Neutral Citation Number: [2008] IEHC 51

THE HIGH COURT

FAMILY LAW

[2007 No. 38 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991, AND IN THE MATTER OF THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTIONS, AND IN THE MATTER OF COUNCIL REGULATION 2201/2003, AND IN THE MATTER OF K. D. AND L. D. (CHILDREN)

BETWEEN

P. N.

APPLICANT

AND

T. D.

RESPONDENT

Judgment of Mr. Justice John Edwards delivered on the 4th day of March, 2008

1. Introduction

The applicant in these proceedings is the mother of the two children named in the title hereto, namely, K. D. and L. D.. The respondent is the natural father of the said children. The applicant contends that at all times material to these proceedings the children in question were habitually resident in France. She contends that the respondent collected the children for a holiday access visit on the 1st of November, 2007, and was due to return them to the applicant on the 6th of November, 2007. It is alleged that the respondent, having removed the children from their place of habitual residence in France to Ireland, wrongfully retained them there contrary to Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, as incorporated into Irish law by s. 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991. The Special Endorsement of Claim to the applicant's Special Summons claims diverse reliefs under The Hague Convention and the aforementioned Act of 1991, including an order for the return of the said children.

The applicant's claim is opposed by the respondent and the matter came on for hearing before me on Thursday 7th of February, 2008. At this hearing the applicant was represented by counsel and solicitor. The respondent appeared in person. At the conclusion of the hearing I was satisfied that the applicant must succeed in her claim and I granted her the primary relief that she was seeking together with various ancillary reliefs. I indicated that I would give my reasons at a later date. I now give those reasons.

2. Pleadings, Affidavits and Proceedings to Date

The proceedings herein were commenced by Special Summons issued on the 26th November, 2007. On the same date the applicant applied *ex parte* to Ms. Justice Finlay Geoghegan in the High Court for an ad interim injunction restraining the respondent from removing the children, K. D. and L. D., out of the jurisdiction of the court otherwise than for the purpose of restoring them to their place of habitual residence, being the jurisdiction of France. The application was grounded upon an affidavit of Vivienne Crowe, Solicitor, of the Legal Aid Board Child Abduction Unit, sworn on the 26th of November, 2007 together with the documents exhibited therein. Ms. Justice Finlay Geoghegan granted the injunction sought and it was expressed in terms that bound not just the respondent but also his servants or agents or any person having notice of the making of the order. The injunction was to remain in force until Wednesday the 5th of December, 2007 in the first instance, that date being the return date fixed by the learned High Court Judge. The order of Ms. Justice Finlay Geoghegan was duly served upon the respondent at 11.50am on the 30th of November, 2007 in Cork City and in that regard I have before me an affidavit of service of one Maria O'Donovan of Skibbereen, Co. Cork. (This affidavit of service refers to an order of the 27th of November, 2007 but I am satisfied that this was a slip and that the deponent was in fact referring to the order of the 26th of November, 2007.) I understand that on the 5th of December, 2007 the ad interim injunction was continued on an interlocutory basis until the trial of the substantive issue in the case, although I have not seen the interlocutory order.

On the 30th of January, 2008 the respondent filed a Statement of Opposition to the applicant's claim, dated the 29th of January, 2008. The grounds of opposition pleaded are procedural and substantive in nature. I will deal with each of them in some detail at a later stage. At this stage, however, it should be stated that the respondent relies, *inter alia*, upon Article 13 of the Hague Convention. The respondent's case in opposition was grounded upon an affidavit sworn by him on the 22nd of January, 2008 together with the documents therein exhibited. The said affidavit seeks, in part, to reply to the affidavit of Vivienne Crowe sworn on the 26th of November, 2007 and also to put certain new facts before the court in support of points of opposition raised by the respondent.

There is then an affidavit of the applicant, P. N. herself, sworn on the 31st of January, 2008 in reply to the respondent's said affidavit.

I should also say that included amongst the papers furnished to me is a Notice of Motion on behalf of the respondent. It is simply dated "January 2008" and purports to be returnable for the 30th of January, 2008. In it the respondent seeks liberty to join the Attorney General as a notice party to the proceedings "for the purpose of recovering the costs, reasonable outlay and expenses incurred by the respondent in this matter". The grounds for this application are then set out in the Notice of Motion and in support of those grounds there is a further affidavit of the respondent, sworn on the 30th of January, 2008, together with documents exhibited therein. Now it appears that this motion was never formally issued. However, the matter does seem to have been mentioned in some shape or form before Ms. Justice Finlay Geoghegan on the 4th of February, 2008, and at her direction a note has been placed on the file in the following terms:-

> "The court directed that a note of the decision of Judge Finlay Geoghegan of the 4th of February, 2008 be included in the pleadings. The court ruled that
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> > (a) all issues of admissibility of evidence were to be dealt with by the trial judge at the commencement of the action; (b) no liberty was granted to T. D. to issue his motion but he was informed that he could renew his application in this regard after the determination of the substantive case."

3. The Evidence

The applicant is a French citizen and was born on the 14th of August, 1969. She is an accountant by profession and currently resides in France.

The respondent is an Irish citizen and was born on the 25th of November, 1962. The respondent is originally from Cork, and his

parents still live in Cork. He is a photographer by profession and until recently was residing in France. He is currently believed to be residing with his mother in Cork.

The applicant met with the respondent in or about the month of October, 1998, while they were both living in England. They started going out together and within a year began living together. They conceived a child, who was born on the 6th of March, 2000, namely K. D., one of the children named in the title to these proceedings. K. was born in Bristol in England. In 2002 the family moved to Ireland and settled in Wexford. The couple's second child was born on the 8th of April, 2002, namely L. D. He was born in Cork.

It is clear from the evidence that by the end of 2003 unhappy differences had arisen between the applicant and the respondent. There is a conflict of evidence as to the basis or cause of these unhappy differences. The applicant contends that the respondent suffers from psychiatric ill health and that he is aggressive, unpredictable and psychologically abusive of the applicant. Further, he has constant financial problems and is incapable of financially supporting the family. Conversely the respondent contends that it is the applicant that is unstable and this caused him in 2003 to be concerned for the safety and welfare of the children. He contends that while satisfied that the applicant would not deliberately harm the children he was very concerned at that time about the fact that she was suffering from depressive illness, mood swings and ill temper. Further, he alleged a degree of intermeddling in the couple's relationship by the applicant's mother. It is not necessary for me to resolve this conflict for the purposes of these proceedings. However, it is common case that in January of 2004, the applicant expressed a wish to move to France. It appears that while the respondent was initially reluctant to do so, he eventually agreed to this.

While there is some degree of conflict between the applicant and the respondent as to how this came about, it can be stated in broad terms that in March, 2004 the applicant left the parties family home at New Ross, Co. Wexford, taking the two children with her. She contends that this was for the purpose of seeking refuge from an abusive situation. The respondent contacted the Gardaí who located the applicant and the children. The Gardai apparently satisfied themselves that the children were fine and in no danger, and took no further action. The applicant avers that the childrens' "passports and identification papers" were in the possession of the respondent at this time. While the evidence is not specific with regard to the nature and/or provenance of these documents, I infer that the reference to passports must mean either Irish or French passports in the childrens' own respective names, or (more probably) that they were named on the passports of either or both parents. Presumably at this time the mother was a French passport holder and the father an Irish passport holder. In so far as other identity documents are concerned I would infer that these consisted of an English birth certificate in the case of K., and an Irish birth certificate in the case of L.. In any event, the applicant sought new passports for the children at the French Embassy in Dublin on Monday the 24th of March, 2004. The French Embassy, however, refused to issue passports to the children in the absence of signatures from both parents.

Two days later the respondent applied to Gorey District Court for an order pursuant to s. 6A of the Guardianship of Infants Act, 1964 (as amended) appointing him to be a guardian of both children. The District Court Judge made the order sought and a copy of his order is exhibited before me. It is in terms that the court:-

> "…hereby appoints the above named applicant, T. L. D., to be a guardian of the said children pursuant to section 6A of the above Act, with primary care and control to the mother."

