Neutral Citation Number [2007] IEHC 326

THE HIGH COURT

FAMILY LAW

[2007] 22 HLC

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

AND IN MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION DONE AT THE HAGUE ON 25TH OCTOBER 1980

AND IN THE MATTER OF COUNCIL REGULATION NO. 2201/2003 (EC)

AND IN THE MATTER OF S.A.T. (A MINOR) AND R.G.T. (A MINOR):

BETWEEN

G.T.

APPLICANT

AND
K.A.O.

RESPONDENT

AND
THE ATTORNEY GENERAL

NOTICE PARTY

Judgment delivered by Mr. Justice William M. McKechnie on 10th day of September, 2007.

Introduction

1. Just over three years into their relationship, almost the entirety of which was spent living like man and wife and as part of a *de facto* family unit, the respondent mother, in January 2007, took the twin boys identified in the title of the within proceedings, from this jurisdiction to her parents place of residence in England. She did so without the knowledge, consent or approval of their natural father, the applicant herein. At some point in time thereafter she made a decision not to return to the family home in the Leinster region. The father instituted proceedings in both the courts of Ireland and the courts of England. In the latter jurisdiction, he sought a return of his children under both the Hague Convention and Council Regulation, No. 2201/2003 (EC). These proceedings stand adjourned pending this Court's decision on whether or not the removal or retention of the children in England is "wrongful" within the meaning of article 3 of the Convention and/or article 2 of the Regulation. The resolution of this matter would be entirely straightforward if the parties had been married to each other. However they were not. Accordingly the answer to the question depends in part on what rights, if any, an unmarried father has in respect of his children in this jurisdiction.

2. The applicant, who is an Irish citizen, is by profession a teacher and is presently studying for a PhD. The respondent is both an Irish and British citizen and has had her principle career in the Civil Service. She is also a professional singer. By a previous marriage she has one son J. who is now about nine years of age. In late 2003 she first met the applicant and their friendship quickly developed into a full relationship. This occurred in January, 2004 at a time when the applicant was teacher/ training in Wales. Soon after meeting they agreed to set up home, get engaged and get married, rear children and function as a family unit. Some time in February of that year the respondent became pregnant. They remained in Wales cohabitating with each other between January, 2004 and July of that year. In or about that time they moved to the Isle of Man where the applicant had obtained a teaching post for the academic year 2004 – 2005. The twins were born in that jurisdiction on 13th October, 2004. Details of their respective births were recorded, as required by Manx Law, under the Civil Registration Act, 1984. Their birth certificates show the applicant as their father with each certificate being signed by both mother and father. The children have dual citizenship being both Irish and British. In July, 2005 all five as a unit, moved to this jurisdiction where in Dublin on 12th August, the applicant and respondent got engaged. They lived together at two different addresses in this jurisdiction until 2nd January, 2007, when, as previously stated, the mother took the children to England where they presently remain.

3. On 12th February, 2007 Mr. G.T. instituted proceedings, in fact three sets of proceedings, under the Guardianship of Infants Act, 1964 (the Act of 1964) as amended. All applications issued simultaneously and had a first return date of 9th March. One application was made under s. 6A of that Act, as inserted by s. 12 of the Status of Childrens Act, 1987 (the Act of 1987) wherein he sought to be appointed guardian of his children. In the second application he sought joint custody under s. 11 (1) of the Act of 1964 and in the third sought directions, again under s. 11, with regard to access. On the return date the presiding District Court judge raised doubts about his jurisdiction to deal with the issues and adjourned each application to the 13th April. As it happened the matters were further adjourned until 4th May, when the local District Court made an order adjourning all three applications generally with liberty to re-enter (i.e. liberty to apply).

Whilst I do not have the precise reasons as to why this course of action was adopted by the learned judge, it most probably resulted from his jurisdictional concerns as well as from being informed of the applicant's intention to pursue a return of his children through the English courts.

4. In any event High Court proceedings issued in the Courts of England and Wales, under I assume, both the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25th October, 1980 ("The Hague Convention" or "The Convention") and Council Regulation No. 2201/2003 (EC) ("The Brussels II Regulation (R)" or "The Regulation)". On 2nd July, 2007, the English High Court adjourned the proceedings with a request that an *inter partes* application would be made expeditiously to the High Court in Ireland, seeking a determination from that court as to whether or not the removal and/or retention of the children in England is wrongful within the meaning of article 3 of the Convention and/or article 2 of the Regulation. This request, which no doubt was made under article 15 of the Hague Convention and perhaps also under article 15 of the Regulation was acted upon by the issue of a family law special summons made returnable for 25th July, 2007. On 31st July a detailed pre-trial order was made, giving directions as to what pleadings should be filed and by what date. Submissions were provided for and in accordance with Order 60 Rule 2 of the Rules of the Superior Courts the Attorney General was joined as a notice party. A trial date of the 29th August which was suitable to the parties was assigned to the case. On that occasion both the applicant and respondent were professionally represented by solicitor and senior counsel as was the Attorney General. All parties made submissions and judgment was reserved at the end of the three day hearing. It is that judgment which this Court now gives.

5. In accordance with regular practice the procedure adopted in this case followed that which is appropriate to a special summons

whereby the evidence is outlined by way of sworn affidavit. Both parties were however given permission to serve a notice of intention to cross examine on the respective affidavits sworn by each of them. Having effectively heard the entire case including the substantive submissions of all three parties I enquired if either the applicant or the respondent wished to pursue this notice of intention to cross examine. The applicant's counsel was satisfied to rest the evidence on affidavit but the respondent sought to cross examine Mr. G.T. on one specific area, namely the grounds for his sworn belief that his two children and their mother were still habitually resident in this jurisdiction up to, at the earliest, about the 13th April, 2007. I so agreed and that cross examination was conducted and concluded.

6. Counsel on behalf of the respondent then, rather unusually, sought to call her own client to give oral testimony after the applicant again declined a further offer to cross examine her. A simple reiteration of her affidavit evidence was not what was intended. Rather counsel wished to elicit from Ms. O. new or fresh evidence not heretofore scoped, even informally, in her affidavit. In the face of strong opposition I refused to permit this unusual event to take place. I did so because:-

(a) of the lateness of the application,

(b) of the fact that she had been on explicit notice of the applicant's averment on this point, since 16th July, 2007,

(c) of the several opportunities afforded to her to file, and/or to file any further replying, affidavits as she was advised and saw fit to so do,

(d) of the probable fact that an adjournment would have been required, thereby jeopardising the attainment of a specific objective of the Convention and of the Regulation, namely the speedy resolution of the matter in issue, and finally

(e) of the injustice and lack of fairness which would have resulted.

Consequently, subject to the cross examination of Mr. G.T., the facts of this case are to be ascertained from the affidavits only together with the exhibits therein referred to.

7. Without oral evidence it is of course impossible to make any final determination as to where both the truth and accuracy lay, relative to the controversial issues between the parties and if this Court was deciding on the respective merits of those issues, this course of action would have had to be undertaken. This Court is not however in that position and for what I have to decide, it is unnecessary to reach any definite conclusion on many of the disputed matters. Therefore I am totally satisfied that wide ranging cross examination was not required in this case.

8. As stated above the jurisdiction of this Court seems to have been invoked under article 15 of the Hague Convention and accordingly its function is quite narrow and strict. What is sought is a decision whether or not the removal or retention of the children is "wrongful" within the meaning of article 3 of the Convention and article 2 of the Regulation. This court is therefore not the court before which the Hague Convention proceedings or the Regulation proceedings stand. That court is the High Court of England and Wales. I am therefore not concerned with the application of the Convention or of the Regulation "*per se*" and should not and indeed cannot make any order about the return, (or not) of the children. Moreover several articles of the Convention such as articles 12, 13 and 20 are of no relevance to this Court. In essence this is not the requested State. Accordingly my sole concern is to answer the questions posed.

These comments equally apply to the Regulations and to the comparable articles thereof.

9. Technically speaking the relief sought in the Special Summons is a Declaration pursuant to s. 15 of the Child Abduction and Enforcement of Custody Orders Act, 1991, as amended by Regulation 8(d) of the European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. No. 112 of 2005) that the removal of the children from the State or the retention of the children outside the State is "wrongful" within the meaning of article 3 of the Convention and or article 2 of the Regulation. During the course of the debate some discussion took place about the relationship between the Convention and the Regulation and whether as between Member States the latter has now superseded the Convention. See the amendment to the original s. 15 of the Act of 1991, as inserted by article 8(d) of S.I. 112/2005, and article 60 of the Regulation. Whilst I will address these matters later in this judgment it is my intention to consider the issues under both pieces of legislation and to give an answer to each of the questions posed. In so doing it will become immediately apparent that when treating the issues in this manner there will be a good deal of overlapping material common to both codes. Firstly the Hague Convention application.

10. The Hague Convention:
In 1991 the Oireachtas passed the Child Abduction and Enforcement of Custody Orders Act, 1991, for the purposes *inter alia* of giving to the Hague Convention the force of law in this State. In the Preamble the signatories to the Convention declare that "the interests of children are of paramount importance in matters relating to their custody" and that the intention of the Convention is to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence". Article 1 specifies the objects of the Convention as being

"(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 State".

11. Articles 3, 4 and 5 of the Convention read as follows:-

"article 3

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 the 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 para (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

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

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) 'right 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."

For the reasons above given it is not necessary to set out any further articles of the Convention.

12. As can therefore be seen a removal or retention of a child is considered "wrongful" where:-

(a) it is in breach of 'custody rights', which rights

(b) are attributed to a person or institution or other body,

(c) arise under the law of the State where the child is habitually resident immediately before the removal or retention and

(d) at the relevant time were been actually exercised or would have been but for the removal or retention.

