

**THE HIGH COURT  
FAMILY LAW****[2005] No. 19 H.L.C.****IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE  
HAGUE CONVENTION AND IN THE MATTER OF COUNCIL REGULATION 2201/2003 AND IN THE MATTER OF O., M., N. AND G.L.****BETWEEN****F.L.****APPLICANT****AND****C.L.****RESPONDENT****Judgment of Ms. Justice Finlay Geoghegan delivered on the 25th day of January 2006.**

1. The applicant is the father of the four children named in the title to the proceedings. The respondent is the mother of the children. The father and the mother were lawfully married to each other in Northern Ireland. The children named in the title are the four children of the marriage born on the following dates: O. born on the 19th October, 1996, M. born on the 17th September, 1998, N. born on the 29th June, 2000 and G. born on the 9th July, 2002.

2. The children were at all material times habitually resident in Northern Ireland with the parties until 4th November, 2004.

3. On the 4th November, 2004, the mother brought the children to this jurisdiction. She did so with the consent of the father. The father asserts that the consent was for a weekend trip to visit the maternal grandparents who are resident in this jurisdiction. The nature of the consent is in dispute.

4. The mother did not return to Northern Ireland with the children at the end of the weekend following the 4th November, 2004. The father contends that she informed him on the 4th November, 2004, by telephone from this jurisdiction that she was not returning after the weekend and remaining with the children in this jurisdiction.

5. These proceedings commenced on the 9th September, 2005, the father seeks an order pursuant to part II of the Child Abduction and Enforcement of Custody Orders Act 1991. In substance this is an application for an order for the return of the children pursuant to the Hague Convention on Child Abduction as implemented in this jurisdiction by the Act of 1991 and now subject to Council Regulation 2201/2003 of 27th November, 2003.

6. Regretfully the present relationship between the parties is extremely acrimonious. Several affidavits have been filed by each party. Each party was cross-examined on a limited number of issues with the leave of the court.

7. An assessment was conducted by Dr. Gerard Byrne, Consultant Child Psychiatrist in relation to the degree of maturity of the eldest child O. and for the purpose of ascertaining those matters specified in the order of this Court of the 9th November, 2005, in relation to the objections, if any, of O. to a return to Northern Ireland. Dr. Byrne provided a report to the Court setting out his conclusions (which forms part of the evidence) and appeared in person and was cross-examined by counsel for the parties.

**Application for Amendment to Summons**

8. Paragraph 8 of the summary summons issued herein states:

"This honourable court has jurisdiction and will determine the application herein by virtue of the provisions of article 10 of Council Regulation 2201/2003."

9. Regretfully, very late in the hearing an application was made by counsel for the father to amend this plea to refer to article 11 of Regulation 2201/2003. This followed a submission by counsel for the mother that any assertion that this Court has jurisdiction under article 10 of Regulation 2201/2003 is inconsistent with an application for an order for the return of the children to Northern Ireland pursuant to the Hague Convention and the Act of 1991 implementing same in Ireland and hence the father should not be permitted to pursue the application for the return of the children. Counsel for the father in seeking the amendment submits that the reference to article 10 was made in error and that the reference should be to article 11 of Regulation 2201/2003.

10. I accept that the reference to article 10 was an error. Any assertion by the father that this Court has jurisdiction under article 10 would be entirely inconsistent with the claim made in these proceedings. It does not appear to me that the mother has in any way been prejudiced by this error. Since the proceedings commenced they have been dealt with by both parties as an application for an order for the return of the children pursuant to the Hague Convention and the Act of 1991. It is such application which in substance has been addressed by the replying affidavits and all other submissions made on behalf of the mother. No preliminary point was taken on behalf of the mother in relation to this plea.

11. The Court may, pursuant to Order 28 Rule 1 of the Rules of the Superior Courts, 1986 permit an amendment at any stage in proceedings to an endorsement as may be necessary to determine the real questions in controversy between the parties.

12. It appears to me necessary for such purpose to permit an amendment so as to delete the reference to article 10 of Regulation 2201/2003 in paragraph 8 of the special endorsement of claim. In permitting this amendment I do not wish to be taken as holding that the court is exercising jurisdiction conferred by article 11 of Regulation 2201/2003. It appears to me that in this application this Court is probably exercising a jurisdiction conferred on it by the Act of 1991. Article 11 of Regulation 2201/2003 undoubtedly recognises the continuing jurisdiction of courts other than the courts of habitual residence of a child who has been allegedly wrongfully removed or retained to consider and determine an application for the return of a child pursuant to the Hague Convention. It also prescribes certain matters to be taken into account by the court in hearing such an application which in accordance with article 60 take precedence over the provisions of the Hague Convention. Finally it imposes certain obligations on this Court if it refuses to make an order for the return of a child. Nothing turns on this distinction as it is not alleged on behalf of the mother that this Court does not have jurisdiction to hear this application for return of the children if the submission in reliance on the reference to article 10 was rejected.