I understand a concurrent application by the respondent for access to the children was adjourned to a later date, with an exhortation from the District Judge to the parties to the effect that they should, in the interests of the children, make strenuous efforts to resolve that issue by agreement.

On the 23rd of April, 2004 the parties entered into an agreement in writing governing the access which the respondent was to have to the children. This agreement was in the following terms:-

> "By consent the following terms have been agreed between the parties:-
>
> 1. That while the father of the children, T. D., lives in Ireland and the mother of the children, P. N., lives in France with the children, that the father shall have the right of access to visit the children in France, at his own expense every four to six weeks, by giving no less than ten days notice to the mother of his intention to see the children for five days. These days will be Friday evening, Saturday, Sunday, Monday and Tuesday evening to avoid disruption to any school or playschool pattern. That these visits will take place in the mother's house the times of each visit will be agreed by the father and the mother having regard to the welfare of the children and school commitments.
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> 2. It is the father's intention to relocate to France, in or around September 2004, when access will then increase to overnight access every second weekend, the father to collect the children from the mother's address at 6.00pm, on Friday evening and return the children at 6.00pm, on Sunday evening. If the children are going away for an event or a special occasion then a replacement weekend will be decided between the mother and father, i.e., the father has the children two weekends in every four weeks. The father agrees to notify the mother of his address in France and will make every effort to reside in the Department near his children.
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> 3. That the father may call to the mother's house for one hour from 7.00pm until 8.00pm, two to three evenings a week to read the children a bedtime story weekdays. The father must contact the mother by telephone to confirm his intention to call to her house for these evenings at least three hours in advance.
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> 4. It is both parents aspiration that the mother and the father will make every effort to feed the children on organic food and try not to give the children food containing additives, preservatives, colours or GMO's.
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> 5. In the event that the father does not relocate to France on the dates specified or at all, access shall remain as set out in paragraph 1 above, save that from September, 2004 the father will have access at an alternative venue to be decided between the parties.
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> 6. The mother will at all times keep the father informed of the childrens' address and contact phone number. The father also agrees that he will notify the mother of the childrens' address and contact phone number when they are with him.
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> 7. Both parties agree that they shall not do or say anything that shall in any way influence the children against either party.
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> 8. It is agreed between the parties that the children will visit their grandmother (H. D.) in Cork prior to their

departure to France. The mother will notify the father as soon as reasonably possible of the due departure date well in advance.

9. It is hereby agreed between the parties that both children shall be issued with passports in their sole names. The father will immediately sign all papers to enable the mother to obtain passports in the name of each child. The mother shall retain custody of these passports, but shall make same available to the father for the purposes of visits and travel to Ireland to be agreed between the parties.

10. The father acknowledges that it is the intention that the children reside in France and will not remove the children from the jurisdiction without obtaining the prior consent of the mother, such consent not to be unreasonably withheld. Likewise the mother agrees not to remove the children from the jurisdiction of France without the prior consent of the father, such consent not to be unreasonably withheld.

11. Liberty to apply.

12. It is agreed between the parties that this agreement will be reviewed within one year from the date hereof."

The applicant left Ireland with the children on the 5th of May, 2004 and set up home at the aforementioned address in France. The respondent relocated to France in November of 2004. It is not entirely clear as to how well the access agreement operated during the interim period between the applicant's relocation to France and the respondent's relocation to France. There appears to have been some degree of continued acrimony between the parties inasmuch as exhibit C to the affidavit of the respondent sworn on the 22nd of January, 2008 is a letter from the respondent's solicitors to the applicant complaining about a degree of non co-operation on her part in matters of access. At any rate, it does seem clear that following upon the respondent's arrival in France in November of 2004, the terms of the agreement of the 23rd of April, 2004 were not adhered to. There is significant conflict between the parties as to where the fault lies in regard to that. The applicant contends that as the respondent did not have proper accommodation he would not operate the access agreement but sought, and was provided with, access to the children on an irregular, unpredictable and ad hoc basis. The respondent contends that it was the applicant who was unwilling to operate the access agreement. According to the respondent "when I approached the applicant she simply stated I am French, and in France now. I will not do what any Irish Judge tells me to do." It is neither possible, nor indeed is it necessary, for me to resolve this conflict in the context of the present proceedings. Suffice it to state that the ongoing disagreements between the parties led to the initiation by the applicant of proceedings before the Judge for Family Affairs for the County Court of Perigueux.

The record of those proceedings is exhibited before me. It appears that an interim hearing was held on 24th of February 2005 wherein the Court "set support for the children at the amount of €100 per month and per child but waived the payment thereof". Further, in a judgment handed down on the 12th of May, 2005, the County Court Judge for Family Affairs, one Judge O. Lalande, approved of what is described as a "draft partial agreement" entered into between the applicant and the respondent on the 24th of March 2005 covering "parental authority, the main residence of the children and the visiting and accommodation rights of the father at the weekends and during the school holidays, on maintaining the child support as previously set, while opposing the procedure for the exercise of the father's right for two hours on Wednesday from 6 to 8 pm." I interpret this as reflecting that there was agreement between the parties on all issues save for one net issue concerning arrangements in respect of the father's access on Wednesdays. It appears that on that net issue Judge Lalande ruled against the respondent. The judgment asserts that the court would "ratify the agreement and make it enforceable within the pronouncement of the present decision" on the basis that it "corresponds to the interests of the family as it provides fair protection for the legitimate rights of each party while recalling the obligations of each party".

The draft agreement of the 24th of March 2005, as supplemented by the judge's ruling on the net issue of Wednesday access, was then effectively made a rule of court. The operative part of the order (with capitals and text enhancements preserved) is expressed in the following terms:-

"The Judge for Family Affairs, ruling after due hearing of both parties and subject to appeal after discussion in the Council Chamber:-

-STATES that the parental authority over K. and L. shall be exercised jointly by each of the parents;

-RECALLS that for this joint exercise of parental authority the father and the mother shall take, in joint agreement, all the decisions concerning the life of the children and in particular their schooling and professional guidance, leaving the national territory, religion, health and permission to practise dangerous sports;

-SPECIFIES that the parent with whom the child actually stays during the period of residence allocated thereto is authorised to take any and all decisions required by an EMERGENCY (in particular, medical) and/or related to the everyday maintenance of the child;

-STATES that the residence of *K.* and *L.* shall be *mainly set with Mrs. P. N.*, and with *Mr. T. D.*

only failing any better agreement between each of the parties (an agreement reached in the higher interests of the child or children) during the following periods:

1 – every other weekend, from 2 pm on Saturday until 6 p.m. on Sunday;

2 – and the first half of the short and long school holidays in even years and the second half of the same holidays in odd years.

- SPECIFIES that:

* the first weekend is to be understood as starting on the first Friday of the month and that the eventual fifth weekend is to be understood as starting on the last Friday of the month;

* failing any amicable agreement, *if the holder of the right does not exercise that right*_within two hours for the weekends and within the day for the school holidays, the holder SHALL BE PRESUMED TO HAVE WAIVED THE RIGHT FOR THE ENTIRE PERIOD CONSIDERED;

* only the school holidays applied by the educational authority in whose area the child or children have their USUAL residence are to be considered;

* in the event of a public holiday (or extended public holiday) preceding the alternate residence or following on from the end thereof, the alternate residence shall apply OVER THE ENTIRE PERIOD.

-RECALLS that according to Article 373 -2 of the Civil Code "any change in residence of either of the parties, when it alters the procedure for the exercise of parental authority, must be notified in advance and in an opportune manner to the other parent."

-EXEMPTS Mr. T. D. from the payment of any child support given his impecuniousness.

-DISMISSES any additional, further or contrary demand.

-RECALLS THAT PROVISIONAL ENFORCEMENT IS BY RIGHT.

-STATES that the costs shall be borne equally be each of the parties, Mrs. N. and Mr. D. both benefiting from total legal aid."

