respondent claims that the scope of the concept of habitual residence was defined by the European Court of Justice in *Mercredi v. Chaffe* (Case C-497/10PPU) (22th of December, 2010). The Court discussed the factors that must be considered by the national court when determining the habitual residence of the child (at paras. 47-57):

> "47. To ensure that the best interest of the child are given the utmost consideration, the court has previously ruled that the concept of "habitual residence" under the article 8(1) of the Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national court, taking account of all the circumstances of fact specific to each individual case: see Proceedings brought by A, para 44.
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> 48. Among the test which should be applied by the national courts to establish the place where a child is habitually resident, particular mention should be made of the conditions and reasons for the child's stay on the territory of a member state, and the child's nationality; see Proceedings brought by A. para 44.
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> 49. As the court explained, moreover, in para. 38 of Proceedings brought by A, in order to determine where a child is habitually resident, in addition to the physical presence of the child in a member state, other factors must also make it clear that the presence is not in any way temporary or intermittent".
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> 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 Proceedings brought by A, para 40.
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> 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 the assessment must be carried out in the light of all the circumstance of fact specific to the individual case.
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> 52. In the main proceedings, the child's age, it may be added, is liable to be of particular importance.
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> 53. The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

54. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of".

55. That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on who he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the court's case law, such as the reasons for the move by the child's mother to another member state, the languages known to the mother or again her geographic and family origins may become relevant.

56. It follows from all the foregoing that the answer to the first question that the concept of "habitual residence", for the purposes of article 8 and article 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 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.

57. If the application of the aforementioned test were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under article 13 of the Regulation."

27. It is submitted by the respondent that as "N's" habitual residence has to be considered as of the 20th July, 2014 (i.e the date of the alleged wrongful retention), each of the factors set out in *Mercredi* must be considered by the Court in determining the issue of "N's" habitual residence.

28. The respondent submits that as per *Mercredi* (para.55), the habitual residence of "N" follows that of her mother as the respondent is the primary carer of the said minor. Moreover, the respondent submits that the Court must have consideration to the degree of integration by the child in a social and family environment(as per para.56 of *Mercredi*) when determining "N's" state of habitual residence. In analysing the degree of integration by the child in a social and family environment, the respondent submits that the Court must consider the duration, regularity, conditions and reasons for the stay in the territory of the European 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 social connections which the mother and the child have with that member state (as per para.56 of *Mercredi*).

29. It is submitted by the respondent, that the duration of "N" stay in Ireland is a factor to be considered by this Court in determining the issue of habitual residence. It is claimed that up until this hearing, "N" has been resident in Ireland for forty eight weeks and in turn, has spent a significant period of her life in Ireland. However, this Court notes that the issue which must be determined is "N's" habitual residence immediately before the 20th July, 2014. Thus, if the Court was to adopt a durational analysis in determining "N's habitual residence, it could only consider the time "N" has spent in Ireland up until the 20th July, 2014 (i.e the date of the alleged wrongful retention and not any period of time thereafter.

30. If the Court is to adopt a durational analysis in determining the habitual residence of "N", the Court must consider the regularity of "N's" residence in Ireland (as per para.56 of *Mercredi*). The respondent deposes and submits that "N" has been resident in Ireland since the 23rd March, 2014 save for two short visits to France (8th May, 2014 - 15th May, 2014 and 12th June, 2014 - 22nd of June, 2014).

31. It is submitted by the respondent that the Court must consider the "conditions and reasons"(as per para.56 of *Mercredi*) for "N's" habitual residence in Ireland. The respondent claims that due to "N's" age, these conditions and reasons mirror those of her mother. The respondent proffers that the conditions and reasons" for "N's" habitual residence correspond to the second factor which the court must consider under *Mercredi*, that being, "the mother's geographic and family origins and social connections which the mother and the child have with that Member State" (at para. 56 of *Mercredi*). The respondent claims that both her and "N's" residence in Ireland has not be "temporary or intermittent"(as per para.49 of *Mercredi*) and that she has taken the following tangible steps in settling in Ireland;

(i). On the 27th March, 2014, the respondent resigned from her employment in France.

(ii). As of the 28th March, 2014, the respondent applied to the Department of Social Protection and is in receipt of one parent allowance and child benefit. It is proffered by the respondent that this substantiates to recognition by the Irish State that "N's" residence lies in Ireland and not France.