**Wrongful Removal or Wrongful Retention**

13. Counsel for the father submits that on the facts of this case, even as alleged by the father there was potentially both a wrongful removal and wrongful retention within the meaning of article 3 of the Hague Convention. The facts relevant to this issue as alleged by the father are that immediately prior to the 4th November, 2004, he consented to the mother taking the four children to this jurisdiction to visit their maternal grandparents who reside in this jurisdiction for a long weekend. It is contended that the mother, without disclosing her intention to the father intended when she left Northern Ireland on the 4th November, to take the children to this jurisdiction for a much longer and indefinite period and hence there was a wrongful removal.

14. Removal from one jurisdiction to another is a factual event. In this instance it was effected by a single car journey from Northern Ireland to this jurisdiction on the 4th November. The father consented to that car journey. In crossing the border and removing the children from Northern Ireland to this jurisdiction the mother was not acting in breach of any right of custody of the father even on the facts as alleged by him.

15. As already indicated the father contends that the only consent which he gave to this removal was for a weekend visit to the maternal grandparents. This is in dispute. However, on the father's case I have concluded that what is alleged is a wrongful retention within the meaning of article 3 of the Convention and not a wrongful removal and proposed considering the application on that basis.

16. The wrongful retention is alleged by the father to have occurred on the 4th November, 2004. This is the same day upon which the children travelled from Northern Ireland to this jurisdiction. His consent is stated to have been given to them remaining in this jurisdiction until either the 7th or 8th of November, 2004. Nothing turns on this precise date. However, it is alleged by the father that on the evening of the 4th, the mother telephoned him from this jurisdiction and informed him that she would not be returning at the end of the weekend and that she would be remaining in this jurisdiction with the children. This conversation is again disputed. On the issues in the case it does not appear to me that anything turns on whether the alleged wrongful retention is the 4th November, or the 7th or 8th November. I propose for the remainder of this judgment to refer to it as the 4th November, 2004.

### **Consent to Retention and Change of Habitual Residence.**

17. Counsel for the mother submits that the next issue to be determined by the court is whether or not there was a wrongful retention within the meaning of article 3 of the Convention. He submits that notwithstanding the decision of the Supreme Court in *B. v. B.* [1998] 1 I.R. 299 that having regard to Council Regulation 2201/2003 a consent to retention as is alleged by the mother in this case can alter the habitual residence of a child and that the issue falls to be considered under article 3 and not article 13 of the Convention.

18. Prior to considering this legal issue the court must determine, on the facts, whether or not the father consented to the children being retained in this jurisdiction for a period longer than a weekend in November, 2004. The principles according to which the court should determine whether there was consent are not in dispute. The onus is on the mother to establish the consent. The consent need not be in writing. However, the consent must be real, it must be positive and it must be unequivocal. See *re K. (Abduction: Consent)* [1997] 2 F.L.R. 212 and the judgment of Hale J. (as she then was) at p. 217.

19. The consent must be proved on the balance of probabilities and the evidence in support needs to be clear and cogent. It is not necessary in all instances that there be an express statement such as "I consent". The court may in an appropriate case infer consent from conduct.

20. I find on the affidavits sworn herein and the oral evidence given by the parties that as a matter of probability there was no express statement made by the father in advance of the 4th November, 2004, which was an unequivocal consent to the children being removed from Northern Ireland to live in this jurisdiction on a long term or indefinite basis. In making this finding I have had regard to the evidence of the mother of alleged statements by the father that she go to this jurisdiction.

21. I also find that the father did not object to the children leaving Northern Ireland on the 4th November, and travelling to this jurisdiction. However, before such non objection could amount to consent to the children changing their habitual residence to this jurisdiction or remaining for an indefinite period in this jurisdiction it appears that there would have to be clear and cogent evidence that the father was aware that the purpose of the trip on the 4th November, was to bring the children to this jurisdiction for an indefinite period and to effect a long term change in their living arrangements.

22. On the evidence, I accept that the mother had put in place arrangements through her brother to secure rental accommodation in this jurisdiction prior to the 4th November. She also appears to have made enquiries in the relevant local school about enrolling the older children. However, it is not alleged that the mother informed the father of these steps. Further when the mother left Northern Ireland she only took clothes and belongings for a weekend and returned on the 7th November to collect more clothes and belongings.