Notwithstanding that the judgment of the County Court Judge for Family Affairs had clearly been influenced by a significant level of ostensible consensus between the parties, neither party was happy with that judgment. Clearly the consensus was more ostensible than real. On the 25th of May 2005 the applicant appealed those portions of the County Court Judge's order relating to child support and visiting and accommodation rights. On the 10th of June 2005 the respondent cross appealed on the question of his visiting and accommodation rights. The appeals were to the Bordeaux Court of Appeals, Sixth Civil Chamber. That Court gave its ruling on the 18th of May, 2006, and the copy of this ruling is exhibited before me.

It appears from the record that the appeal was heard on the 23rd of March, 2006, in camera, before a bench of three judges. The Bordeaux Court of Appeal upheld the County Court Judge for Family Affairs ruling on child support and made some relatively minor adjustments to the lower Court's order with respect to the respondent's visiting and accommodation rights. The adjustments in question concerned the respondent's visiting rights during summer holidays and weekends.

There was no adjustment with respect to the access arrangements that were intended to apply during school holidays other than the long summer holiday. It was during the autumn 2007 mid term school holiday break that the respondent is alleged to have brought the children to Ireland, and subsequently failed to return them.

It is clear from the affidavits that following the ruling of the Bordeaux Court of Appeal relationships remained strained between the applicant and the respondent. The affidavits exhibit a high level of conflict and difference between the parties in relation to their respective obligations and duties towards, and concerning, the children. It is clear that the respondent has strong views about the needs of children, particularly with respect to dietary matters and medical interventions. The applicant, in turn, has adopted the view that for the most part such matters fall into the category of day to day life issues for which she does not need the respondent's agreement.

The difficulty in this case is that there is enormous disagreement as between the applicant and the respondent concerning what, in fact, constitute day to day issues on the one hand, and fundamental issues relating to the safety and welfare of the children, on the other hand. In the present type of proceedings such disputes would not normally be of concern to the Court. However, as the respondent seeks to invoke Article 13 (b) of the Hague Convention in his defence I think it is necessary to deal in a little detail with his principal complaints.

The respondent particularly complains that he has not been adequately consulted on issues regarding the children's health, education, religion and social matters. He complains that the applicant appointed a medical doctor for the children without consulting him. He complains that this doctor prescribed medicines without consultation with him and in particular, a medicine containing colorant which he contends makes K. hyperactive.

Predictably, the applicant does not accept the respondent's complaints. She contends that the respondent's views about medical interventions are extreme. She states that the respondent refuses all types of medicines save for natural remedies and that he has stopped treatments that she has asked him to give to the children for their health. She says that these have been standard and usual medications for childhood ailments as recommended by the doctor or a pharmacist. The respondent put these medicines in the bin. The applicant complains that her views in regard to necessary medical interventions are ignored by the respondent and that he is unwilling to take the advice of mainstream health professionals. She states that while she respects the respondent's views, she believes that some medical problems will not resolve by themselves or by using plants and she believes that antibiotics are sometimes necessary.

The respondent further complains that the applicant feeds the children on cheap food and not organic food. He complains that the children are allowed to go to the fridge whenever they like and snack on sweets and burger-type cheap meals.

The applicant rejects these allegations as being without foundation. She says that the children have proper, balanced food and have three meals per day together with a 4.00pm snack after school. She states that she limits the amount and number of times they are allowed to have sweets in order to protect their teeth. She insists that the children are appropriately and properly nourished, and says that the food she provides for the children is at all times both suitable and nutritious.

The respondent further complains that the children are attending a Catholic church against his wishes. The applicant acknowledges that the respondent is entitled to his say in religious aspects of the children's welfare. However, she contends that the children are not receiving religious teaching or communion. They merely accompany her whenever she herself goes to church for the purpose of practising her religion which is that of Roman Catholicism.

The respondent further complains that the applicant has been attempting to break down the respondent's relationship with the children. In response the applicant says that she has no desire to break down the relationship between the children and their father and that she has in fact facilitated development of this relationship with access and telephone contact.

The respondent further complains that the applicant's parents have sought to frustrate telephone calls between the respondent and the children by putting the phone on an answering machine at times when his calls were due. The applicant refutes this complaint,

stating that the respondent was told to use her parents' answering machine if he needed to contact her and that she would telephone him back. She contends that the respondent has regularly had an opportunity to speak with the children on the telephone.

The respondent also makes a complaint that he was not consulted as to which school the children would attend. The applicant responds that in France, children attend school in the school area in which they reside and that parents do not and cannot choose their children's public school. K. and L. are attending the public school for the area in which they reside.

The respondent further complains about not receiving information about school activities or being consulted with respect to those activities and the applicant makes the point that under the French national educational system, the school is obliged to send both separated parents all information relating to school life. She asserts that the only circumstances in which this would not occur is if the respondent failed to notify the school of a change of address. She points out that the respondent had changed address five times over the three years preceding the swearing of his affidavit.

The issues that I have detailed give a flavour of the level of dispute and conflict between the applicant and the respondent concerning the children's welfare. Many other issues were raised on both sides and I have had regard to all of them, though I do not propose to list them all in this judgment. There are, however, certain additional issues that I must mention as they are of the more serious variety.

At paragraphs 10 and 11 of his affidavit, the respondent contends that the party's older son, K., has emotional and behavioural problems, has been disruptive in class and has had to attend the school's psychologist. The respondent says that he suggested mediation but that this was an unsuccessful intervention because, after a short time, the applicant refused to attend any further. He also complains that the younger boy, L., has "problems". Specifically, he identified these as toilet "accidents", "apparently as a result of being upset at not being with his father". The respondent expresses concern that the boys' alleged difficulties are to do with constant arguments in the house where the applicant lives with the two boys and her own parents. He contends that the boys very much dislike the applicant's parents and have stated that they want to live in Ireland with their father. He maintains that in April 2006, K. was sent to see a psychiatrist because the school psychologist felt that his problems were too great for her to deal with.

In response, the applicant, while not disputing that K. has difficulties, contends that the respondent's behaviour and attitude has had a traumatising effect on the children. She contends that the respondent manipulates the children and that, contrary to the respondent's assertions, the children do not wish to live with their father. She states that the respondent has told K. that when he reaches ten years of age, he, the respondent, will ask the Court to permit him to live with his father and the applicant believes that the children are being given the impression that they must choose as between their parents. Furthermore, the applicant contends that in fact L. has been toilet trained since the age of two and a half. However, she acknowledges that he does have bed-wetting accidents. The applicant contends that this is as a direct consequence of the conflict between the applicant and the respondent and, in particular, exhibitions of aggression by the respondent towards the applicant in front of the children. She contends that the respondent is regularly verbally abusive of the applicant in front of the children and that this distresses and upsets them.

There was a major incident between the applicant and the respondent at the start of July of 2006. I have already alluded to the fact that the Bordeaux Court of Appeal altered the access arrangements that had been fixed by the County Court Judge for Family Affairs insofar as the summer holidays were concerned. It is perhaps appropriate to recite the terms of the variation as it is relevant in the context of what occurred at the start of July of 2006. The Bordeaux Court of Appeal ruled: -

> "That the father shall exercise his visiting and accommodation rights during the summer holidays during the first fifteen days of July and August and on weekends from 6.00pm on Friday (or from 2.00pm on Saturdays the children have school on Saturday mornings) to 6.00pm on Sunday, every other week, it being incumbent upon the father to collect the children from the mother's home and to return them there too".

It appears from the applicant's affidavit that in this particular year, the children's summer school holidays were not due to commence until the 4th of July, 2006. The applicant claims that she wrote to the respondent on the 28th of June, 2006 informing the respondent of this but that the letter was returned to her on the 1st of July, 2006 marked "not collected". On the morning of the 1st of July, 2006 at 9.30am, the respondent attended at the applicant's place of residence to collect the children for their summer holidays. It appears that the applicant refused to hand over the boys to the respondent and to provide their passports to him as they were not yet finished school. An argument ensued which degenerated into a violent incident. The applicant contends that she was assaulted by the respondent. The respondent, while acknowledging that he held the applicant's arm "while to convince her of her obligations", contends that the applicant completely lost her temper and started hitting him over the head with both of her hands. The allegation is that the applicant's father then joined in the melee. The respondent contends that his tee shirt was ripped and that he was thrown to the ground. The applicant also claimed that her clothing was damaged. While the precise dynamics of the incident are disputed it is beyond dispute that a violent incident of some form did occur. Both the applicant and the respondent made separate reports to the police in Perigueux.