Article 3 then gives, as an example, three sources from which such 'rights of custody' may arise. These are, by operation of law, by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of the State of habitual residence. Finally whilst 'rights of custody' are not defined they are stated to 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". (article 5).

13. In order therefore to answer the question posed of this Court under the Hague Convention it is necessary to decide:-

(a) the extent of the relationship between the applicant and the respondent and in particular the role which the former has played in the lives of his children,

(b) the place of the children's habitual residence in January, 2007 and, if Ireland, for how long thereafter did that remain the position,

(c) whether rights of custody vested in any person, institution or other body within the law of the State of habitual residence immediately before the childrens removal or retention,

(d) whether those rights were in fact being exercised or would have been exercised but for the childrens removal or retention, and

(e) whether there was a breach of such rights.

The Relationship Between the Parties:-

14. With regard to this matter, in respect of which the contents of para. 2 above are relevant, both parties have made mutually uncomplimentary and indeed hostile attacks on each other. They allege and counter allege that one has provided more goods and services to, and earned and contributed more money, for the household than the other: that one worked both within and outside the home more regularly, frequently and intensely than the other, that one assumed more responsibility for, and adopted a more responsible attitude towards, the running of the household than the other, and that one looked after the children in some degree greater than the other. In some of these areas the conflicting evidence is acute whilst in others it much less so. Both parties concentrate on their respective reasons for their parting in January, 2007. Accusations in that regard are made, denied, responded to and repeated.

15. The houses in which they lived whilst in this jurisdiction, were described by the respondent as "the family home", although she complained about the absence of her name on the title deeds. The applicant explains this by stating that on advice from a mortgage broker, he was told that his chances of obtaining a mortgage with an unmarried mother of three children named, on the application form, who had little or no financial information to support an earning capacity, would be greatly lessened than if he himself should apply. Whilst Ms. O. makes complaint of the applicant's influential, domineering and controlling role over her, all of which is strongly denied it is clear to me from the affidavits that he had, and had demonstrated a commitment to a loving relationship which existed between them at least until the latter part of 2006.

16. With regard to the children the real dispute turns on an averment by Mr. G.T. that he was their primary carer. Their mother challenges this but fairly concedes that he did perform duties and did undertake parental responsibilities for their children. He undoubtedly was present at their birth and nurtured them at all times thereafter. It is not seriously disputed that most frequently he got the children up in the morning, including J. washed them, dressed them, fed them and took them to the school or to the crèche. He collected them most days. He organised his tutorial responsibilities in college so as to give him maximum flexibility to care for the children. Ms. O. played with her band frequently at the weekends and infrequently during the week. Not unnaturally therefore she may not have been available when otherwise she might have. She also worked fulltime outside the family home for about three months from mid September, 2006. Both parents became concerned about the developmental achievements of one of their children. This necessitated doctor and hospital visits in respect of which the respondent was decisively involved, signing as he did, a necessary

consent form for an operative procedure which took place on his son in November, 2006. I do not believe that it could ever be said that he was absent from the children for any length of time. It is true that the respondent alleges that Mr. G.T. preferred one twin over the other and that on occasions he was unkind if not downright harsh with J. but all such allegations have been vehemently denied by him on affidavit.

17. There is some independent evidence supportive of Mr. G.T. The principal of a nearby school confirms that he enrolled both his children at the school for September, 2009. A local doctor, who was the family practitioner for about six months ending in May, 2006 when the family moved district, states that the applicant brought his children to him for their immunisation injections and that he actively sought referrals to deal with his son's hearing difficulty. The crèche in the locality where they lived confirmed that they liaised only with Mr. G.T. and that from August/September, 2006 to December of that year, he was the person who both dropped and called for his children on a daily basis. Whilst I appreciate that these events fall far short of being conclusive nevertheless they tend to confirm my strong view that the applicant acted very much like what he was, namely the father to two children and a person in *locum parentis* to J. I therefore have no hesitation in saying that he was very much involved with his children in all aspects of their development and upbringing and that this commenced at their birth and continued thereafter. Whilst I have little or no evidence of what arrangements were put in place after January, 2007 no point is taken under article 3(b) in respect of this period.

The above therefore constitute my findings on the applicant's role in his relationship with the respondent and their children. I will return later in the judgment to the issue as to whether that role confers on him any 'rights of custody', for Convention purposes.

Habitual Residence

18. The expression "habitual residence" which is not defined in either the Convention or the Regulation must be given its ordinary and natural meaning. It is not a term of art but a question of fact, and must be decided by reference to the individual circumstances of each case. It can be taken that if a person leaves Country A " … with a settled intention not to return to it but to take up long term residence in country B instead…," then such a person may be said to have ceased been habitually resident in country A. That person however cannot become habitually resident in country B in a single day an appreciable period of time and a settled intention will be necessary to enable him or her to do so. See in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562. See also McGuinness J. in *C.M. v. Delagacion de Malaga* [1999] 2 I.R. 363 and *Z.S.A. v. S.T.* (Unreported, High Court, Laffoy J., August, 1996). Given the age of the children in this case, their habitual residence after the 2nd January, 2007 will at all times be that of their mother. It is therefore a question of fact as to what their habitual residence was on the dates hereinafter mentioned.

The position under the Regulation is somewhat different in that "the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain that jurisdiction until the child has acquired a habitual residence in another Member State and …" (article 10). Accordingly in a Regulation case, a child's habitual residence for jurisdictional purposes can only be displaced on the acquisition of a new or different habitual place of residence.

19. There is no dispute between the parties but that Ireland was the habitual place of residence of both the respondent and the children immediately prior the 2nd January, 2007. Indeed the request to this Court could only have been made on that basis. The issue under the Convention is at what point in time thereafter did Ireland cease to be their place of habitual residence. For this purpose, as I have said, the acquisition of a new habitual residence is not necessary.

At para. 18 of his grounding affidavit Mr. G.T. avers that the respondent only formed an intention of remaining in England on or about or shortly prior to the 13th day of April, 2007, on which date that intention was, albeit inferentially, first communicated to him. That averment has never been denied by the respondent and she has not sought in her replying affidavit to take issue with it or otherwise to specify an alternative date when she formed a settled intention of not returning to this jurisdiction. Indeed I am satisfied from the evidence that this averment of the applicant is largely correct and I am not dissuaded from this view by the later alternative date of the 2nd May, 2007, which has also been suggested by him.

20. This conclusion is supported by the following. At para. 43 of her replying affidavit, Ms. O. states that her intention of going to England on 2nd January, 2007, was for the purposes of getting "some respite". This is confirmed by a letter written by her solicitor dated 16th January in which it is expressly acknowledged that the respondent "is currently temporarily in the United Kingdom". In addition that letter gives her address as being the family home in Ireland. In that letter she also offers to meet the applicant either in England or in Ireland with a mediator. By way of response dated 25th January Mr. D.P. solicitor, indicates that whilst difficulties had arisen in the relationship, his client the applicant, did not view the circumstances as constituting an irretrievable breakdown of that relationship. On his behalf it was further stated that he would commit himself fully to "retrieve matters" provided Ms. O. returned to this jurisdiction. On 31st January, Messrs A.B. and Company Solicitors, on behalf of the respondent, repeats her offer of returning to this jurisdiction so as to meet with a mediator. On 6th February the same firm of solicitors refers to the efforts made by the respondent to contact the applicant indicating that she had telephoned him each day for the previous six weeks. Moreover they stated that if Mr. G.T. wished to deal directly with the respondent their firm would cease to act for Ms. O. Once again an offer was made of returning to this jurisdiction to meet with the applicant and a mediator so as "to try and seek a resolution to this matter". It is further stated that "she (the respondent) is not under any circumstances trying to keep your client's children from him … (the applicant)" In my view these events are consistent only with Ms. O's absence from the family home being temporary and that throughout this period she had not formed any settled intention to cease to have her habitual residence in this jurisdiction.

21. During the cross examination of Mr. G.T. the position became a little clearer. It was suggested to him that the respondent had prior to the 2nd January cancelled her Irish children's allowance, gave up her job and soon after arriving in England enrolled her son J. in a local school. These steps it was suggested must have meant to him that Ms. O. had ceased being habitually resident in this jurisdiction either in January or at the latest early February, 2007. If that was indeed true, which the applicant strongly denies, it remains rather surprising why the respondent herself did not so aver on affidavit. In any event the correspondence up to at least the 6th February, 2007, belies this suggestion. Moreover Mr. G.T. said that up to approximately the middle of April the respondent was constantly in communication with him, mostly by text, indicating that she loved him and enquiring from him as to whether he loved her. Questions were frequently raised about whether she could have the house if she returned. Given these communications as well as the matters mentioned above, the applicant firmly believes and so states that at all times Ms. O. had every intention of returning to this jurisdiction so that matters could be resolved between them and their family unit reunited. It was only when, on or about the 13th of April when the Irish proceedings were before the District Court, that he began to realise the respondent may not return. He got this feeling or impression when she or someone on her behalf indicated that she would not consent to the applicant been appointed guardian of the children. In fact it would appear that her objections in this regard were communicated by way of letter dated 4th April. In any event Mr. G.T. remained insistent that the first formal notification which he had of Ms. O's intention to remain in England, came only on 2nd May during the course of the English proceedings. Whether that be correct or not, I am quite satisfied that up to then there is nothing in the evidence, in the correspondence or in court documents which gave the impression, that the applicant did not intend to return to this jurisdiction. In fact her conduct as above described is quite inconsistent with the existence of any formed or declared intention of not so doing. Accordingly in these circumstances I am satisfied that she remained habitually

resident in this jurisdiction up to at least the beginning of April, 2007. It therefore inevitably follows that the habitual place of residence of the twin boys was also that of this jurisdiction until that time.

