THE HIGH COURT

RECORD NO: 2016/32 HLC

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

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

AND IN THE MATTER OF COUNCIL REGULATION 2201/2003/EC

AND IN THE MATTER OF RWR, A CHILD

Between

J. W.

Plaintiff

AND

M. R.

Defendant

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 31st January, 2017

1. This is a case in which the father of a child (the applicant) seeks the return of his three-year old son to England pursuant to the Convention on the Civil Aspects of International Child Abduction, 1980 (the 'Hague Convention'). The mother (the respondent) took the son from England to Ireland on the 24th September, 2016, in circumstances which are disputed. Among the issues raised in the case are whether the father consented to the removal of the child from the England and Wales, and whether he was exercising custody rights at the time of the removal.

Chronology

2. The child in question, R, was born on the 19th December, 2013, and is now 3 years of age. The mother was 18 at the time of his birth and the father was 17. Their relationship apparently continued for some time but broke down some months later, perhaps in mid-2014. Certain events during the years 2014-16 are in dispute between the parties, as will be discussed in further detail below. However, what can be said with certainty is that throughout this period, the father, Mr. W, was living at home with his own parents, and the child, R, was living with his mother, Ms. R. At some point, she developed a relationship with another man, one L.H.

3. On the 14th September, 2016, R arrived at nursery or crèche with unexplained bruising to his eye and the local child protection services were contacted. They commenced an investigation into what was a possible non-accidental injury. On the same date, an agreement was reached between the mother, father and social workers that R would reside with the father, Mr. W, at his parents' home while the investigation was being conducted. It was also agreed that Ms. R would not have unsupervised access to the child. R spent the next 11 days living with his father. On the 15th September, 2016, a medical report indicated that the child's bruise was not consistent with a fall, as had been described by Ms. R, and that it was consistent with an inflicted injury. Ms. R was informed of this. A report exhibited in the grounding affidavit to these proceedings says that Ms. R was advised that the police investigation was ongoing and that the Child Protection Social Services would undertake an assessment which needed to be concluded within 45 working days.

4. On the 24th September, 2016, in circumstances which are disputed, the father gave the child to the mother and she left the jurisdiction and came to Ireland. She was accompanied by her partner, L.H., and her mother.

5. On the next day, the 25th September, Mr. W and his parents contacted the authorities to report the child missing. This was done by telephone call to the emergency duty team at 10.29am. Attempts to reach Ms. R and the people who had accompanied her to Ireland by telephone all failed.

6. On the 27th September 2016, the local authority made an application to the High Court of Justice, Family Division, at Kingston-Upon-Hull, based upon papers which included a statement of a social worker dated 26th September 2016 summarising the relevant facts. The Court made an interim care order and a recovery order. It also made an order that Ms. R 'shall forthwith return' the child to the jurisdiction of England and Wales.

7. On the 12th October, 2016, Mr. W through his solicitor, sought the assistance of the Central Authority for England and Wales and applied for the return of the child under Hague Convention.

8. A special summons issued on behalf of Mr. W in this jurisdiction on the 21st October, 2016. An affidavit of the same date was sworn by the father's solicitor. An attempt was made to effect service by email on Ms. R but there was no response. The Special Endorsement of Claim says that he had reason to believe the child was in the Wexford area by reason of the information received from the Garda Siochana and the Child and Family Agency.

9. Throughout October and November, the matter came back before the Court repeatedly, but there was no appearance on behalf of Ms. R. Her whereabouts was unknown throughout the period. Information had been obtained from the Child and Family Agency that the mother may have been in contact with a Mr. Rothery, who was involved with an organisation by the name of Ectopia, which is critical of social services' involvement with families and seeks to advocate on their behalf. Mr. Rothery was summonsed to Court and gave evidence that he had a telephone number for a woman he thought might be the mother in question. This telephone number was passed on to the Garda Siochana and the Child and Family Agency, although the latter agency discontinued its inquiries after a certain point. The Garda Siochana eventually located the mother and child in Donegal on the 11th November, 2016.

10. On the 16th November, 2016, the relevant documents were provided to the mother by email and on the 30th November, 2016, she appeared in person before the Court. There then arose an issue as to her legal representation. Initially, Ms. R wished to be represented by a man who was not a solicitor and the Court advised her on the acquisition of legal representation. She subsequently retained Solicitor and Counsel. The Notice of Appointment of Solicitor is dated the 23rd December, 2016.