It is not for me, in the context of these proceedings, to judge where the fault lies with respect to this particular incident. It is clear from the respondent's affidavit that he felt he was entitled to insist upon strict adherence to the letter of the Bordeaux Court of Appeal's order. The applicant clearly believes that the respondent was being cussed and unreasonably difficult in the circumstances. Certainly, it is to be inferred from the respondent's affidavit, at paragraph 12 thereof, that the respondent harbours some resentment at the fact that the Bordeaux Court of Appeal altered the access arrangements with respect to the summer school holidays at the request of the applicant. The respondent states: -

> "The applicant requested that I should have access to the boys for the first fifteen days in July and the first fifteen days in August instead of the arrangement under the previous court order. There was no logical reason for this change and I am satisfied that she requested it to prevent the boys from travelling with me to the largest Steam Fair in Europe, held annually in Blandford, Dorset, England, at the end of August. The applicant knows how much the boys and I enjoy attending this event but she objects to them taking part in an activity that I am involved in. Both of the boys were most upset at being prevented from attending this event as a result of the Judge accepting the applicant's request".

Be all of that as it may, it is clear from the affidavits that the ugly scene described was by no means an isolated incident and that some incidents of this variety have been witnessed by the children. This is something that is utterly to be deprecated.

Paragraphs 13 and 14 of the respondent's affidavit contain a further litany of allegations against the applicant. The applicant replies to these in her affidavit of the 31st of January, 2008 and, in turn, makes a litany of counter-allegations. I must reiterate that it is impossible for this Court to resolve these kinds of conflicts in the evidence in proceedings of this sort. It would require a full plenary hearing to do so, and in any event it is, for the most part, unnecessary that I should do so.

There is, however, one aspect of the allegations that have been made that does require specific comment. It is alleged that the children were the recipients of physical violence and psychological abuse at the hands of their French grandparents. The type of allegations in question can best be characterised as forms of corporal punishment, though of an unpleasant and worrying nature. The type of thing alleged is that the children were locked in their rooms, threatened that they would be locked in the cellar and fed dog food, hit with slippers, had their hair pulled or their ears twisted.

Now the respondent does not claim to have witnessed any of this abuse personally, but he does contend that the children have complained to him about it. He says that he, in turn, drew the matter to the attention of the psychiatrist who has been seeing K., a Dr Reymark, at C.M.P.P. in Perigueux. He says he also told his French lawyer about it. According to the respondent, neither of these complaints resulted in any action being taken, because he has been advised, by both the psychiatrist and the lawyer respectively, that the authorities would not act upon such complaints since the conduct complained of was "common practice in rural France". I note that the respondent does exhibit a letter from his lawyer dated the 24th of February, 2006 which speaks about "the problem of the grandfather" and which goes on to state:

> "I can tell it to the Court, but these Judges don't have the power to make these things stopped".

Certainly, the existence of this letter does tend to support the suggestion that the respondent did make a complaint to his lawyer about the grandfather. Moreover, the manner in which the applicant deals with the allegations in her affidavit of the 31st of January, 2008 does not particularly impress me. She states that she is a stranger to the averments made by the respondent and asserts a belief that all such allegations are untrue. She says there are no locks on the bedroom doors and the children have gone to the cellar with her on numerous occasions and have displayed no signs of distress. On balance, I am not satisfied that I can dismiss the allegations that have been made out of hand and they do give me some cause for concern. I will return to this aspect of the matter later in this judgment.

At paragraph 14 of his affidavit the respondent describes further difficulties allegedly encountered by him in taking the children on holidays in accordance with his entitlements under the French court orders. Three days after the incident of the 1st of July 2006 there was a further incident. This was the day on which the children actually finished school. He says that he called to the N. household to collect the children at 17.30 hours and he was refused permission to take them by the children's grandmother. Once again the police were involved. When the grandmother refused to deliver the children to him the respondent reported the matter to the police. Four policemen in a van arrived at the house and there was an ugly scene. The applicant responds to this by saying that although, in its judgment of the 18th of May, 2006, the Bordeaux Court of Appeal had directed that passports should be given to the respondent to enable the children to travel abroad on holidays with him, the applicant did not receive this judgment until June and did not have enough time to apply for passports to be issued to the children.

There are further allegations and counter-allegations and allegations in rejoinder and, again, it is unnecessary, and indeed impossible, in a hearing based upon affidavits, to un-tease this tangled web of factual conflict for the purposes of the application presently before me.

Paragraphs 15 through 17 of the respondent's affidavit deal with the period from August until October 2006 and, in essence, they provide evidence of continuing conflict and of the respondent's belief, denied by the applicant, that the children were not being properly raised or cared for. In paragraph 17, the respondent describes how he was summoned to Court in Perigueux to answer charges preferred against him arising out of the incident of the 1st of July, 2006. Apparently, the applicant pressed for the Judge to impose a custodial sentence on the respondent because of damage allegedly done to her shirt in the fracas. There is a conflict between the parties as to what occurred in Court that day, but in my opinion nothing occurred that is of relevance to these proceedings. It appears that the respondent may have been acquitted or, at least, that no penalty was imposed upon him.

Paragraphs 18, 19 and 20 of the respondent's affidavit, deal with events in the period from the end of October 2006 until the end of that year. The respondent describes ongoing difficulties in availing of his access entitlements and he describes a succession of incidents in the course of which, apparently, the children exhibited a reluctance to be with him. There is particular reference to an incident on the 1st of December, 2006 which, once again, involved an ugly scene between the applicant and the respondent in the presence of the children. The applicant purports to address the respondent's allegations in paragraphs 19, 20 and 21 of her affidavit and, again, there is a huge degree of conflict.

The applicant seeks to refute the respondent's allegations of manipulation and brainwashing and asserts that, on the contrary, she regards it as important for growing children to have the benefit of contact with both parents. With respect to the incident on the 1st of December, 2006, the applicant does not deny that it occurred. However, she blames the respondent for it.

In paragraphs 21 and 22 of his affidavit, the respondent makes complaints about further difficulties encountered by him in making telephone contact with his sons at the N. household. He also complains about the fact that the applicant obtained new French passports for the boys, apparently without reference to him.

The applicant disputes the allegations about the telephone contact difficulties and, with respect to the question of passports, she contends that the respondent is not in any way prejudiced as has full access to the children's passports. However, she does not deal with the specific issue that had been raised, namely that without reference to him, the applicant had applied for, and obtained, new French passports for the children. I do not attach any particular significance to the passport issue beyond stating that the conflict over passports is yet another symptom of the deep seated distrust that exists between the parties.