(iii). As of the 25th April, 2014, the respondent applied to her local county council to add her name on the rent book of the property in which she is residing with "N" and her family.

(iv). The respondent contributes to the household fund at the aforesaid property, which is used to discharge utilities and household expenses.

(v). "N" holds an Irish P.P.S number and same was applied for in April 2014.

(vi). Since 29th April, 2014, "N" has been registered with an Irish G.P and health clinic at which her developmental milestones have been assessed.

(vii). In June 2014, both the respondent and "N" were granted medical cards by the Health Service Executive.

(viii). The respondent claims that the applicant has recognised that both the respondent and "N" are not habitually resident in Ireland by virtue of the applicant's removal of her name from the property lease and utility bills of the apartment which they occupied in France.

(ix). The respondent submits that evidence contained within her affidavits demonstrates a clear and established family

and social connection on the part of both the respondent and "N". For example, the respondent is an Irish citizen and has spent the majority of her life in the Ireland. In addition, the respondent has deposed that "N" has resided with the respondent's family for a considerable period of time (23rd March, 2014 to 20th July, 2014) in the state.

32. As stated above, the applicant relied on *S.R. v M.M.R.* (Unreported, Supreme Court, 16th February, 2006) to proffer the proposition that where both parents have equal parental rights over the minor, neither parent can alter the habitual residence of the child unilaterally. It was submitted by the respondent that such a proposition is erroneous as it seeks to place the legal construct of consent on the factual concept of "habitual residence". The Court was directed to *Re KL (A Child)* [2013] UKSC 75, where the U.K Supreme Court provided helpful guidance on this issue (at para.22-23):

> "22.Both Lord Hughes and I also questioned whether it was necessary to maintain the rule, hitherto firmly established in English law, that (where both parents have equal status in relation to the child) one parent could not unilaterally change the habitual residence of a child (see *In re S (Minors)(Child Abduction: Wrongful Retention)* [1994] FAM 70, approved by the Court of Appeal in *Re M(Abduction: Habitual Residence)* [1996] 1FLR 887). As the US Court of Appeals for the Ninth Circuit pointed out in *In re the application Mozes*, 239 F 3d 1067 (9th Cir 2001), at 1081, such a bright line rule certainly furthers the policy of discouraging child abductions, but if not carefully qualified it is capable of leading to absurd results (referring to EM Clive, "*The Concept of Habitual Residence*" [1997] Juridical Review 137, at 145). The court continued:
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> > "Habitual Residence is intended to be a description of a factual state of affairs, and a child can lose its [sic] habitual attachment to a place even without a parent's consent. Even when there is no settled intent on the part of the parents to abandon the child's prior habitual residence, courts should find a change in habitual residence if 'the objective facts point unequivocally to a person's ordinary or habitual residence being in a particular place'[referring to the Scottish case of *Zenel v Haddow* 1993 SLT 975].
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> 23. Nevertheless, it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another. This will have to be factored in, along with all the other relevant factors, in deciding whether a move from one country to another has a sufficient degree of stability to amount to a change of habitual residence."

33. Thus, in light of the above, the respondent submits that "N's" habitual residence lies in Ireland.

The respondent's evidence and submissions on the defence of "grave risk".
34. On affidavit, the respondent claims that her primary reason for leaving France with "N" was because the applicant was "a violent, abusive, controlling, erratic and unstable man". The respondent alleges that the applicant suffers from "paranoia" as a result of smoking cannabis.

35. The respondent alleged that during their relationship, the applicant was both physically and verbally abusive towards her in private and whilst in the presence of "N". In particular, the respondent deposes that during a holiday with the applicant, he threw a medicine bottle which struck her in the shin and caused her significant injuries which required paper stitches and bandaging.

36. In addition, the respondent deposes that her domestic life with the applicant was consumed with turmoil in the form of being locked in the family apartment for long periods of time, being forced to complete menial tasks and witnessing the applicant damage their apartment during fits of rage. The respondent also alleges that the applicant engaged in acts of animal cruelty towards household pets.

37. The respondent made an allegation that the applicant is in possession of a firearm and had used same to issue threats against her. It is further alleged by the respondent that the applicant has been prescribed Xanax by his psychiatrist.

38. The applicant denies the aforesaid allegations and highlights that the respondent never lodged a complaint against him to the French police. In response, the respondent deposed that she did not lodge any complaints regarding the aforementioned allegations to the French police, as the applicant had acquaintances in the local gendarmerie. The respondent deposed that the applicant had availed of the official capacity of acquaintances in the local police force to quash speeding fines. Moreover, the respondent claims that she was reluctant to lodge complaints to the police as such complaints would not be investigated or could exacerbate further domestic violence issued by the applicant.