Indeed as will become clear later in this judgment the critical date in my view is earlier than April and is in fact the 9th day of March, 2007.

Meaning of "Wrongful" and "Custody Rights"
22. For a removal or retention to be "wrongful" and therefore unlawful, it must have been in breach of 'custody rights' under the laws of the state of habitual residence. A debate has been ongoing for some time as to what constitutes 'rights of custody' in this regard, particularly where the natural father has never married the natural mother. In 1990 both the Court of Appeal and the House of Lords in *Re J. (A Minor) (Abduction: Custody Rights)* [1990] 2 A.C. 562 gave judgments on this point. Although describing the way in which the child was removed from Australia by its natural mother as "reprehensible", Donaldson L.J. in the lower court, at p. 570 of the report said "Since articles 3, 4 and 5 of the Convention are solely concerned with the rights of custody, i.e. rights to care, custody, control or guardianship, and with rights of access – the precise terminology does not matter in any of these categories – and since the father had no such rights, for my part, I do not consider that J.'s removal from Australia, reprehensible though it may have been in the way in which the mother achieved it, could constitute a wrongful removal within the meaning of the Convention".

23. Lord Brandon in the House of Lords at p. 577 continued "I consider first the question whether the removal of J. from Australia to England by the mother was wrongful within the meaning of article 3 of the Convention. Having regard to the terms of article 3 the removal could only be wrongful if it was in breach of rights of custody attributed to, i.e. possessed by the father at the time when it took place. It seems to me however that since s. 35 of the Family Law Act 1975 – 1979, as amended of Western Australia gave the mother alone the custody and guardianship of J., and no order of a court to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J. of which the removal of J., by the mother could be a breach. It is no doubt true that, while the mother and father were living together with J. in their jointly owned home in Western Australia, the de facto custody of J. was exercised by them jointly. So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J. should reside. It follows, in my opinion, that the removal of J. by the mother was not wrongful within the meaning of article 3 of the Convention".

Accordingly article 3 was premised on established 'rights of custody', (the source or origin of which was not an issue in that case), and did not include what might be referred to as *de facto* or inchoate rights. In other words although the father acted as a responsible and caring father relative to all aspects of J.'s welfare, nevertheless because his rights were not established rights, his relationship with J. itself was not considered sufficient to confer on him 'rights of custody' within the meaning of the Convention.

24. A further significant decision on this issue was given by the Court of Appeal in *Re B (A Minor)* (Abduction) [1994] 2 F.L.R. 249. Again the facts of that particular case need not detain us though once more, in a dissenting judgment, Peter Gibson LJ described the activities of the mother as "abhorrent". Having given a broad meaning to the word "custody" Waite L.J. for the majority said "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 it 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?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who had assumed the role of a substitute parent in place of the legal guardian".

25. As can therefore be seen whilst respecting the House of Lords decision *in Re J., (A Minor) this Court of Appe*al was nevertheless satisfied to hold that a person, who had no established rights, but who carried out duties and enjoyed privileges of a custodial or parental character, could, on a case by case basis, have rights which qualified as 'rights of custody' within the meaning of article 3. In short these rights have been referred to as inchoate rights. This therefore was a significant development as it undoubtedly made available, as a matter of principle, an additional category of persons who, depending on the individual circumstances of their relationship with the child, could be deemed to have 'rights of custody' for the purpose of the Convention. Apparently in *Re. J. (A Minor)* (see para. 22 above), was distinguished on the basis that it was a case of "shared parenting" between the father and a grandmother in the absence of the natural mother. Peter Gibson LJ, with considerable regret, could not find a distinguishing feature between that case and In *Re J. (A Minor)* and accordingly held that the natural father did not have recognisable rights under the Convention.

26. There have been several other cases in the courts of England and Wales which have touched, to a greater or lesser extent, on this difficult concept of 'custody rights' relative to unmarried fathers for Convention purposes. It is not however necessary for this Court to refer in any detail to such cases. That is because the Supreme Court has considered this issue in depth in a case entitled *In the Matter of the Child Abduction and Enforcement of Custody Orders Act*, 1991 and *In the Matter of H.I. (A Minor): H.I. v. M.G.* [2000] 1 I.R. 110. It is sufficient to say on the facts of the case, that the petitioning natural father (who was not married to the mother) had no rights of custody under the laws of New York (place of habitual residence) either by operation of law, as he required a declaration of paternity which he had not obtained, or by virtue of an agreement having legal effect in that jurisdiction. In addition whilst there was in existence at the relevant time an order from the New York Court, that order did not require the mother to obtain either the consent of the father or the court's approval for the removal from the jurisdiction of her child. Given that situation the Irish Court felt that at first glance there might be great difficulty in the father establishing that he was entitled to 'rights of custody' under New York law. In addressing that issue, the majority judgment of the court, as given by Keane J. as he then was, can be summarised as follows:-

> (a) As a general point since the Hague Convention has the force of law in this State only by reason of an Act of the Oireachtas, namely the Act of 1991, then its terms must be construed in accordance with "normal rules of statutory construction" and consequently, one must "ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context". The Convention should however, if possible, be given a construction which accords with its expressed objectives.
>
> (b) From the wording of article 3 potential 'rights of custody' can arise from sources other than the three specified in that

article. The use of the phrase "… may arise in particular …", would suggest that the express wording does not constitute an exhaustive statement of the legal origin of such rights. This view is borne out by para. 67 of the explanatory report on the Convention by Madam Elisa Perez-Vera. The issue in the case was whether at the relevant time, the child's removal was in breach of 'rights of custody' of the father or any other institution or body under the laws of New York.

(c) Even when a parent has no such rights but where court proceedings have been instituted by him, the removal of a child, whilst such proceedings are still pending, would, without lawful excuse, be wrongful, and

(d) The same position would apply where there was in existence a court order preventing the child's removal without either the consent of the dispossessed parent or the approval of the court itself.

(e) In such circumstances the breach would not be that of the father's rights but rather of the court's rights as it had retained seisin of the case so as to determine issues of custody relative to the child, including either party's right to decide where the child should live.

The Supreme Court then went on to consider questions of access, and whether the same should be dealt with under article 21 and not under article 3. A number of other issues were also discussed but none of these are of interest to us in the present case.

In summary therefore circumstances can arise where a removal would be wrongful as being in breach of 'rights of custody' vested in the court itself.

27. Having made these observations the court was still faced with the argument, first recognised in *Re B. (A Minor)* (see para. 24 above) that persons without established rights, but who preformed a custodial or parental role should be recognised as having 'rights of custody' within article 3 of the Convention. That argument was dealt with by Keane J. as follows at pp. 132-133: "It is going significantly further to say, however, that there exists, in addition, an undefined hinterland of 'inchoate rights' of custody not attributed in any sense by the law of the requesting state to the party asserting them or to the court itself, but regarded by the court of the requested state as been capable of protection under the terms of the Hague Convention. I am satisfied that the decision of the majority of the English Court of Appeal in *Re B. (A Minor) (Abduction)* [1994] 2 F.L.R. 249 to that effect should not be followed." Keane J. then cited the case of *In Re O. (Child Abduction: Custody Righ*ts) [1997] 2 F.L.R. 702 as being illuminative of circumstances which in his view could surely never have been within the contemplation of the framers of the Convention. The learned judge in conclusion acknowledged that the rights of unmarried fathers under the Convention created considerable difficulty which difficulty however should properly be resolved through the machinery of Special Commissions in The Hague and not by court decision.

28. Barron J. gave a dissenting judgment and agreed with the majority view In *Re B. (A Minor*), that the Hague Convention should not be confined to established rights.

He approached the problem however in a different way to that of Waite LJ in *Re B. (A Minor)* The learned judge was of the view that such rights of custody did not have to be legal rights but rather had to be present rights, the basis of which could be recognised by the law of the state of habitual residence. In his view expressed at p. 140 of the judgment "The reality is that the Hague Convention is not concerned with legal rights under the law of habitual residence but with 'rights' which were actually being exercised and to which the courts of that state would not totally disregard as having no legal effect within that state". He was also of the view that a passage from the judgment of Cazalet J., in *Re O. (Child Abduction: Custody Rights)* [1997] 2 F.L.R. 702, at 708 was correct in that: "This passage does not rely upon any subsequent confirmation or conferring of legal enforceable rights. In my view, it recognises what is at the heart of the Hague Convention which is the actual exercise of appropriate rights. It then also recognises that the agreement or arrangement under which such rights are exercised need not have the force of law only that it should not be prohibited: should not be contrary to law." In the circumstances of case before him the learned judge would have held that the natural father had 'rights of custody' under the law of New York.

29. The case of *In the Matter of H.I. (A Minor): H.I. v. M.G.* [2000] 1 I.R. 110, is of importance to this Court for several reasons but in particular two. Firstly it confirms the proposition that 'rights of custody', within the meaning of article 3, may be vested in a court, and if the removal or retention of a child is in breach of the rights so vested, then that removal or retention is wrongful. Secondly, being a decision of the Supreme Court it means of course that I am bound by the majority judgment in its findings, which as a matter of generality can be described as indicating that inchoate rights are not recognisable for Convention purposes. The first matter which I therefore propose to address is whether or not 'rights of custody' vested in the District Court and if so on what date or by what event.