At paragraph 23 of his affidavit, the respondent relates how, at a time when the applicant was on holiday in Ireland with his sons in February of 2007, the oldest boy, K., began to express a profound hatred towards both his mother and his maternal grandparents, and a wish to do them violence. According to the respondent, K. told him "that he knew where the knives were kept and he could 'cut off' his mother's head". The respondent contends that he was so concerned for K.'s mental health that he contacted the Gardai and spoke with a Garda Lorraine O'Donovan. Apparently Garda O'Donovan arranged an interview with a Mr Pat Kelleher of the social work department of the HSE at St Finbarr's Hospital in Cork. Beyond that, however, no action was taken. According to the respondent Mr Kelleher expressed the view that he could not do anything as the children were residing in France and it was a matter for the French child protection people to deal with. Apparently, Mr Kelleher wrote a letter for the French authorities which the respondent translated into French and despatched. The respondent says that he followed this up by complaining in person to the child protection authorities in Perigueux. He says that he was told that they do not act on letters from other countries and in the present case they did not intend to do anything. The respondent says that he then made a complaint to the "Children's Judge" as he was so concerned about his son's welfare. As a result of doing so he was then told that a social worker would call to the applicant's house. The respondent says that when the applicant was told that the welfare of the children was going to be investigated she immediately changed address, moving from the house where she had been living with her parents to a rented house in the same village approximately one

quarter of a mile away. Before dealing with the applicant's response to these allegations, I should say that in support of his contentions the respondent purports to exhibit the letter written by Mr Kelleher. I have carefully scrutinised this document and have some comments to make about it. First of all, the letter is not addressed to the child protection authorities in France. It is addressed to the respondent at a particular address in France. Secondly, the letter takes the form of confirming for the record that certain concerns were raised by the respondent relating to alleged physical and emotional abuse of K. and L. whilst they were in the care of their mother, and also concerns in relation to how the children were treated by their maternal grandparents. Mr Kelleher does not express a view on any of the allegations made. He simply records the fact that these allegations were made. He concludes: -

> "As discussed, this Department does not have a role in investigating the alleged abuse by virtue of the fact that both children live outside of the jurisdiction and I recommend that these issues are presented to the French child protection authorities and investigated fully on that basis".

The applicant rejects the respondent's allegations as being unfounded and malicious and expresses the view that K. was incapable of making the alleged threats of his own volition. She expressly accuses the respondent of manipulating the child and putting him up to it.

At paragraphs 24 and 25 of his affidavit, the respondent describes what can, I think, be fairly characterised as a growing sense of helplessness at what he perceived as an unwillingness on the part of the French authorities to take action against the applicant and her parents. He describes having to attend the Brantome Gendarmerie for the purpose of being questioned by them in respect of complaints made against him by the applicant. He explains that he informed the police that he believed that the applicant was a paranoid schizophrenic and that he, in turn, made an official complaint about her actions. He describes being fed up about an inability to progress matters through the French justice system. He says that he returned to Cork in June 2007 and consulted his family's solicitor. He says that he also sent letters to the applicant, to the French police and to the French Judges, telling them of his feelings. Tellingly, he goes on to state: -

> "I believed that it was in the best interests of the children to return to me in Ireland altogether as soon as possible and so I started to prepare a case for custody in the Irish Courts".

I believe that this was the genesis of a resolve on the part of the respondent to take the law into his own hands and to defy the Orders that had been made by the Bordeaux Court of Appeal.

During the half term break in November of 2007, the respondent brought the children to Ireland. He asserts in paragraph 27 of his affidavit that while they were with him on this occasion, "they begged me to keep them here in Ireland and not to return them to their mother in France". The respondent says that he lodged an application before the District Court sitting in Clonakilty in the County of Cork for an Order granting him sole custody of the children. The presiding Judge was District Judge McNulty and the matter came on before him on the 6th of November, 2007. In regard to what happened on this occasion, the respondent admits to a reprehensible lack of candour with the Court. He told District Judge McNulty about the Guardianship Order made in Gorey District Court and showed him a copy of that order. He also showed the Judge a copy of the Access Agreement of the 23rd of April, 2004. However, he concealed from the District Judge the fact that these instruments had been superseded by orders made by the French courts and he failed to provide a copy of the French court orders to the District Judge. According to the respondent,

> "The Judge ruled that the boys should stay in Ireland pending reports from psychologists, and possibly social workers also, and I was to return to Court on the 20th of November, 2007".

When the matter came up again on the 20th of November, 2007, the respondent was represented on this occasion by a solicitor provided by the Legal Aid Board. The Court was informed that there were difficulties in obtaining the reports that had been requested and the matter was further adjourned to the 4th of December, 2007. By this stage, however, the District Court proceedings were overtaken by the events in the High Court. As previously stated, the applicant was successful in obtaining her interim injunction before Ms Justice Finlay Geoghegan on the 26th of November, 2007, and details of this Order were communicated to Clonakilty District Court. On Tuesday the 4th of December, 2007, District Judge Lucey who was presiding on that occasion, adjourned the respondent's custody proceedings to the 30th of January, 2008 at Bandon District Court in consequence of the High Court proceedings, and in accordance with article 16 of the Hague Convention. I understand that the proceedings have been further adjourned from time to time on the same basis. Now it should be stated that counsel for the applicant argues strenuously that the District Court is entirely without jurisdiction to hear custody proceedings in relation to children that are habitually resident in France and accordingly the respondent's proceedings are misconceived and fundamentally flawed. For his part the respondent contends that the children are, and have at all material times been, habitually resident in Ireland. These are issues that I will return to in due course.

I must conclude my lengthy review of the evidence in the case by describing the procedure by means of which the applicant commenced her proceedings in this jurisdiction, as it is necessary to do so having regard to the fact that the respondent has raised a number of procedural points in his Statement of Opposition.

In this country the Minister for Equality and Law Reform is the "Central Authority" for the purposes of applications under the Hague Convention. - see the Child Abduction and Enforcement of Custody Orders Act 1991 (Appointment of Central Authorities) Order, 1993 – S.I. No 121/93. The corresponding "Central Authority" in France is the "Ministère de la Justice". The evidence before me establishes that when the respondent failed to return the children to the applicant's custody on the 6th of November, 2007 the applicant immediately contacted her lawyers who communicated a complaint on her behalf to the Central Authority in France. Further, the applicant signed an authorization in writing for the purposes of article 28 of the Hague Convention and article 13(1)(a) of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, empowering the French Central Authority to act on her behalf. That authorization is exhibited with the affidavit of Vivienne Crowe.

By a letter from the French Central Authority to the Irish Central Authority dated the 13th of November, 2007 the Irish Central Authority was provided with details of the case and it was requested to:

> " …please apply all the measures in article 7 of the convention to verify the address, to ask the father to return voluntarily the minors to the place of habitual residence and if he doesn't agree, take steps to assure the immediate return of the children in accordance with article 12 of the convention."

The letter concluded:

> "A hearing has been scheduled on November 20, at 2pm, 2007 at Courthouse, CLONAKILTY. Thank you for drawing the

attention of the Judge on the regulations of Article 16 of the above mentioned convention.

Thank you to acknowledge receipt of this file, and to keep me informed of further developments without delay.

Yours sincerely"

In response to this letter the Irish Central Authority instructed Ms Vivienne Crowe to act on behalf of the applicant. Its letter of instructions is dated 19th of November 2007 and is in the following terms:

"Application under the Hague Convention

Applicant: Ms P. N.

Re: K. (dob 06/03/2000) & L. (dob 04/08/2002)

Dear Ms Crowe,

Please find enclosed the application of Ms N. (hereinafter "the Applicant) for the return of the minors K. and L., who have been allegedly wrongfully retained in this jurisdiction by their father, Mr T. D.. The Central Authority would be obliged if you would nominate a solicitor to act in this matter on behalf of the Applicant. Please note that the nominated solicitor will be representing the Applicant only and will take instructions from her directly and proceed on her behalf. Neither the Central Authority nor the Minister for Justice, Equality and Law Reform will be parties to the within proceedings which should be instituted under Rule 2(1) of Order 133 of the Rules of the Superior Courts (as inserted by S.I. No 94 of 2001). The Central Authority will be pleased to offer to the Applicant and the nominated solicitor any assistance possible within the parameters of its statutory powers.

This request is in accordance with the judgment of Finlay Geoghegan J in *DGH and The Minister for Justice, Equality and Law Reform and the Minister for Justice, Equality and Law Reform, as the Central Authority for Ireland (ex parte DGH) (Applicants) v. TCH (Respondent)* unreported HC 24.6.2003.

Please find attached correspondence from the French Authorities, requesting a stay of custody proceedings before the Irish Courts on 20 November 2007 at 2pm, pursuant to Article 16 of the Hague Convention, which states "after receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of a Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following the notice."

I have requested the Gardaí to make discreet enquiries to confirm the address where Mr D. and the children are believed to be residing."

In response to this letter, and acting upon the instructions of the applicant, Ms Crowe caused the proceedings herein to be initiated.