11. An affidavit was sworn by Ms. R on the 7th December, 2016. This contained a significant amount of legal argument in addition to factual averments. As regards the latter, Ms. R said that Mr. W had called her on the 19th September, 2016, and demanded that she

collect the child from him, or he would hand him over to social services; and that she went 'immediately' to collect the child. She said that she told Mr. W at the time of the handover that she intended to go to Ireland, and that he agreed and consented. In her affidavit, she alleged that the present application was in effect an application to aid the UK social services in their intervention or a 'back door' application on their behalf because they had no standing to make the application themselves. She also averred that the father had repeatedly expressed that he did not wish for any contact with R.

12. A replying affidavit was sworn by Mr. W on the 20th December 2016. He categorically denied the alleged conversation on the 19th September, 2016. He said that on the 23rd September, 2016, Ms. R contacted him and asked him to meet up with her. She said her father was extremely ill and that he was dying, and that she wanted to take R to see him. He said he felt sad and extremely sorry for Ms. R and agreed to her request. He said that on the 24th September, 2016, he met Ms. R behind the garages at the back of his house at approximately 9.30am and handed R to her. It was agreed that she would have R for two hours and he would then be returned. At no time, he said, did she tell him that she intended to move to Ireland and he said that he would have objected if she had. He also denied that he had repeatedly expressed that he did not want to have contact with R. He said that he had regular contact until New Year's Eve, 2015, when R sustained an accidental injury to his forehead while in the care of his paternal grandparents, who were minding R while Mr. W was at work. As a result of that incident Ms. R stopped the contact, despite his repeated requests for contact via Facebook. He averred he was allowed to see R on his (the father's) birthday.

13. In view of the conflicts of fact in the affidavits, notices of cross-examination were served. The hearing took place on the 18th and 19th January, 2017. The mother and father were both present in Court for the hearing and were each cross-examined on their affidavits at some length. Legal submissions were heard on that date and on the following day.

The conflicts of fact

14. There were a number of matters on which there was a conflict of evidence. In broad terms, they can be described as follows. First, Ms. R maintained that Mr. W had shown little interest in his son after their relationship had broken down and that, far from his making repeated requests to see his son, she was the person pressing him to spend time with him, which he did only reluctantly and sporadically, at her request. Mr. W maintained that, on the contrary, he made repeated requests to see more of his son and Ms. R had refused to allow him, except on the rare occasions when it suited her for babysitting reasons.

15. Secondly, there was a direct conflict of evidence concerning whether or not Mr. W had given consent to the removal of his child from the jurisdiction. Mr. W said that he had spoken to Ms. R the evening before the removal and that she had told him that her father was dying and that she wished to bring their son to see him and he agreed to that, which was to be a limited visit of approximately two hours. He said that she arrived to collect the child the next morning and he gave him to her on the understanding that they would be visiting the zoo with her father and that they would be returning about two hours later. He said that he became worried when they did not return and that he went to various places looking for her, but did not tell his parents until the next morning because he knew he had done something stupid by letting the child go with her at all, in view of the agreement with the social workers that she was only to have supervised access. In her evidence, Ms. R said that Mr. W knew from several days before that she was planning to take the child to Ireland and that he gave his consent to the child being removed. She stated that on 19th September, 2016, Mr. W rang her, frustrated and angry. She said that she arranged to meet him and did meet him at around 9 or 9.30pm that evening. She said that Mr. W. spoke about R hitting him on the back with a broom and about his father constantly pressuring him to go for full custody of R, which he did not want to do. She said that she told him, right from the start, that if he could not cope he should let her know and she would try her hardest to get R back. She said that Mr. W. said to her "you need to take him back, I can't cope". She then said that she told Mr. W that if he wanted her to take R back, she would have to leave the country, as social services would be the same anywhere in the UK and she did not want R being taken into care. She later confirmed that she believed that R would be taken into care because that was the only alternative option available to living with Mr. W and that that is what Mr. W said he would do, because he could not cope. She said that following this, she told him she needed time to make arrangements; to pack, to book ferry tickets and to sort out her mother's flat and her dog. She said that coming up to the day of departure she told him that the ferry tickets were booked and that she was going to Ireland. She stated that the day before her departure, she told Mr. W that she was ready, and that she would pick R up early the following morning and leave early for the ferry. She said that Mr. W agreed to this and responded, "that's fine", and they arranged to meet at 9.30am the following morning. She said that when he brought the child out to the car, it was piled high with luggage and L.H.'s mother was driving, facts which would have been obvious to him and were inconsistent with any view that she was going to zoo with R to spend time with her father.