23. I find on the evidence that the mother did not inform the father that the purpose of the journey to this jurisdiction on the 4th November, was to make a change in the place of residence of the children either on a long term basis or for an indefinite period of time. Hence there was no consent by the father to the change of residence of the children and their retention in this jurisdiction.

24. Having regard to the findings of fact that there was no consent to the retention of the children in this jurisdiction it is unnecessary for me to consider the legal submissions on the alleged change brought about by Regulation 2201/2003 to the position as determined by the Supreme Court in *B. v. B.* [1998] 1 I.R. 299.

25. Insofar as counsel for the mother submits that there had been a change in the habitual residence of the children prior to any alleged wrongful retention that in turn was dependant upon a factual finding of consent by the father to the change in the residence of the children to this jurisdiction. Accordingly this issue does not now arise.

### **Law on Acquiescence**

26. Article 13 of the Hague Convention provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

(a) the person... [seeking the order for return].., had consented to or subsequently acquiesced in the removal or retention;"

27. It is submitted on behalf of the mother that on the facts of this case the father acquiesced in the retention of the children in this jurisdiction subsequent to the 4th November, 2004, i.e. the date of alleged wrongful retention.

28. There is no significant dispute between the parties as to the principles according to which this Court should determine whether or not the father acquiesced within the meaning of article 13(a) of the Hague Convention. The principles are those set out by the Supreme Court in its decision in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416. In that case judgments were given by all three members of the court (Denham J., Lynch J. and Barron J.).

29. In stating that this Court is bound by the decision of the Supreme Court in *R.K. v. J.K.* I do not wish to suggest that the concept of acquiescence in the Hague Convention as determined by the Supreme Court is an Irish national law concept. It is clear from those judgments that the Supreme Court agrees with the views expressed by the House of Lords in *re H. (Abduction: Acquiescence)* [1998] A.C. 72 through the speech of Lord Browne Wilkinson that the Convention must have the same meaning and effect under the laws all the Contracting States and consequently national law concepts have no direct application to the proper construction of article 13 of the Hague Convention. Having referred to this decision Denham J. at p. 431 stated:

"I agree that it is necessary to ensure a common international approach to the interpretation of the terms of the Hague Convention. The concept of acquiescence in the Hague Convention should not be interpreted in a formalistic way or by reference to national law. Common sense should be applied to the facts of the case".

30. Both Denham J. and Barron J. cite with approval and consider as a point of departure in relation to the meaning of acquiescence the statement by Waite J. in relation to acquiescence in *W. v. W. (Abduction: Acquiescence)* [1993] 2 F.L.R. 211:

"The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return."

31. All three judgments in *R.K. v. J.K.* refer extensively to the speech of Lord Brown Wilkinson in *re H. (Abduction: Acquiescence)* [1998] A.C. 72. Denham J. at p. 430 sets out the summary by Lord Browne Wilkinson in relation to acquiescence at p. 90:

"To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 at p. 838: ... 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.' (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

32. Both Lynch J. and Barron J. also refer with approval to the views expressed by Balcombe L.J. in what was subsequently stated by the House of Lords to be "a strong dissenting judgment" in *Re A. (Abduction: Custody Rights)* [1992] 2 W.L.R. 536. In that case the issue was whether sentiments expressed by a father in a single letter should be regarded as being acquiescence to the wrongful removal by the mother of his two sons. The majority of the court so found but Balcombe L.J. dissented. He said at p. 544:

"In my judgment this is to give 'acquiesced' far too technical a meaning for the context in which it is used. As I have already said, the main object of the Hague Convention is to require the immediate and automatic return to the state of their habitual residence of children who have been wrongfully removed. To this there are a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interests of the children that the exceptions are directed, not (except insofar as these directly affect the interests of the children) the interests of the parents or either of them. In my judgment, this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.

Added force is given to this view by the English and French dictionary definitions of 'acquiesce' which I have quoted above. 'Accept' and 'adhésion' to my mind connote a state of affairs which persists over a period. 'Acquiesce' is not, in my judgment, apt to refer to a single expression of agreement taken in isolation from all surrounding circumstances."

33. Barron J. having referred to the above then stated at p. 449:

"I agree. In my view, acquiescence in the context of the Convention means an acceptance of the changed circumstances arising from the wrongful removal and/or the wrongful retention, as the case may be, by a parent in such circumstances that it is reasonable that he or she should be bound by it. It must be such that it would be inconsistent for the parent who has acquiesced to seek later to rely upon the rights given to such parent under the Convention to have the child or children returned summarily. The acceptance may be by words or conduct."