4. Relevant Legislation
By virtue of section 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991 the Convention on the Civil Aspects of International Child Abduction, signed at the Hague on the 25th of October, 1980 (hereinafter called the Hague Convention) has the force of law in the State, and the Court must take judicial notice of it. Moreover, since 01 March 2005 the provisions of the Hague Convention have to be read and applied in conjunction with what is known as the Brussels II Regulation, a directly effective instrument more particularly entitled Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

It may be helpful if I set out the main provisions of these instruments in so far as they are relevant to this case.

According to article 1 of the Hague Convention the objects of that convention are:

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 3 of the Hague Convention states:

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

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

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

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

Article 4 states:

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

Article 5 is also relevant and it states:

"For the purposes of this Convention:

(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;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

Article 7 provides, *inter alia*:

"Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

(b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;

(c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

(d) to exchange, where desirable, information relating to the social background of the child;

(g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;

(h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;"

Article 8 provides, *inter alia*:

"Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child."

Article 9 provides:

"If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be."

Article 10 provides:

"The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child."

Article 11 provides, *inter alia*:

"The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children."

Article12 provides, *inter alia*:

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

Article 13 provides:

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

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

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

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

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

Article 14 provides:

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

And finally article 16 provides:

"After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice."

The Brussels II Regulation

The preamble to the Brussels II Regulation recites, at paragraph 17 thereof, that:

"Whereas:

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

Article 1 of the Brussels II Regulation sets out the scope of the instrument. It provides, *inter alia*:

"(1) This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:

(a) divorce, legal separation or marriage annulment;

(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

(2) The matters referred to in paragraph 1(b) may, in particular, deal with:

(a) rights of custody and rights of access;"

Article 2 of the Brussels II Regulation then sets out definitions. Those that are of particular relevance to the issues that I have to decide are as follows:

"For the purposes of this Regulation:

7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;

9. the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term "wrongful removal or retention" shall mean a child's removal or retention where:

(a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."

Chapter II of the Brussels II Regulation is principally entitled "JURISDICTION" and within that chapter the second section of it (consisting of articles 8 to 15 inclusive) is sub-titled "Parental Responsibility" Articles 8, 10 and 11 respectively are particularly relevant to the issues that I have to decide.

Article 8 provides:

"General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

(Arts 9 and 12 do not in fact have any relevance in the context of the present case.)

Article 10 provides:

Jurisdiction in cases of child abduction

"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

Article 11 provides, *inter alia*:

Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

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

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

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

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

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.

(h) 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."

5. The Issues
It is common case that both Ireland and France are "Contracting States" for the purposes of the Hague Convention, and within the meaning of section 3 of Child Abduction and Enforcement of Custody Orders Act, 1991.

Strictly speaking, the circumstances of the case with respect to each child are to be treated separately. However, I am satisfied that in this case their circumstances are to all meaningful intents identical and the same issues arise in each case.

Having regard to the pleadings, the evidence and the submissions made to me at the hearing I consider that the following issues require to be determined by me:

> (a) Where were the children "habitually resident" at the time of their retention by the respondent in Ireland?
>
> (b) At the time that the children were retained in Ireland by the respondent with whom did "parental responsibility" lie, and what court or courts had jurisdiction in matters of parental responsibility.?
>
> (c) Was the retention of the children in Ireland 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 children were habitually resident ?
>
> (d) If the answer to (c) is yes, at the time of retention were those rights actually being exercised, either jointly or alone, or would they have been exercised but for the retention?
>
> (e) Did, as the respondent alleges, the Irish Central Authority fail to carry out it's obligations under Articles 7 (c) and Article 10, respectively, of the Hague Convention, and if so, what are the implications for the jurisdiction of the High Court to hear and determine the applicant's claim?
>
> (f) Did, as the respondent alleges, the Irish Central Authority fail to carry out it's obligations under Articles 7 (b) 7(d) and 7(g), respectively, of the Hague Convention, and if so, what are the implications for the jurisdiction of the High Court to hear and determine the applicant's claim?
>
> (g) Is there a grave risk that returning the children to France would expose them to physical or psychological harm or otherwise place the children in an intolerable situation?

6. Decision
Issue (a)

In the United Kingdom and elsewhere various tests have been propounded for determining habitual residence. In their work entitled *International Movement of Children, Law, Practice and Procedure*, (Family Law, 2004) Lowe, Everall and Nicholls describe a "dependency test" (paras 4.45 – 4.47); a "parental rights test" (paras 4.48 – 4.49); a "child-centred test" (para 4.50) and a "fact based test"(para 4.51 – 4.56). In recent times the "fact based test" appears to be the most favoured approach, so much so that the authors assert (at page 63):

> "The authority for the fact based test is so eminent, arising as it does from the speeches of the *House of Lords in R v. Barnet London Borough Council, ex parte Shah* [1983] 2 A.C. 309 and the speech of Lord Brandon in *Re J (A Minor) (Abduction: Custody Rights*) [1990] 2 A.C. 562, that one could say almost with certainty that the state of English law is that habitual residence is a question of fact."

The fact based test approach broadly approximates to the approach that the Irish Courts have been adopting, though the latter have eshewed any particular labelling. The Irish approach has been that the determination by the Court of the habitual residence of a child for the purposes of the Hague Convention is a matter of fact to be decided on all relevant evidence. Thus, in *C. M. (a minor) C.M.and O.M. v. Delegación Provincial de Malaga Consejeria de Trabajoe y Asuntos Sociales Junta de Andalucia, A.B. and C.D.* [1991] 2 I.R.363, McGuinness J stated:

> "Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that "habitual residence" is not a term of art, but a matter of fact, to be decided on the evidence in the particular case. It is generally accepted that where a child is residing in the lawful custody of its parent, its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there."

I am satisfied on the evidence before me that both children were habitually resident in France at the time of their retention in Ireland by the respondent. They have been residing in France since early May of 2004 and are settled there. They have family members and a social network there. Their physical custody on a day to day basis is with their mother, herself both a citizen and a habitual resident of France. Their father though a citizen of Ireland has also moved to, and up until a week before the retention, was still residing in, France. The children have learned to speak French. They are enrolled in a French public school and are being educated in accordance with the French curriculum. The French Courts have made orders regulating the exercise of parental authority over them as between the applicant and the respondent. Since moving to France in May of 2004 they have only left France for temporary vacation purposes. In my judgment the evidence overwhelmingly supports the applicant's contention that the children were habitually resident in France at the time of their retention in Ireland by the respondent.

Issue (b)

Article 2 of the Brussels II Regulation states that the term "parental responsibility" includes rights of custody and rights of access. It is well established that in Hague Convention cases the concepts of custody and access are to be given autonomous meanings, and not their meanings in Irish law. See Keane J. in *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110 at pp 123-124. The meanings that I must therefore ascribe to "rights of custody" and "rights of access" respectively are the meanings of those expressions as set out in Article 5 of the Hague Convention as complemented by Article 2 of the Brussels II Regulation. Indeed the

terms in question as used in those instruments, while not expressed in precisely identical terms (there are minor differences in grammer and punctuation), are so similar that they can be regarded for all practical purposes as being identical. In considering them I must apply the normal rules of statutory construction, and in doing so must, if possible, give them a construction which accords with the expressed objectives of the Convention. In the H.I. case Keane J cited with approval the conclusion of Waite L.J. in re *B (A Minor) Abduction* [1994] 2 F.L.R. 249, at p.260:

> " 'The purposes of The Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.
>
> There is no difficulty about giving a broad connotation to the word "custody". Attention was drawn by Lord Donaldson in *Re C (A Minor) (Abduction)* [1989] 1 F.L.R. 403 to the width of its dictionary meaning, and by Sachs L.J. in *Hewer v. Bryant* [1970] 1 Q.B. 357 at p. 373 to the diversity of the "bundle of rights" which it incorporates in legal terminology. The same is no doubt true of the word "*garde* ", which (in the phrase *"droit de garde* ") provides the translation for "rights of custody" in the French language version of the Convention.
>
> The difficulty lies in fixing the limits of the concept of "rights".Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by court order: or is capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?'"