16. Thirdly, Ms. R asserted that the Mr. W was 'terrified' of his own parents, who controlled the purse strings, and that they were the driving force behind these proceedings because they had for a long time wanted custody of R. Ms. R implied that Mr. W was afraid to admit that he had given consent to R being taken to Ireland because of his parents. Mr. W denied this strongly and said that he had a very good relationship with his parents who were very supportive and re-iterated that he did not give consent to the removal of the child from the jurisdiction.

17. The conflicts of fact in this case are extremely difficult to resolve. It must be emphasised that they are still very young parents, and were extremely young indeed when they had the child, being aged 18 and 17, hardly more than children themselves. I was not satisfied with the complete accuracy of the evidence of either of them. There were many inconsistencies in the evidence of Mr. W and he did not withstand cross-examination very well at all on matters of detail concerning his actions and movements on the 24th September, 2016, (the day he handed the child over to Ms. R), or on particular dates such as Father's Day in 2016. He also admitted having lied to his own mother on the 24th September, 2016, by telling her during the afternoon that R was with him, when he was not. On the other hand, it is the case that he moved promptly to seek the return of R to England and Wales, which is inconsistent with his having given consent. He was also very emphatic in his evidence on certain matters, such as the general question of whether he gave consent, whether he had sought contact with R in the past, and his relationship with his parents.

18. I did not find the evidence of Ms. R entirely satisfactory either, particularly on the issue of when and how she formed her plan to come to this jurisdiction, and when she told Mr. W about this. She admitted to researching websites before the alleged conversation with Mr. W on the 19th September, and appears to have made contact with the organisation Ectopia shortly after her arrival here. It may be noted that she said that she arrived in Ireland with R, her partner L.H., and her mother, and none of them could be contacted by telephone thereafter. It is hard to see why this lack of contact was necessary, if she believed she had Mr. W's consent. I note also that she has suggested two different motives for Mr. W's application under the Hague Convention; first, that he is being exploited by the English social services which lacks the standing to make the application itself; and secondly, that he is in fear of his parents, who are the ones who really want custody of the child. It is also clear that she knew that there was a social services investigation under way in the UK at the time she left that jurisdiction.

19. I will return to this conflict of evidence below.

The custody issue

20. As the child R had lived in England continuously from the date of his birth to the date of his removal to Ireland, being a period of approximately 2 years and 9 months, it is clear that his habitual residence prior to his removal was England and Wales. Ms. R sought to argue in her affidavit that the child's habitual residence was Ireland, but this was not pursued in oral submissions on her behalf, and rightly so, as the relevant time for the purpose of the Hague Convention is the time prior to and at the time of the removal of the child, not the period after the removal.

21. It was argued on behalf of Ms. R that Mr. W did not have custody rights and had not been exercising custody rights in respect of the child prior to the removal of the child from England and Wales. It was argued on behalf of Mr. W that he had both custody rights and had been exercising them prior to the removal of the child, in particular by virtue of the fact that the child was living with him and his parents at the time of his removal, pursuant to an agreement reached with the social services on the 14th September 2016. It is therefore necessary to examine this issue in further detail.

22. Article 3 of the Convention provides as follows:

"The removal or the retention of a child is to be considered wrongful where –

> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
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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.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

23. Article 13 provides, in relevant part:

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

> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;"

24. In *M.S.H v L.H.* [2000] 3 I.R. 390, the Supreme Court discussed the issue of custody rights in a case where the mother of children had removed the children to Ireland from England. At the time of the removal there were proceedings in being before the English courts relating to the welfare of the children. The father of the children, who was serving a prison sentence, subsequently initiated proceedings in Ireland under the Hague Convention seeking the return of the children to England. It was conceded that the children's habitual residence was in England. The High Court ordered the return the children to England to the custody of their paternal grandparents. On appeal to the Supreme Court, the mother submitted that as the father at the time of the removal of the children was serving a prison sentence, the removal was not in breach of the father's rights of custody as set out under art. 5 of the Hague Convention. In the course of her judgment, McGuinness J said:

> "Under art. 13(a) the question arises as to whether the plaintiff was "actually exercising the custody rights" at the time of the removal. This question was carefully considered by the learned High Court Judge in his judgment and I agree with his conclusions. At p. 9 of his judgment he quotes from para. 72 of the report of Madame Perez-Vera, where she explains that the burden of proving that the requesting parent was not exercising rights of access falls on the abducting parent. The learned High Court Judge goes on to say:-
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> > 'I do not understand Professor Perez-Vera in these paragraphs or in any part of her report to be advancing the proposition that it is not sufficient for persons seeking relief under art. 12 of the Hague Convention to establish that the particular custody right upon which reliance is placed and which is alleged to have been breached by the other party was exercised by them but that such persons must in addition in every case establish that they were to some extent taking immediate care of the person of the child at the date of the alleged wrongful removal.
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> > Should this be the case, then persons under a disability, for example, a person serving a term of imprisonment, persons incapacitated by sickness or accident and persons whose occupation necessitates long absences from home such as mariners would all be deprived of the benefits of the Hague Convention in the case of an unauthorised removal of their children. In my judgment, this could hardly have been the intention of the contracting states in entering into this agreement on the Civil Aspects of International Child Abduction.'
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> Whether or not the plaintiff was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition his application to the Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody. Failure to exercise rights of custody must be clearly and unequivocally established. In my view the defendant has not discharged the burden of proof required and I consider that art. 13(a) does not apply in this case."

25. The issue of custody was again discussed by Finlay Geoghegan J. in *M.J.T. v C.C.* [2014] IEHC 196. The applicant was the father of the child in question, and the respondent was the maternal grandmother (through adoption). The child was born in England in April, 2005. The applicant and the mother were then in a relationship. Both were named on the birth certificate of the child. Subsequent to the breakdown of their relationship, the child and her mother lived with the respondent in England. The respondent, mother and child moved to Ireland in 2008. The mother died in 2012, having appointed the respondent guardian of the child in her will. The applicant learnt of the death of the mother in January, 2013, and on the 5th May, 2013, he sought assistance from the Central Authority for England and Wales and made the formal application for custody to the English Central Authority in November, 2013. The proceedings were issued on 14th January, 2014. In the course of her judgment, Finlay Geoghegan J., having referred to Article 3 of the Convention, said:

> "15. As appears, the definition of a wrongful removal has two aspects, sometimes referred to as the juridical and factual aspects, i.e. that the applicant held rights of custody under the law of the State of habitual residence and as a matter of fact was actually exercising those rights of custody at the time of the removal.
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> 16. It is not in dispute that the applicant, being the father of [the child] named on her Birth Certificate, has parental

responsibility in relation to [the child] pursuant, to Children Act 1989, in England, and that the rights thereby held constitute rights of custody for the purposes of the Convention. What is in dispute is whether he was actually exercising those rights of custody between approximately August, 2008 and August, 2011.

17. The question as to whether there is an onus on an applicant to establish, at least with preliminary or prima facie evidence, that the removal of a child is a wrongful removal for the purposes of Article 3 is complicated by reason of Article 13(a) of the Convention which gives the court jurisdiction to refuse to order the return of a child where the person who "opposes its return establishes that…the person … having the care of the person of the child was not actually exercising the custody rights at the time of removal…". *Where such a defence is raised, the onus of proof is on the respondent*." (emphasis added).

Later in her judgment, she said:

"19. An applicant for an order for the summary return of a child to its State of habitual residence pursuant to the Convention must, in my judgment put before the Court prima facie or preliminary evidence that the removal or retention of the child was wrongful within the meaning of the Convention. This follows from the purpose and wording of the Convention and underlined by the above explanations. Where the allegation is that the removal was in breach of the applicant's rights of custody (as in these proceedings), Article 3 requires such evidence of the applicant's de jure rights of custody and also that, as a matter of fact, the applicant was actually exercising his rights of custody.

20. There appears to have been limited consideration by the courts of this issue and as to what facts will be considered as preliminary evidence of the actual exercise of custody rights for the purposes of Article 3(b) of the Convention. Nevertheless, it is possible to discern from the decisions to which my attention was drawn by counsel and one other that, *firstly, the courts take a very liberal view as to what will constitute the exercise of custody rights, and, secondly, that it does require the demonstration by an applicant/parent that he either did or attempted to maintain contact or a relationship with his child.*

21. In *Re H.; Re S. (Minors) Abduction: Custody Rights* [1991] 2 A.C. 476, Lord Brandon observed at p. 500:-

'In my view article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control.'" (emphasis added).

26. Finlay Geoghegan J. also referred with approval to the U.S. Court of Appeals decision in *Friedrich v. Friedrich* 78 F. 3d 1060 (6th Cir. 1996), where Boggs J said:

"Enforcement of the Convention should not to be made dependent on the creation of a common law definition of 'exercise'. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or seeks to keep, any sort of regular contact with his or her child."