'Rights of Custody' vested in the District Court:
30. It will be recalled that the applicant instituted three sets of proceedings all dated 12th day of February, 2007, in which he sought from the District Court, under the Guardianship of Infants Act, 1964 as amended, rights of custody, of guardianship and of access. Those applications were served on some unspecified date but certainly prior to their first return in the District Court. That was the 9th of March. They were then adjourned to the 13th of April and onwards to the 2nd of May when for the reasons above set forth, they were adjourned generally with liberty to re-enter, meaning liberty to apply. As there is no evidence when the necessary documentation was served I cannot be doing any injustice to the respondent if I treat the date of service as coinciding with the first date upon which these applications appeared in the District Court and were moved before the presiding District Court judge. Accordingly I propose to proceed on the basis that the relevant date is the 9th March, 2007.

31. The principles of law enunciated by the Supreme Court in *In the Matter of H.I. (A Minor),* when dealing with this concept of rights of custody vesting in the court, were of necessity and by the facts of that case, general in nature. However both the Court of Appeal and the House of Lords in a Convention case entitled in *Re H., (Child Abduction: Rights of Custody*: [2000] 1 E.L.R. 201 (Court of Appeal) and [2000] 2 AC 291 (House of Lords) dealt more specifically with the issue. In that case the applicant and the respondent were respectively the unmarried father and mother of a child H., who was born on 3rd April, 1992. About three years later the parents separated and by agreement the father had irregular contact with the child. On the 14th March, 1996 he instituted proceedings in the District Court in Carrigaline, Co. Cork under the Guardianship of Infants Act, 1964, which proceedings were compromised by a consent order which was to remain in place for a specified period of time. After the father's release from prison in 1997 he had sporadic access to the child for a further period thereafter. On 30th March, 1998 he again applied to the District Court at Carrigaline and made applications under s. 11(1) and s. 11(4) of the Act of 1964, as amended. wherein he sought the court's directions regarding the custody of the infant and his right of access to her. The application first appeared before the District Court on 14th May, 1998. Again a temporary compromise was reached between the parents and access took place in accordance with that agreement, although the same was not supported by any drawn order of the court. On 23rd June, 1998 the mother without the consent or knowledge of the father went to live in England with their daughter. He then instituted proceedings seeking a return of the child under the provisions of the Hague Convention. Both the Court of Appeal and the House of Lords agreed with him. However what is of interest is their

Lordship's treatment of when and in what circumstances a court can have rights of custody for the purposes of article 3. The speech for the House was given by Lord Mackay who declared unequivocally the existence in principle of such a concept. In support he cited the objects of the Convention and referred to previous decision in English and from Ireland, (In the Matter of *H.I. v. M.G.* [2000] 1 I.R. 110), Canada (*Thompson v. Thompson [*1994] 3 SCR 551) and New Zealand (*In Re S.*) (*Abduction: Children Separate Representation*) [1997] 1 F.L.R. 486, all of which either confirmed or recognised this concept. For rights to so vest there must according to Lord Mackay, be an application to the court which raises matters of custody and secondly the jurisdiction of the court only becomes established when the originating document has been served on all relevant parties. Once invoked the court becomes definitively seized of the application and thereafter its jurisdiction continues until such time as the proceedings have been disposed of or determined. The learned law lord then analyses the facts of the case before him and concludes that the District Court in Carrigaline was so seized as and from 'the date of service' of the applications made under the Act of 1964. Their lordships decided on the date of service by adopting, as being the relevant date, the applicable provisions of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters "(The Judgments Convention)". Indeed unless prior to service it was necessary to lodge the initiating document in court, it is difficult to see how the date could be earlier than the date of service but in some circumstances the date might arguably be later, namely the date upon which the application is lodged in court. For the purposes of the instant case however it matters not, as on the facts I am treating the first return date as being the date of service.

Lord Mackay made two further observations which should be noted, namely that such 'rights of custody' had to have been exercised immediately before the removal or retention and secondly that although the rights were court's rights, nevertheless an individual like a natural father could rely upon them to initiate an article 12 application. Whilst their Lordship's decision in *H.* is not binding upon me, I respectfully adopt it.

32. That being so I have no doubt whatsoever but that the proceedings instituted in the local District Court by the applicant in this case involved matters of "custody" within the meaning of articles 3 and 5 of the Convention as by claiming guardianship and custody he was seeking to have a controlling influence in every aspect of his children's welfare, including the right to physically care for them and the right to decide where they live. Accordingly by a date not later than the 9th day of March, 2007 the court had rights of custody with regard to the twin boys. It matters not whether the presiding judge had doubts about his jurisdiction which in any event was never even tested either by way of evidence or by full submissions. The court as and from that date exercised these rights by reason of the pending application in which it reserved for itself the decision on the children's welfare and where, when and with whom they would reside. Given this Court's finding that the children were habitually resident in this jurisdiction up to a date in April, 2007 it must follow that in the absence of lawful excuse, their retention on and after the 9th of March was wrongful within the meaning of article 3 of the Convention. As there is no such excuse the retention is wrongful.

33. Counsel on behalf of the respondent relies upon the Court of Appeal's judgment, of Thorpe LJ in the *H. (A Minor)* case, as refuting this conclusion. In the rather limited report of his Lordship's judgment which I have, the learned judge is quoted as saying the following:-

> "(i). An application that in substance sought only the determination, definition or quantification of contact could not vest rights of custody in the court (see *Re V-B(minors)(abduction: rights of custody*) [1999] 2 F.C.R. 371.
>
> (ii). An application that in its substance seeks the court's determination on issues of physical care, parental responsibility (to use our current statutory terminology), or the jurisdiction in which the responsibility of physical care will be exercised may or may not suffice to vest rights of custody in the court of issue. To determine whether rights are vested it is necessary to scrutinise the nature of the application, the merits of the application and the applicant's commitment to its pursuit. Obviously the mere issue of a hopeless or insincere application vests nothing in the court which at that stage is no more than the tool of the applicant's manipulation. Equally the issue of an arguably meritorious application may be offset if thereafter by inactivity or inconsistent statement the applicant belies his seeming intention to obtain judgment. In the end each case must call for its own evaluation always giving the article its wide and purposive construction."

34. It is suggested on behalf of Ms. O. that by not pursuing the District Court proceedings to finality Mr. G.T. has been guilty of the type of inactivity or insincerity referred to by Thorpe LJ. I cannot accept this submission. It seems to me that the proceedings in the District Court were adjourned generally with liberty to re-enter essentially for two main reasons which I have outlined at para. 3 above. Secondly there could be no question of the applicant's inactivity given the institution of the proceedings in the English Courts and given the institution of the current proceedings pending before me. Thirdly from my conclusions on the evidence, the question of insincerity or lack of commitment simply do not arise and finally there is no doubt but that in the District Court proceedings the father sought not simply contact or visitation rights but rights of guardianship and custody. I therefore do not believe that any of the qualifications contained in that Court of Appeal's judgment apply to this case. In any event in dealing with the merits of this submission I should say that I do so without prejudice to the appropriateness or relevance of raising these type of questions on an article 12 application and even less so on the narrower application presently before me: See Lord Mackay on this point at p. 305 the House of Lords Report in the same case.

The conclusion which I would therefore make on this issue is that the retention of the boys in England after the 9th March, 2007, is in breach of the rights of custody vested in the court and accordingly wrongful within the meaning of article 3.

'Rights of Custody' vested in the Applicant?

35. As is clear from article 3, the 'rights of custody' therein referred to, may vest in a person, institution or other body and may have as their foundation any one or more of the three sources of origin therein mentioned. In the above part of this judgment I have dealt with the custody rights vested in the court. Whilst that might be sufficient to dispose of the Convention point it is not determinative of the Regulation issue, which in its own right must also be addressed. In addition I feel that I should also deal with the other submissions made, as this matter may be reviewed elsewhere and secondly out of due deference to the efforts of counsel in preparing such submissions.

The applicant's, primary submission under the Hague Convention, is that he himself has such 'rights of custody' and that the same have arisen either by operation of law or by an agreement between himself and the respondent; which agreement should be recognised as having legal effect in the law of this State. The third potential source of such rights, in article 3 of the Convention namely judicial or administrative decision does not arise in this case and it is not suggested that any further or other source is in play. Furthermore it is asserted that the establishment of these 'rights of custody' has been significantly aided by the enactment of the European Convention on Human Rights Act, 2003, ("The Act of 2003"). When the relevant rule of law is considered in the context of that Act, it is claimed that the proposition now advanced currently represents what the present law is, in this jurisdiction.

36. Prior to the Act of 2003 coming into force, the European Convention on Human Rights did not form part of our domestic law due to Ireland's position as a dualist state. Apart from the fact that the Irish Government was obliged to accept the rulings of the European

Court of Human Rights in judgments affecting it, the Convention did not place any direct obligations on any organ of the Irish State to take any particular action; although that is not to say that the Irish courts or the legislature did not take notice of the jurisprudence of the European Court. As part of the Good Friday Agreement, the Houses of the Oireachtas enacted the Act of 2003, which gave effect to the Convention in Irish law but did so through the model of indirect or interpretative incorporation at a sub-constitutional level. One of the key provisions of the Act, is section 2 which reads

> "2(1) In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

Section 3(1) places an obligation on every organ of the State, subject to any statutory provision or rule of law, to perform its function in a manner so compatible with such obligations. Section 3(2) allows that a person who has suffered injury, loss or damage as a result of a contravention of subsection (1) may seek and be awarded damages. Section 4 of the Act provides that judicial notice is taken of the Convention provisions and when applying this interpretative method of incorporation, the Irish Courts must take account *inter alia* of the judgments of the European Court of Human Rights. In addition under s. 5 of the Act both the High Court and the Supreme Court may grant what is termed "declaration of incompatibility", in circumstances where it is not possible for the court to interpret and apply a statutory provision or a rule of law in a manner which complies with Ireland's obligation under the Convention. However such a declaration does not affect the legal validity of the provision or rule of law in question, and any rectifying measure is for the legislature and not the courts. Accordingly as can be seen this Court should apply the provisions of the Convention, in the interpretation and application of any statutory provision or rule of law, insofar as it is possible to so do in accordance with the established canon's of construction and interpretation.