No question of incohate rights arises in the case presently before me. The objectives of the Convention are as expressed in Article 1, and as explained by Waite L.J.. For the purposes of this case, I would afford the terms "rights of custody" and "rights of access" as expressed in Article 5 of the Hague Convention and Article 2 of the Brussels II Regulation the widest interpretation possible, without doing violence to the plain meaning of the words, and consistent with the objectives of the Convention. Having regard to these considerations, and with due regard to the evidence in the case, I am satisfied that at the time of the retention of the children in Ireland by the respondent both he and the applicant were "holders of parental responsibility".

In so far as the nature of the parties' respective rights is concerned I am satisfied that for the purposes of the Hague Convention they both had "rights of custody". In that regard I would adopt and follow the reasoning of Finlay Geoghegan J in *J.C. & R.C. v. I.S.* [2003] 4 I.R. 431. While that case is not on all fours with the present case (the parties in that case were a separated married couple and the wife had sole custody of their only child) I am nonetheless satisfied that in the present case considerations exist similar to those that led Finlay Geoghegan J to the view that the husband in *J.C. & R.C. v. I.S.* had "rights of custody for the purposes of the Hague Convention." Although the parties are not married in the present case the respondent was granted guardianship rights by Gorey District Court.

In so far any dispute or disputes may exist, or have existed at the material time, in relation to rights of custody and/or rights of access, as between the holders of parental responsibility, it is clear that it is the courts of France, and those courts alone, that have jurisdiction to hear and determine those disputes. This follows, having regard to my finding that the children were, at the material time, habitually resident in France and by virtue of Article 8 of the Brussels II Regulation. Accordingly, the applicant is right in her contention that the respondent's recent proceedings before Clonakilty District Court were misconceived and that that court lacked the necessary jurisdiction to hear and determine issues relating to parental responsibility, including rights of custody and rights of access.

Issue (c)

It is clear on the evidence that "rights of custody" in respect of the children in this case were attributed to the applicant under the law of France, by virtue of judgment and order of the County Court Judge for Family affairs at Perigeaux, as affirmed in part and varied in part by the judgment and order of the Bordeaux Court of Appeal. I am also satisfied on the evidence that the retention of the children in Ireland by the respondent was in breach of the applicant's said "rights of custody".

Issue (d)

The children were brought to Ireland ostensibly for the purpose of a short vacation in the context of the exercise by the respondent of the access granted to him by the French courts. The applicant at all times believed that their absence from her physical custody would be brief and transient. When they were retained in Ireland she immediately complained about it, and invoked the Hague Convention without delay. I am completely satisfied on the evidence that the applicant's "rights of custody" in respect of the children would have been exercised but for their retention in Ireland.

Issue (e)

The respondent complains that the Irish Central Authority took no active steps to secure the voluntary return of the children, as required by both Article 7(c) and Article 10 of the Hague Convention, and he contends that it was mandatory that it should do so. The first thing I should say is that the Irish Central Authority is not a party to the present proceedings. Secondly, I consider that even if the Irish Central Authority has failed to comply with it's obligations under the Convention it would not impugn or have implications for the jurisdiction of this Court to entertain the applicant's application. This is because section 11 of the Child Abduction and Enforcement of Custody Orders Act, 1991 provides:

> "Nothing in this Part shall prevent a person from applying in the first instance to the Court, whether or not under the Hague Convention, in respect of breach of rights of custody of, or breach of rights of access to, a child removed to the State."

Clearly the applicant was not constrained to invoke the Hague Convention through the conduit of the French and Irish Central Authorities respectively. If she had ignored the Central Authorities, and had simply travelled to Ireland and initiated High Court proceedings directly she could have sought the same relief as she is now seeking and the Court would, by virtue of section 11, have had jurisdiction to entertain her claim.

However, and in any event, I am not convinced that it is correct to interpret Article 7(c) and Article 10, respectively, as creating an imperative for particular action. As stated earlier I must apply the normal rules of statutory construction and, if possible, give the provisions in question a construction which accords with the expressed objectives of the Convention. If necessary, I am entitled to use the travaux preparatoires which accompanied the Convention's adoption as an aid to its construction. In that regard I have consulted the Pérez-Vera Report on the Results of the Work of the Hague Conference on Private International Law, and I have had particular regard to paragraphs 88 to 98 inclusive dealing with Article 7 generally (paragraph 92 deals with Article 7(c) specifically) and also to paragraph 103 dealing with Article 10. I am satisfied that while the provisions in question are expressive of an strong policy objective on the part of the Contracting States that the parties in any particular case should be encouraged and facilitated by the relevant Central Authority in reaching an amicable resolution, the Central Authority is not required to take any specific action in furtherance of that policy. It is left to their discretion. I am particularly reinforced in this view by paragaph 103 of the Pérez-Vera Report which states that in the original draft the phrase " Before the institution of any legal or administrative proceedings" preceded the words which presently constitute Article 10. This phrase was deleted because some legal systems had difficulty in accepting that a public authority, such as a Central Authority, could act before an application had been brought before the competent authorities. Accordingly, it is clearly to be inferred that the framers of the Convention did not intend to so circumscribe the freedom of a Central Authority as to prevent it from determining for itself in any particular case both how, and particularly when, it might act to give effect to the legislators' policy.

I am further supported in this view by the following passage contained in the previously mentioned work by Lowe, Everall and Nicholls. They state at para 13.33 (page 239):

> " The lack of prescription concerning the means and methods of seeking voluntary resolution has led to considerable diversity in interpreting these provisions."

The passage goes on to describe in some detail different approaches adopted in different jurisdictions.:

> "In Australia, Germany, the Netherlands, Scotland, the United States and some Canadian jurisdictions, the Central Authority is involved, to some degree, in negotiating a voluntary resolution. In Australia, the implementing Regulations initially required the Central Authority to seek an amicable resolution and a voluntary return. (Per footnote, this has since been amended to give the Central Authority discretion) In the Canadian Provinces of British Columbia and Manitoba, the Central Authorities will make a request for a voluntary return if it is considered appropriate. In some other Canadian jurisdictions and in Ireland, Central Authorities initiate contact with bodies such as the police who may be involved in bringing about voluntary resolutions. Several Central Authorities (for example, those of Scotland, the United States and several of the Canadian authorities) initiate suggestion of voluntary resolution by sending a letter to the abductor requesting that the abductor return the child within a certain period of time. In some jurisdictions, so as not to create delay, court proceedings are initiated simultaneously with attempts to seek a voluntary resolution, in case negotiations fail. Since reforms introduced in October 2000 this has been the procedure adopted in Germany. In contrast, in other jurisdictions, notably Austria, Israel, New Zealand, England and Wales, and Northern Ireland, judicial proceedings are commenced immediately although concurrent attempts to bring about a voluntary resolution might be made."

Issue (f)

The respondent further complains that the Irish Central Authority failed to carry out its obligations under Articles 7(b), 7(d) and 7(g).

I must reiterate the view previously expressed that even if that were so, any failure to comply with Article 7 would not serve to impugn,or have implications for, the jurisdiction of this Court to entertain the applicant's application.

In any case I do not believe that the alleged failures are borne out upon a consideration of the provisions themselves and having regard to the evidence before me.

With respect to Article 7(b) I am satisfied that provisional measures were in fact taken. The Pérez-Vera Report makes it clear (at paragraph 91 thereof) that the type of provisional measures envisaged are measures to avoid another removal of the child or, as in this case, children. The Irish Central Authority, by its letter of the 19th of November 2007, placed the matter in the hands of Ms Crowe who immediately issued proceedings in the name of the applicant, and obtained an ad interim injunction.

With respect to Article 7(d), the requirement is circumscribed by the insertion of the phrase "where desirable". It is something left to the judgment and discretion of the Central Authority. Article 7(d) does not create a mandatory obligation.

With respect to Article 7 (g) the obligation, such as it is, is to provide legal aid to the applicant, not to the respondent. That was done. In so far as the respondent is concerned he is in the same position as any other family law litigant. He is entitled to seek to avail of the general Civil Legal Scheme, assuming his circumstances are such as to enable him to qualify for it.