27. In *J.K. v. S.A.L.K.,* [2016] IEHC 713, O'Hanlon J. as recently as last month accepted that an applicant who was named on the child's birth certificate had a right of custody in respect of the child under English law by reason of the operation of the Children Act, 1989.

28. The respondent in this case argued that the Hague Convention and the Brussels II bis Regulation (the Matrimonial and parental judgments: jurisdiction, recognition and enforcement, Regulation (EC) No 2201/2003) clearly distinguish between rights of access and custody, and referred to the decision of European Court of Justice dated 9 October 2014 (Case C-376/14 PPU) on a request from the Irish Supreme Court for a preliminary ruling. The latter case also clearly distinguishes between custody and access. She also sought to rely upon *W.P.P. v S.R.W.* [2000] 4 I.R. 401 to emphasise the distinction between rights of access and custody. In that case, a California court order granted custody to the mother and access to the father of the children. The mother agreed to notify the plaintiff of any planned trips out of the State. She in fact left for Ireland with the minors without letting the plaintiff know of her intentions. The father made an application under art. 12 of the Hague Convention for assistance and proceedings were instituted in this jurisdiction. The matter was heard before the High Court (Kearns J.) and in an *ex tempore* judgment the order sought was refused. The Supreme Court dismissed the appeal. It was held that a parent with custodial rights was entitled to leave the jurisdiction of the court in California with the children without notifying a parent who had access rights and without first seeking leave of the court, provided there were no proceedings in being at the time of the removal, nor any order prohibiting such removal without the consent of the plaintiff or leave of the court. Such a removal was not wrongful within the meaning of the Hague Convention. Further, it was held that the plaintiff's right of access could not be taken to constitute a right of custody under the Convention merely on account of his entitlement to be notified by the defendant of any proposed change of residence of the children. The Court made it clear that where a party had rights of access only, the appropriate machinery for enforcing such rights was art. 21 and not art. 3 of the Convention. In the course of judgment, Keane C.J. said:

"In these circumstances, the question arises in this case, which did not arise in *H.I. v. M.G.* (Child abduction: Wrongful removal) [2000] 1 I.R. 110, as to whether, even assuming that the granting of the rights of access by implication prohibited the removal of the minors without the consent of the plaintiff of a further order of the court, the appropriate machinery for enforcing the access rights is under art. 21 rather than art. 3.

In the course of her explanatory report on the Convention, Madame Elisa Perez-Vera said at para. 65:-

'As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, i.e. by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the Convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the fourteenth Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it was sought to prevent.

> This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrate that decisions concerning the custody of children should always be open to review. This problem, however, defied all efforts of the Hague Conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other.'

In *Thompson v. Thompson* [1994] 3 S.C.R. 551, La Forest J., speaking for the majority of the Canadian Supreme Court, said that it was clear from the wording of the preamble and art. 3 of the Convention that the primary object of the Convention was the enforcement of custody rights. By contrast, the Convention left the enforcement of access rights to the administrative channels of central authorities, designated by the states who were parties to the Convention. He also said at p. 581:-

> 'It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3.
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> The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.'
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> Counsel for the plaintiff cited in support of his arguments art. 5 of the Convention which provides that:-
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> '(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence'

Accordingly, he said, the right which he submitted the plaintiff had to be notified of the decision of the defendant to alter the minor's place of residence was itself a "right of custody" within the meaning of the Convention. I am unable to accept that proposition. No doubt a parent who has the right to determine the child's place of residence but who may not have the right to the physical custody of the child is regarded, by virtue of that article, as having a "right of custody" which is protected by the Hague Convention. The affidavits as to Californian law do not suggest that the plaintiff enjoyed any such right: on the contrary, they proceed on the basis that the defendant, as the parent having custody, was entitled to determine the minors' place of residence. The issue was as to whether the defendant could unilaterally exercise that right in circumstances where the court had already awarded the plaintiff access rights.

The exercise of the right to determine a child's place of residence may, of course, be restricted by the order of the court awarding custody to one parent by prohibiting the removal of the child from the jurisdiction of the court without the further leave of the court or the consent of the other parent. In such a case, as already indicated, the removal of the child, without such leave and without the consent of the other parent may constitute a breach of a right of custody vested in the court. In this case, however, we are concerned with an order which gave the plaintiff rights of access only. It is clear, in my view, that the appropriate machinery for enforcing such rights is art. 21 of the Convention. To order the return of children and their custodial parent to the jurisdiction in which they were formerly habitually resident merely so as to entitle the non-custodial parent to exercise his rights of access is not warranted by the terms of the Convention."