37. At para. 47 of this judgment, when dealing with the application under The Brussels II Regulation (R), I set out both the constitutional and legal position of an unmarried father relative to his child as it presently exists in this jurisdiction. These principles in my view remain valid for Convention purposes notwithstanding the enactment of the Act of 2003. I say this because, as the rights of an unmarried father, including those under the Hague Convention, have been established by the Supreme Court with near certainty, it would not be possible in my opinion to enlarge or re-interpret these rights in accordance with s. 2 of the Act of 2003, so as to reflect any influence which the European Convention on Human Rights may have on such rights. In the absence therefore of making a declaration of incompatibility, (on the appropriateness of which I make no comment whatsoever) which is not sought, I do not believe that the meaning of 'rights of custody' in this jurisdiction can be disturbed by any reliance on the European Convention on Human Rights. To do so would be doing violence to the established principles of law which have been set out by the Supreme Court.

The principles so outlined however, do not reflect any changes which may be necessary for the purposes of article 2 of the Regulation, which since the 1st of March, 2005 has been binding in its entirety and directly applicable in each Member State except Denmark. Nor do they take any account of the fact that the interpretative construction of the Regulation, one having generalised effect in all Member States bar one, may be different to that applicable to the Hague Convention which in this jurisdiction has the force of law only by a domestic Act of the Oireachtas. Consequently, it seems to me, that for the purposes of the submission made under article 3 of the Convention, the rights of a natural father, as set out at para. 47*, infra* are the only rights which such a father has.

38. Given this conclusion, it appears to me that the submissions made on behalf of the father (see para. 35) cannot succeed on either of the grounds advanced by him. There is no doubt but that, in accordance with the pre-Regulation law of this State, the natural father does not possess any of the rights which have been defined or described as 'rights of custody' within the meaning of article 3. In particular 'inchoate rights' are not recognised for this purpose. In the absence therefore of a court order granting him such rights, he does not obtain the same by operation of law. Consequently, I have to reject his assertion in this regard.

39. Equally so with regard to the suggestion that such rights may have arisen by reason of an agreement between himself and the children's mother which has legal effect in this State. It is conceded on his behalf that to succeed on this point this Court would have to follow the line of reasoning adopted in the minority judgment of Barron J. in *The matter of H.I., (A Minor):, H.I. v. M.G.*, [2000] 1 I.R. 110. This I cannot do. Even though I am satisfied beyond question, that from the time of their birth the respondent willingly permitted the applicant to fulfil the role of a caring parent with regard to their children, and that he deferred some of his studies to so do, nevertheless such rights are in the nature of 'inchoate rights' which the majority of the Supreme Court has rejected in that case. If I was not bound by authority on this issue, I would be considerably interested in the submission. However I am. I cannot therefore agree, that any such agreement could, without an intervening order of the court, be enforceable under the laws of this State. Being so bound, I must therefore also reject this submission.

The Brussels II Regulation (R):

40. The second question posed to this Court is whether the removal or retention of the children is "wrongful" within the meaning of article 2(11) of the Regulation. The following articles are relevant for the purposes of this issue:

"Article 2.

Definitions

1. …

2. …

3. …

4. the term 'judgment' shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. …

6. …

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 legal person by judgment, by operation of law or by agreement having legal effect. The term shall include rights of custody and rights of access;

8. …

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. …

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 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."

"Article 8

General jurisdiction

1. The courts of 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. …"

"Article 10

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…"

"Article 11

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 … 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 Hague Convention it shall be ensured that the child is given the opportunity to be heard …

3. …

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

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 …

7. …

8. Notwithstanding a judgment of non-return pursuant to article 13 of the 1980 Hague Convention, …"

"Article 16

Seising of a Court

1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have the service effected on the respondent; or

(b) if the document has to be served before being lodged with the court, at the time when it was

received by the authority responsible for service … ."

Relationship between the Regulation and the Convention:
41. The relationship between the Regulation and the Convention is of some importance. Recital 17 of the Regulation expressly states that "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 … would continue to apply as complemented by the provisions of this Regulation, in particular article 11". Recital 18 makes provision for the transmission of information where a court has decided not to return a child under article 13 of the Convention. It is clear, from these recitals, therefore which are available as an aid to interpretation, that the Regulation did not repeal the Convention, or disapply its provisions as between Member States (save Denmark) nor did it create a substitute or alternative code in place of the Convention. Whilst it is undoubtedly true to say that under article 60, the Regulation takes precedence over the Convention insofar as it concerns "matters governed by this Regulation", this provision in my view must be viewed in the overall context of both the Convention and Regulation applying. It seems to me that the Regulation takes precedence only where there is a direct conflict between any of its provisions and the Convention or where the Regulation deals more extensively with rights or obligations than the Convention. In all other respects the Regulation and the Convention should be seen as complementing each other with the provisions of both instruments being read and applied in a consistent and harmonious way if that is at all possible. On the question of child abduction, it seems to me that the objectives of both the Convention and the Regulation are the same and that the latter was adopted so as to buttress the Convention where that was thought necessary. I therefore believe that their relationship must be looked at in this light.

42. This view is well supported by authority including the Commission's Practice Guide for the application of the new Brussels II Regulation, which has its updated version as of 1st June, 2005. At page 28, for example, it is stated:

> "The Hague Convention… which has been ratified by all Member States, will continue to apply in the relations between Member States. However, the 1980 Hague Convention is supplemented by certain provisions of the Regulation which come into play in cases of child abduction between Member States."

At page 32 when dealing with the prompt return of a child, it is said:

> "When a court of a Member State receives a request for the return of a child pursuant to the 1980 Hague Convention it shall apply the rules of the Convention as complemented by article 11(1) to (5) of the Regulation. To this end the judge may find it useful to consult the relevant case law under this Convention …"

Accordingly, I am entirely satisfied that the method of approach above identified should be followed even where the States concerned are all Member States.

43. I do not believe that s. 15 of the Act of 1991, which was inserted by article 8(d) of S.I. 112/2005, is in any way in conflict with this. The revised section reads:

> "15(1) The Court may, on an application made for the purposes of article 15 of the Hague Convention by any person appearing to the Court to have an interest in the matter, make a declaration that the removal of any child from, or his retention outside, the State was –
>
> (a) in the case of a removal to or retention in a Member State, a wrongful removal or retention within the meaning of article 2 of the Council Regulation, or
>
> (b) in any case wrongful within the meaning of article 3 of the Hague Convention."

If there was any conflict then of the course the Regulation would prevail. But in my view, this provision does not prohibit a court from giving a decision under article 3 of the Convention as well as making a determination under article 2 of the Regulation.

Regulation definition of Wrongful Removal/Retention:
44. There are two main differences in wording between the Convention definition of "wrongful removal or retention" and the Regulation definition of that term. The first is that the Convention identifies the legal persons in whom 'rights of custody' may accrue, whereas article 2(11) of the Regulation is silent in that regard. Secondly, the Convention gives as one of its examples of the possible sources of custody rights, 'a judicial or administrative decision', whereas the Regulation in that regard speaks of a "judgment". The question therefore arises as to whether this difference in phraseology makes any material difference in the respective definitions of that term. In my view, it does not. When one looks at the definition of the term "judgment", which is contained in article 2(4) of the Regulation, it is quite clear that its meaning may include a judicial or administrative decision. In any event, this particular source of rights is not being relied upon in this case. Secondly, when 'rights of custody' exist they must vest in some person or body. If the intention of the Regulation was to restrict those in whom such rights could vest, it would surely have said so. In my view, the absence of identifying by name, the "possessor" of such rights, may mean if anything, that the Regulation in this regard is broader and more comprehensive than the Convention. It is most definitely in my opinion not more restrictive and no such interpretation should be given to it. This view is borne out by the opening lines of article 11 of the Regulation which reads "Where a person, institution or other body having rights of custody applies …". This is precisely the same language as used in article 3(a) of the Convention. Accordingly, I am satisfied that this difference in wording between the Convention and the Regulation is not material for either article 3 or article 2 purposes.

45. This means that, like the Convention, 'rights of custody' can vest *inter alia* in a court or in a natural father. Given my conclusion under the Hague Convention on the court having 'rights of custody', it must logically follow that the retention is also wrongful under article 2(11) of the Regulation. Indeed, that conclusion is reinforced in two specific ways by the Regulation itself. Firstly, unlike the Convention, the courts of habitual residence retain their jurisdiction until such time as the child has acquired a new habitual residence in another Member State (article 10). And secondly, article 16 expressly confirms that a court is seised of the proceedings when the instituting document is lodged with that court. Accordingly, as I have already found that the children were habitually resident in Ireland on 9th March, 2007, it must inevitably follow that no new place of habitual residence could have been acquired by the respondent or the children prior to that date. It therefore seems to me, that a similar conclusion must be reached on this point as it has been under the Convention.