Issue (g)

The respondent contends if this Court were minded to return the children to the applicant's custody in France there is a grave risk that they would be exposed to physical or psychological harm or that they would otherwise be placed in an intolerable situation. He urges that the Court has a discretion, by virtue of Article 13(b) of the Hague Convention, and that the Court should, in the exercise its discretion, decline to order the return of the children.

I have been referred to, and have carefully considered, the extensive jurisprudence that exists in respect of Article 13(b). In that regard I have found the following cases to be of particular assistance, namely, *In re A (A Minor) (Abduction)* [1988] 1 F.L.R. 365; *C.K. v. C.K.* [1994] 1 I.R.250; *R.K. v. J.K.* [2000] 2 I.R. 416 and *M.S.H. v. L.H.* [2000] 3 I.R. 390.

In *C.K. v. C.K.* Denham J, then a judge of the High Court, adopted as reasonable the test propounded by Nourse LJ in *In re A (A Minor) (Abduction)*[1988] 1 F.L.R. 365 at 372 when he stated:

> "I agree with Mr. Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the eiusdem generis rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view."

McGuinness J, giving judgment in the Supreme Court in *M.S.H. v. L.H.* confirmed that the phrase "grave risk" applies to both parts of Article 13(b) and it is not to be read disjunctively. Referring to the quotation from the judgment of Nourse L.J. adopted by Denham J in *C.K.*, McGuinness J states (at page 404 of the report):

> "Denham J. states that this is a reasonable test and she adopts it. In that case, of course, Nourse L.J. was discussing the first half of the test - the risk of physical or psychological harm - but nevertheless his emphasis that the risk must be a weighty one and must be substantial and not trivial would apply also to the "intolerable situation" test."

R.K. v. J.K. is a decision of the Supreme Court. In her judgment in that case Denham J. stated:

> "The grave risk contemplated in the Hague Convention is that of a serious risk. *In Thomson v. Thomson* [1994] 3 S.C.R. 551, La Forest J. of the Supreme Court of Canada stated at p. 596:-
>
> > "In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause ' or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation."

Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.

The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the court orders in the requesting country then the policy of the Hague Convention to return children to the country of their habitual residence will be met. Also, the particular children affected by the Hague Convention in a case will have their interest protected."

Giving judgment in the same case, Barron J. stated:

> "In my view the words "intolerable situation" relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed.
>
> *Prima facie* the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.
>
> In my opinion the following passage from *Friedrick v. Friedrick* (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is as follows:-
>
> > "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

I believe that it is necessary, having regard to the evidence before me, to consider three particular issues raised by the respondent in the context of Article 13(b). These are:

> (i) Food and medication
>
> (ii) Corporal punishment of the children
>
> (iii) Pyschologically damaging environmental factors.

It is necessary to deal with each separately. I have given consideration to possibly hearing the views of the children on these issues but have decided against it. It am not satisfied that it is appropriate to do so having regard to their respective ages and degree of maturity.

Food and medication
It is clear from the evidence that the respondent has strong views about the type of food that his children should be eating. He strongly supports and advocates organic food options, and he has particularly strong views about the use of colourants, additives, preservatives and GMO's in foods and foodstuffs. It appears that his views are shared to some extent by the applicant. The agreement of 23rd of April 2004 expressed a joint aspiration on the part of the part of the parents to "make every effort to feed the children on organic food and try not to give the children food containing additives, preservatives, colours or GMO's."

It is also clear that the respondent has strong views about the use of many proprietary and, dare I say, mainstream medications and medical treatments, preferring to use so called "natural" or herbal remedies. The applicant strongly disagrees with the respondents views and believes that there is a place for antibiotics and other chemical remedies in appropriate circumstances.

The views held by the respondent with respect to food and medications represent personal lifestyle choices. They are not universally held views. He seeks to impose these lifestyle choices on his children. He may do so to the extent that the applicant is in agreement, and provided it does not place the children at risk. However, if as appears to be the case, there is disagreement between the parties concerning whether or to what degree the respondent's personal choices should be imposed upon the children, it is a matter for the parties to arrive at a compromise or accommodation on these issues, with or without the assistance of the French Courts. This Court would only intervene and refuse to return the children if there was evidence before it that failure on the part of the applicant to adhere to the respondent's lifestyle choices would place the children at grave risk of harm or otherwise place them in an intolerable situation. I am satisfied that, apart from evidence as to the respondent's personal opinions, there is no evidence of that sort before me. In particular there is no independent scientific evidence before me to suggest that the children are at risk of harm. I am not

therefore prepared to exercise my discretion under Article 13 (b) on account of the food and medication issues.

Corporal punishment of the children
I have already indicated that I have some concerns, on the basis of the evidence, that the children may indeed have been subjected to some corporal punishment at the hands of their grandparents. If such has occurred, I don't wish to be too judgmental about it as the evidence before me does not suggest that the children have been actually harmed, either physically or psychologically, on account of this to date. It is not that long ago that corporal punishment was outlawed in this country. The reasons for doing so were many and varied. Some of those reasons included a belief that "there is a better way" of disciplining children. There were also concerns about possible blurring of the line between reasonable chastisement and assault/child abuse. There were also concerns about implications arising under the European Convention on Human Rights and Fundamental Freedoms. It appears, on the state of the evidence before me, that corporal punishment may still be permitted in France, and indeed may be culturally acceptable there, particularly in rural areas. Even if that be so I do not believe that France could, or would, condone corporal punishment at an abusive level. France is a member state of the E.U. It is a long standing signatory to the European Convention on Human Rights and Fundamental Freedoms. The facts of the matter are that there is no medical or psychological evidence before me that the children have been harmed. The respondent has not actually witnessed the alleged abuse. The applicant, who I am satisfied does care about her children, denies that they are being abused. The evidence, such as it is, only supports the possible locking of the children in their rooms, and minor physical chastisements. The more serious matters mentioned, if the hearsay evidence with regard to them is to be believed, took the form of threats. There is no suggestion that they were carried out.

I am confident that if, in the future, the children are threatened with, or actually subjected to, abuse as opposed to reasonable chastisement, the respondent will be able to access the necessary help and assistance within France to put a stop to it. I take on board that he has been advised by both the psychiatrist and his lawyer that there is a reluctance on the part of the French authorities to intervene in such cases. However, I have little doubt that if a complaint based upon real concerns were made it would be acted upon. I am not therefore prepared to exercise my discretion under Article 13 (b) on account of the corporal punishment issues.

Pyschologically damaging environmental factors.
There is no medical evidence before me that the children are being psychologically harmed. However, there is evidence that K. has had difficulties at school and has had to see both a psychologist and a psychiatrist. Moreover, his father believes him to be in need of psychological help on account of the alleged incident in February 2007 wherein K. is said to have expressed disturbingly negative sentiments about his mother and maternal grandparents. In addition the evidence suggests that L. may have had some toilet accidents or bedwetting incidents, though it has to be said he is still very young.

There is no evidence before me as to what the cause of these difficulties, such as they are, may be. However, what does come across is that they may have been traumatised by the ongoing acrimony between their parents. This is something in respect of which both parents have a great deal of control, and it is something that they can do something about. It is not for this Court to attribute blame as between the parents and I do not intend to to so. However, they are going to have to make a better effort to resolve their differences in a civilised way and by making better use of services such as mediation.

In any case I do not believe that the long term interests of the children would be served by refusing to return them to France. I daresay the acrimony would continue even if I retained them in Ireland. I am not satisfied on this account that the high threshold of a grave risk of harm is established. Neither am I satisfied that returning them would subject them to an intolerable situation. It is entirely within the control of the parties to make the situation tolerable for these children and I strongly urge them to do so. Failing that, the parties ongoing disputes must be referred back to the French Courts for an imposed solution. For these reasons I am not prepared to exercise my discretion under Article 13 (b) on account of alleged pyschologically damaging environmental factors.