39. In turn, the respondent raises the defence of grave risk under article 13(b) of the Convention. Moreover, the respondent claims that the return of "N" to France without the security of separate accommodation (with the respondent), with no financial support from the applicant, along with the risk of being exposed to an environment of domestic violence amounts to an "intolerable situation" within the meaning of article 13(b) of the Convention. In G. v R. (Unreported, High Court, Peart J., 12th January, 2012), Peart J provided insight on what amounts to an intolerable situation (at para.44):

> "The phrase "intolerable situation" is vaguer still in my view. Given that it is provided for in the Article as an alternative to either physical or psychological harm, it must embrace a wide range of situations, factors and circumstances in the place of habitual residence, which, though falling short of being likely to cause physical or psychological harm, may yet amount to situation which the child ought not to be expected to endure. I take "intolerable" to mean "unbearable" or " other than what the child should reasonably be expected to endure". Again, each child is different. What one child can readily endure or bear might be utterly intolerable to another for any number of reasons. Again each case must be judged on its own facts and circumstances and by reference to the particular child. It suggests a subjective test, yet a Court will always be aware that simply because a child expresses a wish against something does not mean that his wishes must be acceded to. There are general policy considerations behind the Convention which may require that a child's clearly expressed wishes or objections should yield to those other considerations. The child's wishes are not always determinative, but they must be considered and taken into account. This was touched upon by Finlay Geoghegan J. in her judgment in *C.A v C.A (otherwise CMcC)* [2010] 2 I.R. 162 (at pg 174) when she referred also to the comments of Baroness Hale of Richmond in *In Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288 (at p. 1307). Those comments were made in the context of considering a child's objection to being returned, but they seem to have some relevance also to the similar consideration of whether or not a return would for the particular child place him or her in an "intolerable situation".

40. The respondent submits that the Court can refuse the application for the return of " N" to France, if the applicant fails to make adequate arrangements (in the form of undertakings) which alleviate the alleged "grave risk" to "N". Article 11(4) of the Regulation states:

> ""A court cannot refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

41. It is submitted by the respondent that the applicant bears the burden of satisfying the Court that adequate arrangements have been/can be made to protect "N" if returned to France. The respondent directed the Court to the decision of Finlay Geoghegan J. in *I.P. v. T.P* [2012] 1. IR 666, where the Court refused the return of a minor to Poland due to an absence of effective protective measures which could safeguard the welfare of the child. The comments of the learned judge on the issue of protective measures are noteworthy (at para.47-48):

> "47. In the Irish adversarial system, it must primarily be a matter for the applicant to establish to the satisfaction of the court that such adequate arrangements "have been made" to secure the protection of the child upon return....."
>
> 48. In the absence of protective measures, I am forced to the conclusion that the contention by the father that on the facts herein a summary order for the return of Anna to Poland would constitute a grave risk of placing her in an intolerable situation has been made out."

42. The respondent submits further that the Courts of England and Wales have also refused applications for the return of a child on the basis that adequate arrangements had not been established before the Court which buttress the safety of the child on their return to their place of habitual residence (see *SP v. EB and KP* [2014] EWHC 3964 (Fam) (at para.21)).

43. The respondent claims that, with regard to the all evidence, the adequate arrangements necessitated in this case would be as follows:

> (i). The provision of secure accommodation for the respondent and the child in France to the exclusion of the applicant;
>
> (ii) The provision of financial support by the Applicant to the Respondent for the benefit of the child by way of initial lump sum and periodic payments thereafter;
>
> (iii) Relief akin to the forms of relief available under the Domestic Violence Act 1996, e.g an undertaking in the terms of a safety order or barring order.
>
> (iv) An undertaking on the part of the applicant to take such steps as are necessary and to bring the appropriate application before the French Court to ensure the enforceability of any "adequate arrangements" as directed by this Honourable Court pending further order of the French Courts-except for the issue of accommodation which ought to remain permanent save at the election of the respondent.
>
> (v) All the above arrangements to be put in place (including the requisite orders of the French Courts) before the child is returned to France, if that is the ultimate decision of this Honourable Court.

The applicant's evidence and submissions on the defence of "grave risk".