Thus, it is clear that if a parent has access rights only, the application should not be dealt with under art. 12 of the Convention.

29. As has been stated by Finlay Geoghegan J. in the *M.J.T.* case referred to above, the issue of custody has both a juridical and a factual aspect. Turning to the juridical or legal aspect in the first instance, Mr. W was named on the birth certificate of R and therefore has custody rights under English law pursuant to the Children Act, 1989. The same situation arose in the *M.J.T.* case itself and in *J.K. v. S.A.L.K.,* referred to above. Therefore I am satisfied that the applicant satisfies the first "juridical" limb of the custody test.

30. As to the second and factual question of whether Mr. W was exercising custody rights at the time of the removal of the child from the jurisdiction, it was argued on his behalf that he was clearly exercising custody rights, given that the child was in his full-time care pursuant to an agreement reached 11 days before between himself, Ms. R and the social services. It was argued on behalf of Ms. R that she had consented only unwillingly to the arrangement in the first place, under pressure from the social workers, and that this was against a backdrop of very rare contact from Mr. W and his son in the two years preceding that event. As noted above, the latter factual assertion was disputed by Mr. W in his evidence. It was also argued on her behalf that the father had, at best, access rights and that any application on his behalf under the Brussels II bis Regulation should be pursued through Article 21 of the Regulation and not Article 11.

31. It is clear from the decision of the Supreme Court in *M.S.H v L.H*, above, that a failure to exercise custody rights must be established clearly and unequivocally; and, from the decision of Finlay Geoghegan J in the *M.J.T*. case, that the courts are to take a liberal approach to the exercise of custody rights in this context. Further, the key difference between the *WPP* case relied upon by the mother and the present case is that the California court in *WPP* had clearly determined that the father had access rights only, whereas in the present case the child was living full-time with the applicant father in his parents' home at the time of the child's removal. It is not necessary to resolve the conflict of fact concerning the degree to which Mr. W sought access to the child in the preceding months and years; the fact of the matter is that the father in this case not only had custody rights as a matter of law but that the child was actually living with him full-time, pursuant to an agreement, at the time the child was removed. The height of the respondent's case in this regard is, as it was put in the written submissions on her behalf, that the UK social services had issued a 'diktat' whereby they demanded that the child live with Mr. W's family; that this was not at his initiation or request, and that an 'imposed situation' of this nature could not be considered sufficient to satisfy the test of a father exercising rights of custody. It seems to me that the flaw in this argument is that Mr. W agreed to take the child into his home; he did not have to do so, even though the child would presumably otherwise have been taken into care. He had a choice, and chose to exercise his parental rights by taking the child. It may not have been a pleasant choice, and the alternative of the child being in care may have put a degree of pressure on him, but it was nonetheless a decision he made. It seems clear to me, therefore, that, even leaving aside entirely the disputed history of his contact with the child in the preceding years, Mr. W was in fact exercising custody rights at the time of the child's removal and, therefore, that the exception in art. 13 has not been established by the respondent mother.

The consent issue
32. Article 13 of the Convention provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, *or had consented to or subsequently acquiesced in the removal or retention*"

33. The nature of the consent required in this regard was discussed in *F.L. v C.L.* [2007] 2 I.R. 630. The applicant father and the respondent mother were married to each other and had four children aged from 9 years to 3 years. At all material times until the 4th November, 2004, the children were habitually resident in Northern Ireland. On the 4th November, 2004, the mother brought the children to this jurisdiction, and telephoned the father that she would remain here. There followed a period of time during which the father attempted to effect a reconciliation with the mother and sought a restoration of the family unit in the family home in Northern Ireland. Some time thereafter, the mother informed the father that she intended to seek a divorce. The parties then entered intense discussions regarding the future living arrangements of each of the parties and of the children. The relationship between the parties deteriorated. The applicant instituted proceedings on the 9th September, 2005, seeking an order pursuant to part II of the Child Abduction and Enforcement of Custody Orders Act, 1991 for the return of the children pursuant to the Hague Convention on Child Abduction. The mother contended that the applicant had consented to the removal of the children to this jurisdiction on the 4th November, 2004. The applicant contended that his consent to their removal from Northern Ireland extended only to their removal for the purposes of spending a weekend with her parents. The mother also contended that the father both consented and acquiesced to the retention of the children in this jurisdiction.