34. The above appears helpful in determining the level of acceptance of the changed circumstances which must be found by the court to form part of the subjective intention or conduct of the wronged parent. It appears from the above and in particular the observation of Barron J. that a finding of acquiescence should be made by the requested court, where having considered all the relevant circumstances the court concludes that the wronged parent either actively or passively accepted the changed circumstances such that it is reasonable that s/he be bound by it and it would be inconsistent for that parent to rely upon his/her rights under the Convention to have the child or children returned summarily. The same considerations appear to underlie the exception envisaged by Lord Browne Wilkinson where even in the absence of any finding of acceptance by reference to the subjective intent of the wronged parent the conduct of that parent may be such that it has led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with a summary return of a child.

35. I would respectfully agree with the characterisation by Balcombe L.J. of an object of the Convention being the immediate and automatic return of children who have been wrongfully removed or retained to their State of habitual residence. Also, that the purpose of the exceptions are directed to the interests of the children as distinct from the parents. The object of an immediate return requires both that the wrong parent make a prompt request for the return of the child and that the national authorities and courts adopt expeditious procedures. Whilst article 12 applies to proceedings commenced within one year this does not mean that a parent is permitted to await commencing proceedings until shortly before the expiry of the year. As is clear from the above decisions a parent may be found to have acquiesced within the meaning of article 13 through inactivity.

36. Further, it appears important to stress the consideration to be given by the court to whether the conduct, active or passive alleged to constitute acquiescence is inconsistent with a right to summary return under the Convention. Summary return as used in the above decisions appears to be the automatic return under article 12 where the requested court has no discretion to refuse by reference to the then circumstances of the child. The purpose of the exceptions is as stated by Balcombe L.J. to avoid distress to the child. Where a defence under article 13 is established it does not automatically follow that there will not be an order for return. Acquiescence or any other defence simply gives to the requested court a discretion as to whether or not to make an order for the return of the children in accordance with the decision of the Supreme Court in *B. v. B.* [1998] 1 I.R. 299. The creation of such a discretion by establishing a defence appears to me consistent with the above analysis of Balcombe L.J. of the purpose of the exception or defence of acquiescence in the context of the objects of the Convention. Acquiescence will normally mean that the child has been left in the country to which he or she has been wrongfully removed or retained for a longer period than is envisaged by the requirement for prompt applications and expeditious procedures under the Convention. The Convention, in the interests of the child in such circumstances gives the requested court a discretion which permits it to take into account the then position of the child albeit in a context of the objects of the Convention. The nature of this discretion is considered in more detail later.

### **Findings of Fact Relevant to Acquiescence**

37. As already indicated, there are now regretfully many and bitter disputes between the parties. The affidavits of the parties go beyond issues which fall to be resolved by this Court in this application. Having considered carefully the affidavits, oral evidence and submissions made on behalf of the parties and their respective counsel I have reached the following conclusions and make the following findings of fact (insofar as the relevant facts were disputed) relevant to the issue of acquiescence.

1. The relevant period commences on the 4th November, 2004. On the father's case, he was informed on that date that the mother was proposing to retain the children indefinitely in this jurisdiction and enrol them in schools.
2. The father is a well educated, intelligent and successful business person with a keen attention to detail. He has had legal advice available to him at all material times.
3. The mother also is a well educated intelligent person. She is now and has been for some time under the care of a Consultant Psychiatrist who reports that she is suffering from anxiety. Such anxiety appears to have made more difficult the handling by her of certain issues, particularly relating to access by the father to the children. Notwithstanding, in the witness box she was able to cope with cross-examination by counsel for the father.
4. To the knowledge of the father the older children were enrolled in school in this jurisdiction in November, 2004. The father has been aware of the details of their schooling and subsequently met with some or all of the relevant teachers.
5. Between November, 2004 and the end of January, 2005, the father regularly visited this jurisdiction and enjoyed access to the four children and on occasion stayed in the rented accommodation occupied by the mother and the children in this jurisdiction. In the early period he stayed in such accommodation even when the mother was also present.
6. Prior to the end of 2004, whilst the father communicated distress at the fact that the mother and children had left the family home and in relation to the separation of the parties and sought and hoped for the return of the mother and the children to the family home in Northern Ireland he did not expressly seek the return of the children to the jurisdiction of Northern Ireland as distinct from a reunification of the family in the family home nor did he expressly object to the children remaining in this jurisdiction whilst the mother and children lived away from the family home.
7. By agreement between the parties the mother went on holidays without the children to mainland Europe for approximately three weeks commencing at the end of December, 2004. Prior to leaving, the mother brought the children to the family home in Northern Ireland. They then stayed there with the father in Northern Ireland for approximately one week. The father then by arrangement with the mother brought the children back to this jurisdiction and the then rented accommodation. He stayed with them for a further period in this jurisdiction and settled the children back into school in this jurisdiction at the commencement of the January, 2005 term.
8. Until the mother returned from holidays on approximately 18/19 January, 2005, the father hoped for a reconciliation of marital differences which would result in the mother returning with the children to the family home in Northern Ireland. I am satisfied that the actions which he took in relation to the children and to his wife from 4th November, until 18/19 January, were focused on attempting to achieve a reconciliation and a restoration of the family unit in the family home in Northern Ireland.
9. A major change occurred to this situation on the return of the mother from holidays in January, 2005. The mother then informed the father that she intended seeking a divorce. The father became aware within a short time that reconciliation was unlikely.
10. There were further significant events in the weekend following the mother's return from holidays. The father travelled to this jurisdiction to visit the children. The mother was away from the home. The father believed from information given to him that she was at a course in Dublin but on her return discovered that she in fact been in England seeking legal advice.
11. At this time, the end of January, 2005, the father realised that reconciliation was unlikely and that the mother intended seeking a divorce. A factor in the deteriorating relationship between the parties at this stage appears to have been the father's suspicion that the mother had a relationship with a third party and the father's reaction to this situation.
12. There were intense discussions between the parties at the end of January, and early February. In particular a significant conversation by telephone about the 2nd February, 2005. Whilst I find that one of the options discussed at