'Rights of Custody' vested in the Father under the Regulation:
46. The applicant's principal submission under this heading is that when considering whether or not he has 'rights of custody' under the Regulation, this Court must disregard all existing jurisprudence under the Hague Convention as well as the case law on the domestic rights of natural fathers: (see paras. 47 – 50 inclusive). This submission is based on the fact that unlike the Convention, the

Regulation is a European instrument and must be applied with uniformity and a single meaning throughout all Member States (save Denmark). It is also essential to construe a person's 'rights of custody' under article 2 in a manner consistent with the European Convention on Human Rights. Under article 8 of that Convention it is asserted that the applicant's relationship with the respondent and their children constitute family life within the meaning of that article, and accordingly thereunder, due respect must be afforded to both the applicant and his children. Article 14 of the European Convention on Human Rights is also relevant in this regard. This being the situation and notwithstanding the primacy which Irish law, both constitutionally and legally, affords to a family unit based on marriage, it is claimed that this Court under the Regulation, must reach a conclusion different to that which the Supreme Court did under the Convention. It is therefore forcibly asserted by counsel that there is but one answer to this Regulation question.

47. At present the following principles would appear to represent what the domestic law is, in the context of the issue under consideration:

> 1(a). A family based on the institution of marriage is the only family entity recognised by and entitled to the protection of Article 41 (The Family) and Article 42 (Education) of Bunreacht na hÉireann, the Irish Constitution. No other family unit, howsoever established, functioning or stable, is within these provisions. This is held by the Supreme Court in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567.
>
> (b) It follows that neither the natural mother or the natural father have any rights to their non-marital child under either of these Articles.
>
> 2. An unmarried mother has however, certain natural rights *inter alia* to the custody and care of her child under Article 40.3 (Personal Rights) of the Constitution. This right is considered a number of cases including: *The State (Nicolaou); G. v. An Bord Uchtála* [1980] I.R. 32, *M. O.C. v. Sacred Heart Adoption Society* [1996] 1. ILRM 297 and *Northern Area Health Board v. An Bord Uchtála* [2002] 4 I.R. 252.
>
> 3. An unmarried natural father has no such natural rights to his child which attract the protection of Article 40.3 of the Constitution or any other Article. See *In re S.W., an Infant, J.K. v. V.W.* [1990] 2 I.R. 437 and *W.O.R. v. E.H.* [1996] 2 I.R. 248.
>
> 4. A non-marital child enjoys the same constitutional rights as children born within marriage. This was held in *G. v. An Bord Uchtála (supra).* Discrimination between such children born within marriage was abolished by the Status of Children Act, 1987, harmonising Irish law with the European Convention on Human Rights.
>
> 5. The mother and father of a child, who are married to each other, are the joint guardians of their child: (s. 6 (1) of the Guardianship of Infants Act, 1964). On the death of either, the survivor, if any, together with any other guardian appointed by the deceased, shall be the guardians of such a child (s. 6(2)).
>
> These and all other statutory rights are in addition to the constitutional rights above identified.
>
> 6. Both male and female adopters, under an adoption order, are treated as having exactly the same statutory rights as those above mentioned.
>
> 7. Every such guardian shall be the guardian of both the person and the estate of the child unless the deed of appointment or will or order of the court provide otherwise. Subject to any such restriction, every guardian shall be entitled, as against all other persons save for his joint or co-guardian, to the custody of his child (s.10(2)(a) of the Act of 1964).
>
> 8. An unmarried mother of a child, whilst living, is entitled to the sole guardianship of her child unless there is in existence a s. 6A order, or the mother and father have made a statutory declaration conferring upon the latter the status of guardian, or any other person has been so appointed under the Act of 1964. This is so provided in s. 6(4) of the Act of 1964 as inserted by s. 11 of the Status of Children Act 1987.
>
> 9. Under s. 6A of the Act of 1964, as inserted by s. 12 of the Act of 1987, the court, on application by the natural father, may appoint him to be the guardian of the child.
>
> 10. Any guardian may apply to the court for its directions on any question affecting the welfare of the child. This is provided by s. 11(1) of the Act of 1964. "Welfare" includes the religious, moral, intellectual, physical and social welfare of the child. Section 11(4) of the Act of 1964, as inserted by s. 13 of the Act of 1987 provides a natural unmarried father who is not a guardian may use this section to seek directions with regard to the custody and/or rights of access to his child.
>
> 11. Section 3 of the Act of 964 states that in any proceedings before the court, touching upon *inter alia* the custody, guardianship, upbringing of a child, the welfare of that child shall be the first and paramount consideration.
>
> 12. For the purposes of article 3 of the Hague Convention, an unmarried father, by reason only of that status, does not have any 'rights of custody' in respect of his child. 'Inchoate Rights' are not recognised in this jurisdiction as decided by the Supreme Court *H.I. v. M.G.* [2000] 1 I.R. 110.

48. From the relevant case law, which has established and confirmed the position of an unmarried father in this jurisdiction, there are two decisions in particular, to which I wish to refer. The first is *In the matter of S.W., an infant*, *J.K. v. V.W.* [1990] 2 I.R. 437. In 1987 s. 12 of the Status of Children Act was enacted which added a new s. 6A to the Guardianship of Infants Act, 1964. The section reads:

> "6A-(1) Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant."

When hearing a Circuit Court appeal, Barron J., then a High Court judge, held that the legal effect of this section was that a natural father had a right to be guardian, which right however was defeasible, if he was not a fit person for that role and/or if the welfare of the child so demanded it. Because of its importance the learned judge stated a case for the opinion of the Supreme Court, whose majority judgment was given by Finlay C.J. The court held that the section did not confer any natural or constitutional rights on an unmarried father, although they "may be rights of interest or concern arising from the blood link between the father and child".

(emphasis added). It also held that the High Court was incorrect in that s. 6A did not, even *prima facie*, confer guardianship rights on an unmarried father. What the Act of 1964 as amended, did, was to grant to him the 'right to apply' for guardianship but no more. At p. 447 the Chief Justice then said:

> "This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.
>
> The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly indeed, depending on the circumstances of each individual case.
>
> The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

McCarthy J. gave a dissenting judgment, essentially agreeing with the High Court and in the process at p. 449 of the report said:

> "I find it difficult to accept that a loving father, who with the mother wanted to have a child, has no natural right to the society of the child."

49. In *W.O.R. v E.H.*, [1996] 2 I.R. 248, the same issue arose and counsel on behalf of the unmarried father made virtually an identical submission to that which had been made in the *S.W. (an infant)* case. In the Supreme Court, counsel argued that his client had both constitutional and statutory rights in respect of his child. The majority of that court reaffirmed the view taken in the *S.W. (an infant)* case. In addition, however, the Supreme Court characterised the phrase used by Finlay C.J., in *S.W.*, which is emphasised at para. 48 above, as being no more than a factor or factors which a court would take into account when dealing with the welfare of a child. Once more there was a strong dissenting judgment from Barrington J., who expressed a view that the reasoning in *The State (Nicolaou)* (see para. 47 (1)(a) *supra*) was fundamentally flawed and therefore was wrongly decided. The learned judge reached this conclusion, essentially on the basis of the court's failure to distinguish between natural fathers who had no interest in their children and those who devoted their entire existence to them. At p. 280 of the report he said that,

> "The logical flaw in the argument [conferring no rights] can more easily be seen if one reduces it to a syllogism:-
>
> 1. Many natural fathers show no interest in their offspring and the State may properly exclude them from all say in their children's welfare.
>
> 2. The prosecutor is a natural father.
>
> 3. Therefore the State may properly exclude him from all say in his child's welfare."

He felt that such a generalised approach could not be correct much less just.

50. For my part I am of course bound by the majority judgments of the Supreme Court in both of the above cases. Without in any way questioning that principle, I would like however to make some very brief observations, of my own, on the issue. The vast majority of people might readily agree, that parenthood, by itself and no more, may give very little rights, if any, to an unmarried father. Examples of circumstances at this end of the spectrum are numerous and very definitely include, casual encounters, rape, incest, etc. But what about a person who fathers a child within an established relationship, and who from the moment of birth, nurtures, protects and safeguards his child; sometimes to a standard which all too frequently married fathers fail to live up to. As Murphy J. said in *O.R.* [1996] 2 I.R. 248 at 286:

> "For better or for worse, it is clearly the fact that long-term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave embarrassment a generation ago are now widely accepted."

Indeed could I say that even in the past decade, such relationships have multiplied and continued to so do. In any event, where the above described circumstances exist, could anyone possibly object to what Finlay C.J. said in *S.W.* where he described such a situation as "… bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed"? If as I respectfully suggest, that our society, which is governed by a Constitution which declares the principles of prudence, justice, charity and human dignity, might in its maturity so agree, should there not be a greater recognition of the type of father whom I mention? At a minimum should there not be a means readily available so that such a father, whose children had been removed without forewarning or knowledge, can assert and vindicate his rights? I strongly believe that there should be.

51. Even however within the existing structure, is it altogether accurate to say that a caring and devoted father has only, in respect of his child, a right to apply? Putting it in that way, gives the impression that the court seised, is the creator of whatever rights the father might ultimately obtain on an application under the Act of 1964. That, in my view, is not correct. Any rights which a father may have are founded upon, and evolve and develop by reason of, his relationship with his child, and if it exists, with the child's mother. Such rights are alive and present before any court hearing and do not merely spring into existence on the application date. In my view, what the court does is to declare such rights rather than even confirming them, much less creating them. It declares them essentially, or in substantial part, on evidence which is largely historical with of course a prospective and future element to govern an orderly and beneficial relationship into the future. Admittedly it is the declaration which presently renders such rights lawfully enforceable, but as a matter of fact their existence has been created prior to any court hearing. I therefore feel that a father fulfilling a parenting role of the type which I have described, should be recognised as having rights referable to his child, even if such rights are contingent on a declaratory order. Whether such rights may also be described, as 'inchoate rights' is a matter of choice and is largely inconsequential unless put in context.