34. In the course of her judgment, Finlay Geoghegan J. discussed the issue of consent as follows:

> "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. at p. 217.*
>
> *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.*
>
> 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 made by the father that she go to this jurisdiction.
>
> I also find that the father did not object to the children leaving Northern Ireland on the 4th November, 2004, 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, 2004, was to bring the children to this jurisdiction for an indefinite period and to effect a long term change in their living arrangements.
>
> 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, 2004. She also appears to have made inquiries 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, 2004, to collect more clothes and belongings.
>
> 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, 2004, 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." (emphasis added).

35. I referred earlier in this judgment to the direct and stark conflict between the evidence of the mother and father in the present case concerning, inter alia¸ the issue of whether Mr. W consented to Ms. R taking the child to Ireland, and that I did not find the evidence of either of them entirely satisfactory. In light of the comments of Finlay Geoghegan J. in the *FL v. CL* case, I do not consider it necessary to resolve the conflict of fact as between the evidence of Mr. W and Ms. R on this issue. I take the view that, even if Mr. W gave consent to a plan that had been developed by Ms. R in the previous days to bring the child out of the jurisdiction, this was at best a decision reached in a very short period of time by a very young father, aged 20 at the time, who had 11 days beforehand come under the sudden pressure of dealing with full-time care of his 3-year old child, without having discussed any such decision with his own parents or anyone other than Ms. R, and without having necessarily understood the long-term implications of any such decision. I am not satisfied that any such consent, even if it did exist, would be the kind of full free and informed consent necessary for the purposes of the Convention. Accordingly, I am of the view that the removal of the child from the jurisdiction was wrongful within the meaning of Article 3 of the Convention.

The discretion issue
36. In circumstances where I am of the view that the respondent has not established consent for the purposes of Article 13, it is not, strictly speaking, necessary to deal with the issue of discretion under Article 13. For completeness, however, I wish to express my view that even if I had taken the view that Mr. W had consented for the purposes of Article 13, I would have exercised my discretion in favour of the return of the child to England and Wales in any event. The authorities make it clear that, even where one of the exceptions in Article 13 applies, the Court has a discretion as to whether an order should be made for the return of the child and that this discretion should not be exercised lightly in favour of non-return.

37. The issue of discretion was considered by the Supreme Court in the case of *B.B. v J.B.* [1998] 1 I.R. 299. This was a case in which two documents indicated that the appellant had consented to the removal of V.B. to Ireland, but the appellant repudiated these documents. The High Court (Barron J) found that the applicant had given consent to the removal of the child, and that therefore the removal was not wrongful and the Convention did not apply. The Supreme Court allowed the appeal, remitting the matter back to the High Court for decision, on the basis that a finding of consent gives rise to judicial discretion under Article 13. Denham J. set out the following factors as relevant to the exercise of discretion pursuant to Article 13 of the Convention:

> (1) The habitual residence of the child at the time of the removal.
>
> (2) The law relevant to her custody and access.
>
> (3) The overall policy of the Convention and its objective to secure protection for rights of access.
>
> (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 the other jurisdiction.
>
> (8) The matter of undertakings, especially in relation to very young children.

38. The issue of discretion pursuant to art.13 of the Convention after the introduction of the Brussels Regulation was considered in *F.L. v C.L.* [2007] 2 I.R. 630, where Finlay Geoghegan J. said:

> "Counsel for the parties are in agreement that the factors identified by Denham J. in *B. v. B. (Child Abduction)* [1998] 1 I.R. 299 must now be considered in the context of the consequences provided in article 11 of Brussels II bis at paras. 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.'
>
> *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 Brussels II bis 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." (emphasis added).*

39. That the discretion should not lightly be exercised in favour of non-return was made clear by the Supreme Court in *A.U. v T.N.U* [2011] 3 I.R. 683. The applicant sought the return of his two children to the State of New York, the place of their habitual residence prior to their wrongful removal from there by the respondent. The High Court (Birmingham J.) found that the removal of the children from New York was wrongful within the meaning of art. 3 of the Hague Convention and that no defence of grave risk had been made out, but he exercised his discretion pursuant to art. 13 of the Hague Convention by refusing to return the children on the grounds that the children objected to being returned (see [2011] IEHC 268). The applicant appealed against this refusal. The Supreme Court held, dismissing the appeal, that the court had a discretion pursuant to art. 13 of the Hague Convention in having regard to the objections of a child to being returned to his or her country of habitual residence and was therefore entitled to take account of the children's views and to determine the weight to be applied to those views. In the course of delivering judgment, Denham C.J. said:

> "[35] The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.
>
> [36*] It is also the case that in interpreting and applying article 13 of the Convention, courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country*. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the court has discretion pursuant to article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. *The circumstances in which children would not be returned are exceptional*. As article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed

> out in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288, the extent to which the child's objections "coincide or are at odds with other considerations" which are relevant to his or her welfare are also relevant.
>
> It is clear that in exercising his discretion the High Court Judge took all these factors into account (as indeed this court has in this appeal), including the fundamental policy objectives of the Convention." (emphasis added).

