

**THE HIGH COURT  
FAMILY LAW****[2005 No. 15 HLC]  
[2005 No. 38 1A.]****IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE  
HAGUE CONVENTION AND IN THE MATTER OF K.McD., E.McD. AND J.McD., MINORS****BETWEEN****V.G.****APPLICANT****AND  
P.McD.****RESPONDENT****Judgment of Ms. Justice Finlay Geoghegan delivered on the 25th day of January 2006.**

1. The applicant is the mother of the three minors referred to in the title of the proceedings who will be collectively referred to as "the children" in this judgment. The respondent is the father of the children. The mother and the father are not married to each other. They have had what has been described as an "on/off relationship" for approximately 6 years. The eldest child K.McD. was born on the 15th October, 1999, the second child E.McD. was born on the 6th February, 2002, and the third child J.McD. born on the 26th September, 2003.

2. This is an application pursuant to the Hague Convention for an order that the children be returned to the jurisdiction of the courts of England and Wales. It is alleged that the children were wrongfully retained in Ireland by the father at the end of October, 2004. Nothing turns on the precise date. The present application is based on the evidence of the parties given in their affidavits as supplemented by limited oral evidence at the hearing. Regrettably there are many factual issues in dispute between the parties and the present relationship between the parties is not good. Also, regrettably I have concluded that neither party has told the court either on affidavit or in oral evidence the full truth in relation to the matters in dispute between them. Many of those disputes are not relevant to the issues which this court has to determine in the present application. It is however necessary to set out findings of fact on a limited number of factual issues relevant to the legal issues which must be determined in this application.

3. The mother has lived most of her life in England. The eldest child K. was born in England. The mother was the sole carer of K. after her birth. She was visited occasionally by the father who in that period was living in Ireland.

4. The father is Irish and appears to have lived most of his life in Ireland in or close to a town on the east coast. The second child E. was also born in England and shortly after her birth the father moved to England and lived with the mother and as she describes it they then lived "as a family". Their third child J. was born in September, 2003 whilst they were living together.

5. There is considerable dispute between the parties as to the nature of the decision made to move to Ireland in March, 2004. I find that this was a matter which had been under discussion for six to twelve months prior to the move; that the father had a strong desire as he perceived it to return to Ireland; that the mother did agree that the family should move but that she believed that if she did not like it that she could return to England with the children.

6. At the time of the move in March, 2004, the father sold land which he owned close to his home town and realised monies sufficient to purchase a house in his home town close to his mother. He already appears to have had an interest in a house owned with his mother. Further, he had a concern that the local authority would not sell him a second house so he arranged for the purchase to be made in the name of the mother (the applicant herein) and she appears then to have signed a declaration of trust in his favour. In her oral evidence the mother was clear that she considered the house to be a house belonging to the father.

7. Within a short period of time the mother became unhappy with the move to Ireland. She missed her family and friends. The relationship between the parties broke down. There is considerable dispute between the parties as to the circumstances in which the mother left the family home in Ireland. The mother contends that after this break-down in their relationship and by reason of her exclusion from the house by the father she commenced a relationship with another man in the same town in Ireland. The father contends that the mother took up part time employment and during her absences from the home commenced a relationship with a third party and then left the home to live with this other person. It is unnecessary for me to resolve any of these disputes. It is common case that by the end of June, 2004, the mother returned briefly to England leaving the children with the father.

8. A few days later, at the beginning of July, she returned to Ireland with her brothers. Again there is considerable dispute as to the circumstances in which the mother and her brothers took the three children back to England. Again it is not necessary for this court to resolve these disputes.

9. After her return to England with the children the mother sought and obtained from Brentford County Court on the 15th July, 2004, a prohibited steps order forbidding the father to remove the children from the care or control of the mother or the jurisdiction of the courts in England and Wales save for any contact previously agreed in writing between the parties or by order of the court. This was an interim order and a date was set for a further hearing in September, 2004. This order was served on the father in Ireland. He did not appear before Brentford County Court in September when the order was continued.

10. Relations between the parties appear to have been strained after the return of the mother and the children to England in July, 2004. However, the mother perceived that relations improved in the early autumn and telephone contact recommenced both between the parties and between the father and the children. The father did not travel to England in this period. The father's mother, who had been involved in the children's lives in Ireland, was in England during this period staying with her daughter and visited with the mother and the children and spent a day with them. In October, 2004, at the commencement of the half-term break the mother brought the children back to Ireland. There is again dispute between the parties as to how or why this occurred. The mother states that as relations had improved between herself and the father that she asked the father if he would like to see the children during the half-term break and that she reached agreement with him that she would bring the children to Ireland for a one week holiday with him during half-term. She also alleges that she arranged with him that she would leave the children at his mother's house. She brought the children over in a car and believes that she left England on a Saturday and arrived in Ireland on a Sunday morning.

11. The father contends that the mother arrived at his mother's house with the children unannounced. Further, that she brought the

children to Ireland as she was finding it difficult to cope with them on her own and that she brought them for an indefinite period. He also states that when the children arrived in Ireland they were in an unkempt state. He believes she arrived on a weekday but is not precise about the day. He says he believes this was so as he knows he was working on the arrival day as his mother telephoned him whilst he was at work to tell him that the children had arrived and that at that time he did not work on a Sunday.