that time for the future living arrangements of each of the parties and the children was the mother returning to Northern Ireland with the children to live in a separate house to the father, I am also satisfied that such discussions also included the mother continuing to live in this jurisdiction with the children. No agreement was reached between the parties on future arrangements. Discussions appeared to have reached the stage whereby at one point when both were present in the rented accommodation in this jurisdiction the mother downloaded from the internet a proforma separation agreement which would provide for separation on what the father described as "a clean break" basis. Such a break appears to have then been in contemplation of both parties.

13. The father and the mother jointly own a business in Northern Ireland. Financial tensions and disagreement also contributed to the deterioration in the relationship at the end of January or early February, 2005.

14. A disputed incident is alleged to have occurred on the 6th February, which then caused a deep rift between the parties. The mother alleges that threats were made to her and the children by the father. I make no findings in relation to whether or not these events as alleged occurred. Even the allegations and their consequences are important to a consideration of the father's actions during the subsequent period.

15. The mother obtained an interim barring order against the father in the District Court in this jurisdiction on the 23rd February, 2005. The father then instructed solicitors in this jurisdiction who appeared on his behalf at the full hearing of the application for a barring order in the District Court on the 9th March, 2005. Judgment was given by the District Judge on the 16th March, 2005 and the application for a barring order refused. The interim order was also discharged.

16. The father had no face to face access with any of the children between the 6th February, 2005 and the judgment given by the District Judge on the 16th March, 2005. I use the term face to face access to distinguish from any telephone contact which if it occurred was not significant.

17. Arrangements were sought to be put in place through the respective solicitors for access by the father to the children in this jurisdiction on the weekend of the 19th March, 2005. This did not take place notwithstanding the father and his sister travelled for that purpose. It is not relevant for this court to determine the disputed reasons for such failure.

18. Thereafter the father did not have face to face access with the three younger children until the 17th September, 2005, after the institution of these proceedings. That initial access on the 17th September, was arranged independently of these proceedings and was prior to service of the proceedings on the mother.

19. The father, at the request of the eldest child attended her First Confession in this jurisdiction in April, 2005. Likewise he and a number of members of his family attended at her First Communion in this jurisdiction in May, 2005. The younger children were not present on either occasion. Those two dates were the only days upon which the father had access to the eldest child between 6th February and 17th September, 2005.

20. At all material times between February, 2005 and September, 2005, the father was extremely anxious to have access to his children. The access sought by the father, was primarily access to the children in this jurisdiction.

21. The mother went to England with the children in early June, 2005. There are again disputes as to the nature and purpose of this move which it is unnecessary for me to resolve. The mother had physical medical difficulties in this period in respect of which she sought advice in England. The mother's intentions in making that move are not relevant to the issues this court has to determine. What is relevant and I find is that the father was not informed of the move until after it occurred. He became aware of the move in mid June, 2005. Correspondence between the respective solicitors discloses that the father was aware that the children were with the mother in England but unaware of the precise address. He also appears to have had an English mobile telephone number for the mother. The position again appears to have exacerbated by the fact that the mother went to stay with the third party.

22. The mother returned with the children to this jurisdiction on the 28th July, 2005, as her parents had been involved in a serious road traffic accident.