44. The applicant denies the allegations of domestic violence but does concede that both parties did argue occasionally. In particular, the applicant denies being physically abusive towards the respondent and denies forcing the respondent to complete menial domestic tasks. The applicant deposes in his affidavit that no complaints were lodged against him by the respondent to the French police nor does he have any relationship of influence with same. The respondent alleged that the applicant threw a medicine bottle at her while they were on holiday, which resulted in the respondent suffering minor injuries. In response to this allegation, the applicant claims that the respondents injuries were accidental as he threw the aforesaid bottle on the hotel bed and it "rebounded" and hit the respondent on the leg.

45. The respondent expressed concerns in her affidavit that the applicant had been prescribed Xanax by a psychiatrist for a "mental illness" arising from an alleged dispute between the applicant and his employer. The applicant denies being referred to a psychiatrist by his employer. Moreover, the applicant claims that he consulted with his family doctor on a voluntary basis due to work related and relationship stress. It was deposed by the applicant that two years prior to this hearing, he was prescribed Xanax by his family doctor. However, the consumption of the aforesaid medication was at the liberal discretion of the applicant.

46. In regards, the allegation that, on occasion, the applicant locked and detained the respondent and "N" in the family apartment, the applicant claims that he never intended to lock the respondent and the minor in the apartment maliciously. Rather, the applicant deposed that he locked the front door instinctively for security, and claims the respondent had a key in any event. In addition, the applicant denies the allegations of property damage and animal cruelty that were proffered by the respondent.

47. An allegation was made by the respondent that the applicant was in possession of a firearm and used same to issue threats against her. The applicant concedes that for about two to three weeks, he kept a friend's "ornamental gun" for safekeeping. However, the applicant denies threatening the respondent with the aforesaid firearm. The applicant claims that he is not in possession of any firearms at present.

48. The applicant submits that the onus of establishing a defence of "grave risk" rests on the respondent. Moreover, the applicant asserts that burden of establishing the alleged "risk" to either the applicant or "N", is of a high threshold, and to meet that burden, the respondent has to provide "clear and compelling evidence " that returning "N" to France would expose her to a high level of risk of serious harm. In *C.A v C.A (otherwise C.McC)* [2010] 2 I.R 162, Finlay Geoghegan J. stated (at pg.170):-

> "It is common case, in accordance with the decisions of the Supreme Court, and in particular those in *A.S. v P.S (Child Abduction)* [1998] 2. I.R 244 and Minister for Justice *(E.M) v (J.M.)* [2003] 3 I.R 178, that the potential defence provided for in article 13(b) is a rare exception to the requirement under the Convention to return children who have been wrongfully removed from their jurisdiction of habitual residence and that it is an exception which should be strictly applied in a narrow context in which it arises. Further, it is common case that the evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence".

49. The applicant submits further that the respondent must show compelling evidence that the French Courts or the relevant French

authorities would not be in a position to provide effective protection to "N" if she made complaints of domestic violence to the aforesaid bodies. The applicant directs the court to case of *E.H v. SH* (Child Abduction) [2004] 2 I.R. 564, where Finlay Geoghegan J. endorsed the approach adopted by the English Courts in *T.B. v J.B.* [2001] 2 F.L.R 515 regarding the assessment of the defence of grave risk. Finlay Geoghegan J. refers to a pertinent passage of the judgment of Arden L.J. in *T.B. v J.B.* [2001] 2 F.L.R 515 at 542 (at pg. 570 para. 21):

> "The policy of the Convention as set out above seems to me to require that the evaluation of risk is carried out on the basis that the abducting parent will take all reasonable steps to protect herself and her children and that she cannot rely on her unwillingness to do so as a factor relevant to risk. The onus would thus be on the mother in this case to show that, even if she took all reasonable steps, she would not be adequately protected from Mr. H in New Zealand"

Finlay Geoghegan J. goes on to state (at pg. 570 para.21):

> "I agree with the above as a general statement of the approach which this court must take to the assessment of grave risk. The facts of this case are different to *T.B v J.B* [2001] 2 F.L.R. 515 insofar as it is not an unwillingness to seek protection which is alleged but rather an inability to do so by reason of psychological frailty resulting from the alleged violence and dominance of the applicant. However, even in such differing circumstances it appears to me that the principle as stated by Arden L.J. must be considered at a minimum, to be the starting point of any consideration by this court. A respondent who attempts to persuade this court of an inability to seek protection from the court of the habitual residence of the child by reason of the respondent's own psychological frailty would have to establish by clear and compelling evidence that, on the particular facts pertaining to her (including her psychological frailty), it would be reasonable for her not to seek the protection from the courts of the habitual residence of the child".