Could I add that the institution of marriage may have little, if anything, to fear from this approach. In fact one might strongly argue that Society, as a 'general rule' should encourage non marital fathers to act responsibly towards their children and of course towards their children's mother. To acknowledge only a 'right to apply' could hardly be seen as dynamic in this regard.

The European Convention of Human Rights in European Law:

52. Notwithstanding the status of an unmarried father within Irish domestic law it is submitted that in considering whether or not there is a wrongful retention or removal under the regulation, this court must arrive at a construction compatible with E.U. law, which takes due cognisance of the European Convention on Human Rights. In particular articles 8 and 14.

"Article 8

> Rights to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family, his home and his correspondence.
>
> 2. There shall be no interference by a public authority which the exercise of this right accepts such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

53. Article 14 secures to all persons an entitlement to enjoy the rights of the Convention "without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". It is claimed that the unit which was established in early 2004 and which continued to January, 2007, constitutes a "family" within the meaning of article 8 of the European Court on Human Rights and as a result both the applicant and his children are entitled to the protection thereof. This it is submitted can be achieved by giving a purposeful interpretation to the phrase 'rights of custody' in article 2 of the Regulation.

54. The European Court of Human Rights addressed article 8 in *Johnston and Others v. Ireland,* [1987] 9 EHRR 203. At para. 55 the court said:

> "The principles which emerge from the Court's case law on Article 8 include the following:-
>
> (a) By guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family.
>
> (b) Article 8 applies to the "family life" of the 'illegitimate' family as well as to that of the 'legitimate' family,
>
> (c) Although the essential object of Article 8 is to protect the individual against arbitrary interference by a public authority, there may in addition be positive obligations inherent in an effective 'respect' for family life. However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.
>
> In the present case it is clear that the applicants, the first and second of whom have lived together for some fifteen years, constitute a "family" for the purpose of Article 8. There are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage."

55. In *Keegan v. Ireland* [1994] 18 EHRR 342 the court said very much the same thing. In paras 44 and 45 it stated as follows:-

> "44. The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso jure* part of that 'family' unit, from the moment of his birth and by the very fact of it. Thus there exists between the child and his parents a bond amounting to family life, even if at the time of his or her birth the parents are no longer cohabitating or if their relationship has then ended.
>
> 45. In the present case the relationship between the applicant and the child's mother lasted two years during one of which they cohabitated. Moreover the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time has thus the hallmark of family life for the purpose of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

And finally at para. 50 the court contained:-

> "50. According to the principles set out by the Court in its caselaw where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment at birth the child's integration into his family. In this context reference may be made to the principles laid down in Article 7 of the United Nations Convention on the Rights of the Child… that a child has, as far as possible, the right to be cared for by his or her parents. It is, moreover, appropriate to recall that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between the parents has broken down."

56. One of the most recent cases from the court dealing with Article 8 is *Lebbink v. The Netherlands* (2005) 40 E.H.R.R. 18 at p. 417. The conclusions which it reached in that case can be summarised as follows:-

> (a) The views previously expressed that the notion of a "family" may include what has been referred to as a non-marital *de facto* family were reaffirmed,
>
> (b) A child born out of such a relationship is *ispo jure* part of that family unit,
>
> (c) Cohabitation is generally a requirement for the recognition of such a de facto relationship but exceptionally other factors may exist which demonstrate a sufficient commitment to create such a *de facto* family ties.
>
> (d) The existence or non-existence of "family life" for the purpose of article 8 is a question of fact "depending upon the

real existence in practice of close personal ties".

(e) In the instant case the father never sought to recognise his daughter and had never cohabitated with her and her mother.

(f) The court rejected the view that mere biological kinship without more should be regarded as sufficient to come within article 8.

(g) However the daughter in question was born from a genuine relationship between the applicant and her mother which lasted for about three years and ended only when the daughter was about seven months old.

(h) Whilst the court noted that the father had not so cohabitated with both as a unit, he was nevertheless present at the child's birth and did visit her mother at specified regular intervals. In addition but quite sparingly, he babysat for his daughter and changed her nappy and finally he liaised with the mother about the child's impaired hearing.

(i) In such circumstances the court was satisfied that the father was entitled to protection under article 8.

57. When dealing with whether a non-marital relationship can be said to amount to family life, a number of factors may be relevant, including whether the couple lived together, the length of their relationship and how and by what means they demonstrated their commitment to each other. See *Kroon and Others v. The Netherlands* (1995) 19 E.H.R.R. 263. These must have existed in practice close personal ties between the parties. In my view there can be no doubt but that under article 8 of the European Court on Human Rights the applicant and the respondent through their relationship, which included co-habitating with each other for almost three years in a number of different jurisdictions, their engagement, and the birth of their boys who were conceived out of a loving commitment which each parent had for the other, constituted, at all relevant times a de facto family within the meaning of that article. As a result there exists " … between the child and his parents a bond amounting to family life … [and] the Court further recalls that the immediate enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down …". See para. 43 of the judgment of the European Court of Human Rights in *Elscholz v. Germany* (2002) 34 E.H.R.R. 1412. Accordingly it is beyond argument but that the applicant and his children are entitled to respect for their family life within the meaning of article 8.

58. In deciding whether or not there has been a breach of article 8, the European Court of Human Rights has on several occasions set out what the correct approach to this question is. In addition to protecting an individual against arbitrary action by a public authority, a State under the article may also have positive obligations which are inherent in having effective respect for family life. In this regard the State must strike a fair balance between the competing interests of an individual and of the community as a whole, and when so doing the State enjoys a margin of appreciation see *X, Y, and Z v. U.K.* [1997] 2 FLR 892. In *Marckx v. Belgium* (1979-80) 2 EHRR 330, the court said that a domestic system of law which regulates the ties between an unmarried mother and her child, must allow that unit to lead a normal family life. The court said at para. 31 "As envisaged by article 8, respect for family life implies, in particular … the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child's integration in its family. In this connection the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of article 8 without there being any cause to examine it under paragraph 2".

59. In *Re. W: Re. B: (Child Abduction: Unmarried Fathers)*: [1998] 2 FLR 146. Hale J., looked at article 8 and article 14 in the context of the Hague Convention The learned judge identified the key question before her as being " … whether our law is required automatically to afford completely equal parental responsibility and authority to the parents or whether the opportunities of developing their relationship given to the father by English law are a sufficient safeguard of their family life, having regard to the wide margin of appreciation which is recognised in this context … The cases so far do not indicate that Contracting States are required to do this, so long as there are sufficient opportunities of developing the relationship between father and child. They all concern laws which are undoubtedly more defective than ours now is in this respect". On the facts of the case the judge concluded that there was no breach of article 8 and that the difference in treatment between unmarried fathers and married fathers in English law was not tantamount to discrimination under article 14, as it had an objective and reasonable basis of justification.

60. As can be seen the decision of Hale J. was reached on the basis that English law afforded an unmarried father a reasonable opportunity of developing a relationship with his child and as a result the statutory provisions in question were a sufficient safeguard of family life under article 8. This very statement however highlights the acute difficulty which an unmarried father faces in a child abduction case. At the outset let me immediately acknowledge, that notwithstanding the views expressed above, the policy of Irish domestic law and to some extent that of the European Court of Human Rights (see *B. v. U.K.* [2000] 1 FLR 1), is in general to allow for a distinction between the rights of a married father and those of an unmarried father with regard to their children. So much so that no case under the European Convention on Human Rights Convention has to date abolished all differences between both fathers. Such a view may be justified in the generality of a child's relationship with his parents. This discrimination however causes particular difficulty for the unmarried father especially in cases involving the Hague Convention or the Regulations. These difficulties, which are self evident and which have been acknowledged in this jurisdiction by the Supreme Court in *H.I. v. M.G.*, have not been addressed in the manner hoped for by Keane J. in that case at p. 133. Many might argue that in a purely domestic context the 'right to apply' under the Guardianship of Infants Act, 1964 may be considered as a sufficient vindication of the position of an unmarried father, particularly given the varying circumstances which may surround a child's conception, as well as the wide variation in the frequency of contact and quality of the father and child relationship.

61. However for an unmarried father access to a court with competent jurisdiction, which incidentally is a constitutionally protected right in Ireland, is an essential pre-condition to obtaining any legally enforceable influence over his child. Unless such an application is made when the child is habitually resident in this jurisdiction the opportunity therefor maybe lost forever. In many of the Convention cases the father has been denied any relief because of this. Moreover such a process simply encourages mothers to behave in "abhorrent" and "reprehensible" ways, as is demonstrated in some of the cases above mentioned. As the Convention was not designed to apply to what has been described as *ex post facto* orders or "chasing orders" (see *Thomson v. Thomson* [1994] 3 Can. S.C.R. 551, this problem of fleeing mothers who furtively remove children from their place of habitual residence, without the knowledge consent or approval of their father, is most acute. If this anomaly could be addressed it would go a significant way in removing the objection which presently exists in this regard. In my view it would also very much strengthen the enforceability of the objects of both the Convention and the Regulation. Is there any way therefore that this Court can, without usurping its function, lawfully address this issue, for in truth that is where the major problem lies. Given the fact that no declaration of incompatibility is sought in respect of any provision of the Guardianship of Infants Act, 1964 no relief can follow from what is included or not included in that Act. However the applicant argues that by virtue of his relationship with his (emphasis added) children, the phrase 'wrongful removal or retention' should for Regulation purposes be so construed in a manner which vindicates his article 8 rights. If this can be done he must therefore be deemed to have 'rights of custody' within the meaning of article 2 of the Regulation.