23. There is a dispute as to whether the father was informed on the 2nd August, by telephone by the mother or in a letter of the 10th August, that the children had returned to this jurisdiction. Nothing appears to turn on this. I am satisfied that, at latest, by a letter of the 10th August from the mother's solicitors the father through his solicitors was informed that the children had returned with the mother to this jurisdiction.

24. The father has stated on affidavit, and was not cross-examined on the averment that he determined to take proceedings under the Hague Convention in this jurisdiction "in or about the early part of June, 2005". He also avers that he was informed by the principal of the children's national school on the 14th June, that the children had left the jurisdiction and states "therefore no proceedings could be initiated in those circumstances at that time".

25. I am satisfied that on no date after the 6th February, 2005, and prior to the commencement of these proceedings did the father object to the children remaining in this jurisdiction or request their return to Northern Ireland. While direct communications between the parties were limited in this period, I find no such objection nor any request for the return of the children to Northern Ireland in this period was directly made. The correspondence between solicitors does not contain any such objection or request.

26. The father has stated and I accept that he first took specific legal advice from his Northern Ireland solicitors in relation to his family circumstances at the end of January, 2005, when it became apparent to him that his wife intended seeking a divorce and reconciliation was unlikely. From that date forward he was advised by solicitors in Northern Ireland and later also by solicitors in this jurisdiction. There is significant correspondence between both firms of solicitors with solicitors instructed by the mother both in this jurisdiction and Northern Ireland between March, 2005 and September, 2005. At no point in that correspondence is there any request for the return of the children to the jurisdiction of Northern Ireland nor any objection taken to the children remaining in this jurisdiction. The focus of that correspondence is the obtaining of appropriate and proper access for the father to the children. In the initial stages it is in the context of the failure to provide such access that proceedings of an unspecified nature are threatened. In a letter of the 21st March, 2005, following the failed arrangements for access on the 19th March, 2005, the father's solicitors in this jurisdiction Hugh J. Campbell and Co. wrote to the mother's then solicitors in this jurisdiction Florence G. McCartney and Associates and having referred to the events of the previous weekend stated:

"Mr. L. has now come to the conclusion that your client does not have, and never had, any intention of affording Mr. L. any Access or contact with his children.

We now make a further and final request that Mr. L. be afforded all reasonable Access to the children. We should be obliged if you could please now revert in reply to his request, and by return.

You should note that if reasonable Access is not afforded to Mr. L., he will have no option but to consider all legal remedies at his disposal to obtain Access and contact with his children."

27. The focus on seeking to obtain appropriate access for the father to the children continued in August, 2005. Messrs. Campbell and Grant Solicitors for the father in Northern Ireland wrote to the mother's Northern Ireland solicitors, Peden and Reid on the 3rd August, 2005, following a telephone conversation between the mother and father of the 2nd August, 2005 and stated *inter alia*:

"Your client enquired if our client was making an application for contact/access to his children and no application had yet been made despite the fact that this had been mooted on or about 16th March 2005 in the Republic of Ireland.

Our client has been seeking contact/access to his children since February 2005 and this has been denied by your client to date. Your client has deemed this not to be appropriate since that time.

If it is in fact that situation that your client is now prepared to consider facilitating such access between our client and his children. I would welcome discussions regarding this and I would indeed ask whether or not it is necessary for proceedings to be initiated to enable this to take place?"

28. When the father became aware of the return of the children to this jurisdiction Messrs. Campbell and Grant Solicitors wrote to Florence G. McCartney and Co. the mother's solicitors in this jurisdiction on 15th August, 2005, and stated at the commencement of the letter:

"We note your client has left London on account of this accident. Can you confirm that this is now a permanent move back to the Republic of Ireland and to L.? Our earlier correspondence to Peden & Reid (of which you have copies) refers.

What are the arrangements for the children's return to school after the end of the summer holidays? Are they to return to the same school in L.? We would be obliged if you could confirm this."

In the same letter having referred to a number of specific facts, none of which contain an objection to the children remaining in this jurisdiction the father's solicitors conclude by stating:

"As indicated our client seeks access to his children immediately. Might we respectfully submit that you submit proposals to us for that access to take place immediately? Given the length of time that has passed since Mr L. has had the opportunity to see his children both before and after your client moved to London, we deem it appropriate to hear from you with proposals to allow this to happen this week."