50. The applicant submits that the respondent bares the onus of satisfying the high evidential threshold of showing "clear and compelling evidence" that the French authorities would not be in a position to provide effective protection to "N", as it is implicit in the Convention that signatory parties will respect and protect the rights of children. The applicant directs the Court to the decision of *P.N. v T.D.* (Unreported, Supreme Court, 30th April, 2008) where Fennelly J. held (at pg.3):

> "Under the principles recognised and underlying the Hague Convention and all of the other applicable instruments of International Law including Community Law, I would like to say in the clearest possible terms, that it is implicit in all of those that the courts of each of the Member States, and in this case France, so far as this court is concerned, give full recognition to the necessary protections of the best interests of the children. Those courts are bound to respect the European Convention on Human Rights and other instruments which have been referred to by the appellant in his argument today including the UN Convention in respect of Human Rights of the Child. There is no reason at all to doubt that the French Courts will not respect those principles of law and the rights of all the parties principally of course in the first instance, the rights of the children themselves, but also the rights of their parents including the rights of access of the appellant. This is the basis on which the Hague Convention operates."

51. The respondent has raised the point that if this Court was to order the return of "N" to France, it must consider its obligations under article 11(4) of the Regulation and ensure that adequate arrangements are in place that protect the welfare of "N" on her return. In response, the applicant, through his counsel, has offered the following arrangements;

> (i). He would provide secure accommodation for the applicant in the form of vacating the apartment in which he resides, for six months.
>
> (ii). He would not enter the apartment or present himself on the surrounding grounds or environs of said apartment.
>
> (iii). He would not harass or threaten the respondent.
>
> (iv). He would pay the rent and utilities of the aforesaid apartment during the respondent's six months residence.
>
> (v). He would pay the sum of €600 per month in maintenance to the respondent for the upkeep of both herself and "N".
>
> (vi). He would undertake to keep "N" on his health care policy.
>
> (vii). He would not initiate or pursue any criminal prosecution against the applicant if their was an issue arising from an alleged wrongful retention.
>
> (vii). He would undertake to swear that there is no firearm in the aforementioned apartment and would obtain a judicial officer to conduct a search of the apartment to ensure same, said search would be confirmed by certification.

Conclusion.

52. I have considered all the affidavits and submissions of the parties.

53. In determining the habitual residence of "N", I have considered the degree of integration by the child in a social and family environment which encompasses factors of duration, regularity, conditions and reasons for "N's" stay in the Republic of Ireland. The Court also recognises that the conditions and reasons for "N's" stay correlates with the respondent's geographic and family origins and the family and social connections which the respondent and "N" have with the Republic of Ireland (as per para.56 of *Mercredi*). However, four points raised in *Mercredi v. Chaffe* (Case C-497/10PPU) (22nd December, 2010) are of particular relevance to this case.

54. Firstly, the Regulation does not state any minimum duration period in which the child must be present in a member state before the habitual residence of that child is transferred to that state(as per para. 51 of *Mecredi*). However, the European Court of Justice does say that it is imperative that the removing parent has it in mind to establish there[the state] the permanent or habitual centre of his/her interests, with the intention that it should be of a lasting character, but duration of the aforesaid stay can serve only as an indicator in the assessment of the permanence of the residence, and that habitual residence must be assessed in terms of circumstances fact specific to the individual case.

55. Secondly, the European Court of Justice in *Mercredi*, held that in determining habitual residence, it was important that in addition

to the physical presence of the child in a member state, other factors must also make it clear that that the presence of the removing parent and the child is not in any way temporary or intermittent(at para.49 of *Mercredi*). In this particular case, while the respondent has deposed details of acquiring rented accommodation, receipts of child benefit and social welfare from the Irish Department of Social Protection and the acquiring of Irish P.P.S and Passport records for "N", her stay in Ireland from the 23rd March to the 20th July (i.e the date of the alleged wrongful retention) was intermittent with return trips to France. As a result, the Court accepts the affidavit evidence of the applicant that he was unaware that the respondent's travels to Ireland were informed with the intention to reside with "N" in Ireland permanently, and that he would have never of permitted "N" to leave France if he was aware of these intentions. Moreover, this Court also accepts the submission of the applicant that he believed the respondent was going to return to "France" before the 11th July, 2014 and that the applicant's beliefs were supported by the respondent and "N's" intermittent return trips to France.