62. The cases which I have cited above deal with articles 8 and 14 of the European Convention on Human Rights in the context of domestic measures from individual Member States. There is as well, the case of *Re. W: Re. B: A Minor: unmarried fathers*) [1998] 2 FLR 146, which deals with the Hague Convention. None of them however deal with the Regulation and what influence the European Convention on Human Rights might have on that instrument via its position in EU law.

Article 6 of the Treaty of the European Union (TEU) provides as follows:-

> "(2) The Union shall protect fundamental Rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms… and as they result from the constitutional principles common to the Member States, as general principles of Community law".

Whilst it is overstating the situation to say that this article effectively renders the Convention part of the ECJ case law nevertheless there is no doubt but that it has a pre-eminent role in community law. In *Nold v. Commission Case* 4/73, [1974] ECR 491, the ECJ identified the Convention as one of the primary sources of fundamental rights whose observance is guaranteed in the community legal order. Takis Tridimas, in The General Principles of EC Law (Oxford, 1999) at p. 237 states:

> "The case law acknowledged the 'special significance' of the Convention, the underlying principles of which 'must be taken into consideration in Community law. Reference to its provisions have been made in numerous cases. Amongst the most oft-quoted articles are article 6 and 13, 8 and 10. Reference are also made in numerous Community documents and measures of secondary law. Given the special status of the Convention, it would be unthinkable for the Court not to recognise as fundamental a right enshrined in its provisions. Although the Community is not formally bound by it, leading commentators accept that 'the Convention has the same effect as if the Community was formally bound'. This view is countenanced by Article 6(2) of the TEU which commits the Union to respect fundamental rights 'as guaranteed by the European Convention' … It seems therefore that the Community is bound to respect, as a minimum, the standards of the Convention which form an integral of Community law".

63. Accordingly I am satisfied that in both the interpretation and application of this Community instrument, this Court is entitled to have regard to the European Convention which in the particular circumstances of the case equates with article 8 thereof. I say article 8 only because I do not think it is necessary to treat the issue separately under article 14. In truth the net point, at this juncture is not a discriminatory one but rather an interpretative one.

64. In the more usual type of case, involving the European Convention, the court, at this point in its judgment, would be considering whether or not a particular domestic measure, either based on statute, or court or administrative decision, so hindered the enjoyment of a Convention article that the applicant's rights had been infringed. Any such interference however may also have to be looked at under the saving provisions of article 8(2). That provision reads "8(2) There shall be no interference by public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". In addition to prohibiting arbitrary interference however it should be noted that article 8 also places positive obligations on the State, subject to a margin of appreciation, to have in force measures which will enable parents to be reunited with their child, who has been wrongfully removed or retained see *Iglesias Gil v. Spain* (2005) 1 FLR 190.

65. In this case the situation is somewhat different. As I have said it is not the applicant's primary approach to identify a provision of the Act of 1964, and to suggest that his article 8 rights have been infringed by reason of that provision's existence or operation. Rather, as I understand the submission, it is that in the context of article 8 a broader definition is called for in respect of the phrase 'rights of custody' … acquired by operation of law under article 2 of the Regulation. In other words there is nothing in principle to prevent a court from leaving untouched the existing jurisprudence under article 3 of the Convention, whilst at the same time giving a more comprehensive meaning to this phrase for Regulation purposes.

66. It is submitted by Mr. James Connolly S.C. on behalf of the notice party and supported by Miss Inge Clissman S.C. on behalf of the respondent, that the Act of 1991, as amended by S.I. 112/2005 adequately transpose and give effect to the Regulation in this jurisdiction and that as a result all parties have had their private and family lives respected in accordance with articles 8 and 14 of the European Convention. Keane J. in *A.C.W. &. N.C.W. v. Ireland and the Attorney General* [1994] 3 I.R. 232 was cited as supportive of this submission. Moreover it is said that the difference in treatment between a married and unmarried father has been found to be compatible with the European Convention on Human Rights, in *B. v. U.K.* [2000] 1 FLR 1 and in *Re. W: Re B.* [1998] 2 FLR 146. Therefore article 2 of the Regulation should be given the same meaning as article 3 of the Hague Convention.

67. It seems to me that the phrase 'rights of custody … required by operation of law' as used in article 2(11)(a) of the Regulation, must be given a meaning independent of Irish law seeing as it is, part of an autonomous legal order. That order also includes the European Convention of Human Rights. Therefore in keeping with the express objectives and general policy of the Regulation and following long established precedent in giving to it a purposive interpretation, I should endeavour to construe the above phrase in a manner consistent with the objects, purpose and intent of both the Regulations and the European Convention on Human Rights. In this regard I do not believe that the decision in *A.C.W. & N.C.W. v. Ireland and the Attorney General* [1994] 3 I.R. 232 is really on point, as the true challenge in that case was focused on the Hague Convention. Moreover the case pre-dated both the Act of 2003 and the Regulation.

68. The facts of the instant case are such that, at least up to the latter part of 2006, the applicant was part of a stable relationship 'indistinguishable from the conventional family-based unit', (See *B. v. United Kingdom* [2001] FLR 1) or to the use the words of Finlay C.J. in the case of *S.W. An Infant*, (see para. 49 above), as part of a family unit "bearing nearly all of the characteristics of a constitutionally protected family". As a matter of probability therefore if the applicant had had an opportunity of pursing his District Court application, he most likely would have been declared to be entitled to substantial rights in respect of his children. It is with such a father whom I am dealing and not with one, whose rights, if any, reside at quite the opposite end of the spectrum.

69. In these circumstances the applicant unquestionably enjoyed article 8 rights in January, 2007. The question is whether, given the legal nature of the Regulation, its policy and objectives when dealing with child abduction and the influence which as a matter of EU law the European Convention on Human Rights has on that instrument, the phrase 'rights of custody' contained in article 2(11) can be construed in such a way as to apply to the applicant in these circumstances? There has never been a difficulty in giving a broad connotation to the word "custody". That was so acknowledged in several Convention cases including In *C. v. C. (Abduction: Rights of Custody*) [1989] 1 W.L.R. 654 and *In Re. B: (A Minor) (Abduction)* [1994] 2 FLR 249. The difficulty has been with the word 'rights'. In my opinion such difficulties which have existed in that regard under the Convention should no longer apply under the Regulation. The only possible construction, to give full effect to the matters which I have presently identified, is one which recognises that the

applicant's role within the family unit confers upon him 'rights of custody' under article 2 of the Regulation. Any other interpretation would in itself amount to an interference with article 8. That of course should be avoided if possible. I therefore believe that as of January, 2007 the applicant had such rights, that such rights were been exercised by him and that the removal of the children from this jurisdiction without his knowledge, consent or approval was a breach of those rights. In such circumstances that removal in my view is wrongful within the meaning of article 2 of the Regulations.

70. At first glance this finding of 'wrongful removal' might appear to be inconsistent with the earlier finding of 'wrongful retention'. One might point to a difficulty in this regard given the existing case law on the correct meaning of and on the relationship between the words 'removal' and 'retention'. See for example *In Re. J. (A Minor) (Abduction): (Custody Rights*) [1990] 2 A.C. 562, 571. And indeed that may very well be the situation if the recipient of both such findings was the same person. However that is not the situation in this case. Whilst I have not been referred to any decision in which a 'wrongful removal' and 'a wrongful retention' was found to jointly exist, nevertheless the distinguishing point in the instant case is that rights of custody vested in different legal persons at different times . In any event, it is important to bear in mind the limited role of this Court under an article 15 request. Whilst I therefore realise the existence of some awkwardness in this conclusion I do believe that in the particular circumstances it is justified.

71. Finally could I say with respect, that the question before me is not the same as Hale J. posed in *Re. W*. Unlike what the learned judge said in that case, the key question before this Court is not whether all differences between married and unmarried fathers should be removed. It is much narrower than that. It is whether an unmarried father, who has preformed duties and accepted responsibilities in relation to his child - which are indistinguishable from those carried out by a married father, should be recognised for the purposes of article 2 of the Regulation as having 'rights of custody' in respect of that child. As I have said I believe that for the reasons above mentioned, such a father is the father, has acted as a father and should be recognised as a father. He therefore in my view has those rights.

72. Miscellaneous Matters
Lastly there are a number of miscellaneous points which should be briefly dealt with.

(a) The applicant wished to argue that the *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 was wrongly decided. Counsel on his behalf agreed that until reviewed by the Supreme Court I was bound by that decision,

(b) No submissions were advanced that the applicant had acquired 'rights of custody' under article 2, by way of agreement legally enforceable under the laws of this State,

(c) The applicant also made submissions under the Protection of Children (Hague Convention) Act, 2000 but in fact that Act has not as yet been brought into force in this jurisdiction,

(d) In the pleadings Mr. G.T. sought to argue that his designation as father on the childrens birth certificates conferred on him rights of 'parental responsibility'. That submission was not pursued during this case.

(e) There were no submissions made to this Court on what the common law position might be in respect of an unmarried father, and

(f) Given the ages of the children there was no question of this Court usefully interviewing or otherwise hearing from them.

73. In conclusion I have held firstly that the removal of the children from this jurisdiction in January 2007 is wrongful under article 2 of the Regulation as constituting a breach of the applicant's 'rights of custody', and secondly that their retention in England after the 9th of March, 2007 is also wrongful under article 3 of the Hague Convention as been in breach of the 'rights of custody' then vested in the District Court.