### **Conclusion on Acquiescence**

38. I have concluded that the father did acquiesce in the retention of the children in this jurisdiction within the meaning of article 13(a) of the Convention. I have reached this conclusion on the findings of fact set out above. In reaching this conclusion I have considered differently the words and actions of the father prior to the end of January, 2005 and subsequent to that date. The actions of the father particularly in bringing the children back to this jurisdiction after the Christmas holiday in Northern Ireland and staying with them and settling them back to school here evidence an acceptance at that time by the father that the children should remain living in this jurisdiction. However in this period the father was seeking to achieve a reconciliation with the mother and a voluntary return of the mother and the children to the family home in Northern Ireland. Accordingly in reaching my overall conclusion I have not taken into account the actions of the father in this period save as constituting the factual background against which his actions and inactivity in the subsequent period should be considered.

39. The next relevant period are the months between early February and the end of May. I have considered this period by reason of the unchallenged averment of the father that he determined to commence proceedings under the Hague Convention in early June. During this period the position was entirely different. Relations between the parties had to become extremely acrimonious; reconciliation appeared unlikely and most importantly the father was being deprived of access to his children. The father was during this entire period taking legal advice on his family situation. I find that the father accepted during this period that the children should remain living in this jurisdiction. His actions in challenging the District Court application for an order barring him from the house in which the mother and children were residing in this jurisdiction and the correspondence from his solicitors seeking access in this jurisdiction together with a total lack of any either direct demand or demand through his solicitors for the return of the children to Northern Ireland, are only consistent with an acceptance by the father during this period that the children should continue to live in this jurisdiction whilst insisting of course, as he was entitled to do that he should have proper access to the children.

40. Notwithstanding the stated determination by the father to commence proceedings under the Hague Convention in early June, 2005, neither he nor his solicitors gave any indication to the mother or her solicitors of any such determination and intent. Insofar as relevant I accept the submissions of counsel for the mother that it does not follow that because the children and the mother were not in the jurisdiction at the relevant time that proceedings could not have been initiated under the Hague Convention. Also, communications from both the father and the solicitors in August, 2005, indicate continuing acceptance by the father that the children reside in this jurisdiction and return to school in this jurisdiction at the end of August, 2005.

41. Taking into account all the relevant circumstances and findings of fact I have also concluded that, even considering the period from early February, 2005, the father accepted the residence of the children in this jurisdiction such that it is reasonable that he is bound by such acceptance and it would be inconsistent for him to be entitled to obtain the summary return of the children to Northern Ireland pursuant to the Hague Convention in proceedings commenced on the 9th September, 2005.

### Objections of Eldest Child

42. In the light of the finding that the father acquiesced in the retention of the children in this jurisdiction, it is unnecessary for me to determine whether by reason of the evidence of Dr. Byrne in relation to O. this Court would have discretion under Article 13 on that ground alone to refuse to make an order for return. As, by reason of the acquiescence found the Court already has a discretion under article 13 the appropriate approach appears to be to take into account in exercising that discretion both the reported objections of O. and Dr. Byrne's evidence in relation to her maturity and the source of those objections.

43. Article 11.2 of Regulation 2201/2003 obliges this Court to ensure that a child is given the opportunity to be heard during the proceedings "unless this appears inappropriate having regard to his or her age or degree of maturity". Having regard to the age of each of the children I am satisfied that it was only appropriate that O. should be interviewed in relation to the order for return sought. Further, having regard both to the age and to the degree of maturity of O. I am satisfied that it was appropriate that she be heard in the proceedings by the assessment conducted by Dr. Byrne and his report to the Court. Further that it would not have been appropriate that O. or any of the other children be brought to court or be asked to give evidence to either formally or informally.

### Discretion under Article 13

44. In *B. v. B.* [1998] 1 I.R. 299 the Supreme Court determined that where a defence under Article 13 of the Convention is made out then the court has a discretion as to whether or not an order for the return of the children should be made. In that case Denham J. at p. 313 set out factors to be considered by the court in exercising its discretion. These were:

"Factors to be considered include:

(1) The habitual residence of the child at the time of the removal.

(2) The law relevant to her custody and access

These two first factors raise the issue of the comparative suitability of the competing jurisdictions: whether the decisions as to the best interest of the child should be taken in an English or Irish court: in light of the Hague Convention.

(3) The overall policy of the Convention and its objective to secure protection for rights of access.

In this latter regard the fact that the mother of a two year old girl has not had access other than on the day of the court hearing of the child is a relevant consideration, though not decisive on its own.

(4) The object of the Convention to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.

(5) The circumstances of the child, information relating to the social background of the child, as stated in the final paragraph of art. 13 of the Hague Convention.

(6) The nature of consent of the appellant. Was it consent to the removal of the child from England for some time or in effect a waiver of custody of the child until she was 16? In this regard the circumstances of the making of the consent are relevant.