56. Thirdly, the Court notes that *Mercredi* was a reference case to the European Court of Justice on the issue of habitual residence for the purposes of article 8 and 10 of the Regulation. The European Court Justice notes that in determining the issue of habitual residence of an infant, the court must consider the mother's integration in her social and family environment where that infant is dependent on her mother. However, the mother in *Mercredi* held sole parental rights over the infant in question. The father in *Mercredi* did not have any parental responsibility over the infant for the purposes of the Regulation. This Court notes that in this case, the applicant father holds parental rights over "N" and has provided for her during her residence in France up until the 23rd March, 2014 and during "N" intermittent trips to France on the dates mentioned above.

57. Fourthly, the European Court of Justice in *Mercredi*, recognised that it was for the national courts of member states to determine the issue of habitual residence, taking into account all the circumstances of facts specific to each individual case (at para.56 of *Mecredi*). This proposition is of the utmost importance in that it grants the national courts a level of flexibility in ensuring that the ethos of the Convention are not subverted, and that objectives of same are vindicated. Moreover, the aforesaid proposition has underpinned the jurisprudence of this Court in determining the issue of habitual residence in child abduction cases.

58. It was admitted by the respondent on affidavit that on the 23rd March, 2014, "N" was habitually resident in France. On considering the affidavits, legal submissions and case-law submitted, this Court concludes that "N's" state of habitual residence was not altered to the Republic of Ireland between the 23rd March, 2014 and the 20th July, 2014. In turn, this Court is of the view that considering all the circumstances of facts specific to this case including the duration, reasons and conditions of "N's" stay in Ireland, along with both the respondent's and "N" family origins and social connection with both Ireland and France, the Court is of the view that "N's" habitual residence remains in France.

59. It is undisputed that the applicant holds common parental authority over "N" pursuant to Article 372 of the French Civil Code. This Court is of the view that the applicant would of exercised these rights of custody but for the respondent's retention of "N" in Ireland.

60. Thus, in summation this Court concludes that the applicant has established, on the balance of probabilities, that:

> (a) "N" was habitually resident in France immediately before the 20th July, 2014;
>
> (b) on the aforesaid date, the applicant had rights of custody in respect of "N" under the laws of France;
>
> (c) the respondent's alleged retention of "N" in the Republic of Ireland on or about the 20th July, 2014, was in breach of these rights of custody, and
>
> (d) the alleged custody rights of the applicant were exercised or would have been exercised but for the removal or the retention.

61. The respondent has raised the defence of "grave risk" and in particular, claims that to return "N" to France would expose the minor to an intolerable situation or serious harm. As is clear from the decision of Finlay Geoghegan J. in *C.A v. C.A. (otherwise C. Mc.C)* [2010] 2 I.R. 162, that the type of evidence which the respondent must adduce in order to avail of a defence of grave risk under article 13(b) of the Convention is "clear and compelling" evidence. It is the view of this Court that the respondent has failed to meet this evidential threshold in that returning "N" to France would expose her to a risk of serious harm and/or that the requisite French authorities are not in a position to address her allegations of domestic violence or take steps to protect "N".

62. Thus, this Court concludes that the respondent has not raised "clear and compelling" evidence to support a defence of grave risk under article 13(b) of the Convention which would vitiate an order for the return of "N" pursuant to article 12 of the Convention.

63. This Court has also considered its obligations under article 11(4) of the Regulation, and with consideration to the points made at paras. 43 and 51 of this judgment, coupled with any prospective undertakings required by this Court and the Courts of France, adequate arrangements can be made to secure the protection of the child after her return.

64. In turn, this Court grants (i) a declaration that on or about the 20th July, 2014, the respondent wrongfully retained the minor, "N", in the Republic of Ireland within the meaning of article 3 of the Hague Convention on Child Abduction and article 2 of Council Regulation(E.C) No. 2201/2003 (Brussels II *bis*) and (ii) an order for the return of "N" to France pursuant to article 12 of the Hague Convention on Child Abduction and Part II of the Act of 1991.

65. As is the practice of this Court (see *M.L. v. J.L.* (Unreported, M.H Clark J., 28th July, 2011) I will hear counsel on the terms of the order and the ancillary undertakings necessary to ensure that an adequate plan is in place for "N" upon her return to France.