40. It is clear from the above authorities that a wide range of factors should be taken into consideration when a court is exercising its discretion pursuant to art. 13 of the Convention. A non-return should not lightly be ordered. Further, the court should have regard to the overall objectives of the Convention as a whole. It should also be kept to the forefront of the court's mind that these proceedings will not determine custody and access issues in the long term, but merely whether the child should be returned to England within the parameters set by the Hague Convention.

41. In the present case, Ms. R decided to remove the child from England and Wales after the social services commenced an investigation into a possible non-accidental injury to the child. It is true that there was no court proceedings or court order in being at the time of her departure, which distinguishes the case from others in which a respondent removes the child from a jurisdiction when there were already court proceedings in being at the time of the removal. Nonetheless, she was fully aware of the existence of the investigation and removed the child in breach of an agreement that she had made that the child would live with his father during the investigation and that she would not have unsupervised access to the child. Having regard to the fundamental aims and objectives of the Hague Convention, it would seem to me highly inappropriate if this Court were to exercise its discretion in favour of a parent who had removed their child from a jurisdiction in those circumstances, and who failed thereafter to maintain any contact at all with the parent from whose custody she had removed the child or with the authorities who were conducting the investigation.

42. It was argued on behalf of Ms. R that the Court should exercise its discretion pursuant to art.13 to refuse the return of the child because the order made by the English Court on the 26th September, 2016, providing for the interim care of the child pending the outcome of the investigation, was made in the absence of Ms. R and was an order which could never have been made in Ireland, because it would be in breach of fundamental principles such as that of audi *alterem partem*. It seems to me that this was in effect an attempt to make an art. 20-type argument by the back door. The parameters of when art. 20 should be applied were discussed comprehensively by O'Donnell J. in *Nottinghamshire County Council v. K.B. and K.B*. [2013] 4 I.R. 662. In that case, the married parents of two children brought the children to Ireland after care proceedings had been commenced in the United Kingdom. They contended that art. 20 of the Convention and arts. 41 and 42 of the Constitution of Ireland, 1937, prohibited the return of the children because the law of England and Wales permitted adoption of children of married couples in circumstances not permitted in Ireland, and that there was a constitutional right not to have the care of children determined in a setting that did not provide the same protections as arts. 41 and 42. The High Court (Finlay Geoghegan J.) ordered the return of the children to the jurisdiction of the courts of England and Wales ([2010] IEHC 9). On appeal to the Supreme Court, it was held, dismissing the appeal, that a difference in the legal regimes, even a constitutional difference, did not suffice to trigger Art. 20. The test was whether what was proposed or contemplated in the requesting state was something that departed so markedly from the scheme and order envisaged by the Constitution, and was such a direct consequence of the court's order, that return was not permitted by the Constitution. It was the return, not the possible adoption, that must be constitutionally prohibited and that was the focus of inquiry when Art. 20 was invoked. The Irish Constitution did not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt Irish standards as a price for interaction. Friendly cooperation between nations necessarily encompassed recognition of differences between states and the manner in which they approached the organisation of their societies. The Constitution required the courts to refuse return only when the foreign procedure was so contrary to the scheme envisaged by the Constitution and so proximately connected to the order of the court that the court would be required to refuse return. In the present case, there was no real attempt to compare and contrast Irish and English child-care law, and the position falls very far short of meeting the test set out in the Nottinghamshire case, namely, that the United Kingdom court system applies principles in child care cases that depart so markedly from the scheme and order envisaged by the Constitution that return could not permitted by the an Irish court. I do not think that any different test could be applied when exercising discretion under Art. 13, and indeed, I am of the view that this issue should be approached through the prism of art. 20, rather than art. 13. Accordingly, I reject the argument that the Court should refuse to return the child to England by reason of the fact that an English Court made an interim care order unfavourable to the respondent on an *ex parte* basis.

43. In the circumstances, I will order the return of the child to the jurisdiction of England and Wales.