(7) The litigation in England and the decision of the 5th August, 1996, by the English High Court, Family Division, that V.B. be a ward of court, that the respondent return the child to that jurisdiction, and that V.B. reside with the appellant.

(8) The matter of undertakings, which are settled law in this jurisdiction, especially in relation to very young children."

45. Whilst certain of the above factors related specifically to the facts of that case, many are of general application and of application to the facts of this case. As already indicated the Court should in accordance with the rights of the eldest child take into account the objections expressed by the eldest child to the return to Northern Ireland. However, having regard to the evidence given by Dr. Byrne as to the reasons for the objections and source of anxiety of the child, without wishing in any way to appear disrespectful of the objections voiced by the child it does not appear appropriate to give any significant weight to those objections in determining whether or not to make an order for return in the exercise of the discretion now given to the court by Article 13 of the Convention.

46. Counsel for the parties are in agreement that the factors identified by Denham J. in *B. v. B.* must now be considered in the context of the consequences provided in article 11 of Regulation 2201/2003 at paragraphs 7 and 8 in the event that the Court does not make an order for return. These provide:

"7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non return pursuant to article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

47. It also appears important to note that whilst the court in exercising a discretion under Article 13 to determine whether or not to make an order for return may take into account the interests of the child, it does not appear that it is intended to engage in the type of wider welfare inquiry in relation to the future needs of the child which it would do if the application were a dispute in relation to custody or residence between the parents. The court in determining whether or not to make an order for return under Article 13 is not determining such a custody or residence dispute. Article 11 of Regulation 2201/2003 retains to the courts of the State of habitual

residence of the child prior to the wrongful removal or retention the right to decide on a question of custody notwithstanding an order for non-return.

48. On the facts of this case I have taken into account in the habitual residence of the children in Northern Ireland prior to 4th November, 2005; the similarity of laws and approaches of the courts in both jurisdictions to issues of custody and access; the ability of the parties to access lawyers in both jurisdictions; the fact that the children have now been in this jurisdiction for approximately fourteen months and the elder ones are in their second academic school year and the fact that such period has resulted at least in part from the acquiescence of the father to their retention in this jurisdiction as found.

49. I have considered carefully the object identified by Denham J. of the Convention to secure protection for rights of access. The fact that the two jurisdictions are adjacent and on the same relatively small island is important. In the initial period after the move the father had access in both jurisdictions. Whilst, the father was unable to exercise access between February, 2005 and September, 2005 it was not due to any geographical dislocation. Also in that period he did not seek the assistance of the courts in this jurisdiction to secure access to the children. Since the commencement of these proceedings he has made and has obtained interim orders for access. He has had access to his children on a regular basis and the orders made have included permitting him to take the children to Northern Ireland for a holiday after Christmas upon his undertaking to return them to this jurisdiction with which he complied. I have concluded that there is no geographical obstacle to the father exercising access if the children remain in this jurisdiction and the protection of the father's right to access can be secured equally by the courts of this jurisdiction or Northern Ireland.

50. I have also taken into account the fact that the mother has commenced divorce proceedings in Northern Ireland in which on the evidence given it appears that she has had to furnish a statement of arrangements in relation to the children. Also I have noted that even if an order for return is refused either party may subsequently seek to have the courts of Northern Ireland the question of custody of the children. Whilst there is no evidence of any dispute about custody/residence I have taken into account that following an order of non-return if either party seeks to invoke the jurisdiction of the courts of Northern Ireland to determine a question of custody there may be proceedings in relation to the children in both jurisdictions i.e. custody in Northern Ireland and access in this jurisdiction.

51. Notwithstanding this inconvenience, and having regard to all the above factors on the facts of this case I have determined that the Court's discretion should be exercised by refusing an order for the return of the children to Northern Ireland. It appears to me that it is in the interests of the children that their present place of residence and in the case of the elder three school arrangements should not now be changed by an order of a court without the type of full and wide ranging welfare inquiry which would be made if the court were determining a dispute in relation to custody or residence of the children.

52. Accordingly there will be an order refusing the application of the father for an order for the return of the children to the jurisdiction of the courts of Northern Ireland pursuant to the 1980 Hague Convention and the Act of 1991 and there will be an order for the transmission of the court order, this judgment, the pleadings, affidavits and exhibits, report of Dr. Byrne and the transcript of the oral evidence to the High Court of Justice of Northern Ireland pursuant to article 11.6 of Regulation 2201/2003. As this application was made directly to the courts in this jurisdiction and without the apparent involvement of the central authority in either jurisdiction it does not appear appropriate that the documents be transmitted through the central authorities.