12. I find that the mother did bring the children to Ireland without any agreement with the father as to the period they were to be left in his care. I have also concluded that the mother at the time was having difficulty coping with the children on her own and that this contributed to her decision.

13. There is further dispute as to what the mother did once she brought the children to Ireland. She says that she returned the next day, the Monday to England in her car and came back again at the end of the week in her car to collect the children. The father says that she stayed in Ireland and that she had available to her at the time a place to stay.

14. It is common case that the mother did come back to the father's house approximately one week later and sought to take the children back to England and the father refused. Contrary to what is stated in his affidavit the father in his oral evidence stated clearly that the mother did at that time wish to take the children back to England and that he refused to allow her take them back.

15. Whilst there is some difference between the parties as to how long the mother may have stayed in Ireland at the end of October or early November prior to returning to England or how many times she visited the father's house, it appears to be common case that on one visit by the mother to the father's house he handed her a summons for the District Court in Ireland in which he was seeking an order of appointing him as a guardian of the children and that she left shortly after the father's refusal to give back the children.

16. The mother returned to England in early November, 2004. She gave evidence which I accept that before she left Ireland she went to a citizen's advice bureau who gave her an appointment with a legal aid solicitor for early 2005. Those solicitors then appear to have corresponded with the father's then Irish solicitors informing them of the prohibited steps order. That correspondence was not put into evidence but it appears to have procured the withdrawal of the father's application in the District Court. The father acknowledges at paragraph 10 of the affidavit sworn by him herein on the 8th November 2005, that his application for guardianship had to be abandoned "according to legal advice I received, because of the prohibited steps order obtained by the mother".

17. However, notwithstanding this contact with her English solicitors, the mother states that she was never advised by them of the possibility of making an application under the Hague Convention for the return of the children to England. She states she believed from the advice given that she would have to get legal representation in Ireland to obtain the return to her of the children and was not then in a position to do this. This evidence was not challenged and whilst surprising is consistent with the letter from Lloyd Brennd to her housing authority referred to below.

18. The mother did not next return to Ireland until the end of January, 2005, or early February. There only was telephone contact from the mother to the father and the children between early November and the middle of January, 2005. The mother stated in evidence which I accept that she was unwell during this period; that she found it difficult to get out of bed some days and that there were a number of other difficulties in her life including the fact that regretfully an aunt of hers died on Christmas day. Limited evidence was given of difficulties encountered by the mother in her life prior to the period at issue. The evidence was not specific but the mother appears to have suffered from medical problems. Evidence was given by the father of erratic behaviour. Whilst I wish to make clear that I am not making any findings in accordance with the evidence given by the father about the mother, I have heard the mother's own evidence and had the opportunity of observing her both in the witness box and during the proceedings. I have formed the view that the mother is a person of fragile psychological disposition, volatile and not able to cope well with adversity. Further, I have concluded that as a matter of probability in the autumn of 2004, the mother did go through a turbulent period when she found it difficult to cope with her life and was very unsettled as to what she wanted for herself and the children

19. The mother appears to have improved again by January, 2005. Also in that month there was contact between the mother and the father. The mother states that the father informed her that he had no money with which to buy essentials such as milk and nappies for the children because "he did not have guardianship to be able to claim child benefit". As a result she went to her English solicitor who spoke to the father on the telephone and then wrote a letter to him dated the 21st January, 2005, in the following terms:

"Dear Sir,

*Re: - Our Client: V.G.*

*Children: K.McD. d.o.b. 15.10.99, E.McD. d.o.b. 06.02.02 and J.McD. d.o.b. 26.09.03*

We act on behalf of our Client Miss G. in respect of her matrimonial matters and write further on our Client's instructions.

We write to confirm that at present you are the primary carer of the children whilst they are living in your care in Ireland and confirm that our client is not claiming any Child Benefits for the Children in England and that you are able to obtain guardianship in order to claim Children's Allowance for the period that the children are in your care.

Yours faithfully,

*LLOYD BRENNAND"*

20. The mother states that this letter was written on her instructions to meet the immediate physical needs of her children about whom she was worried. Such evidence was not disputed. She states she was not consenting to the children remaining with the father in Ireland.

21. By consent of the father there was handed into court by counsel for the mother a copy of a second letter written by Messrs. Lloyd Brennd on behalf of the mother on the same date, 21st January, 2005, to the relevant housing authority for her in England. This had not been seen by the father prior to the hearing. The purpose of the letter appears to have been to avoid the implementation by the housing authority of a stated intention to remove the mother from her then accommodation and place her in a hostel. In the letter Messrs. Lloyd Brennd explained the then current position of the mother (their client) and her children (presumably in accordance with her instructions) to the housing authority in the following terms:-

"The children went over with the Client to Ireland in order to allow the Father to have contact over the half term break in October. The Father unlawfully retained the children and made various applications through the Irish Courts to obtain residency of the children. Our Client is strongly opposing these applications however she has to seek independent legal advice from Irish Solicitors who have the jurisdiction to represent her. However, due to the legal system in Ireland our client is not eligible for legal help and has had to secure employment before she can instruct a firm in Ireland.

We confirm that our Client has secured employment and this will commence on the 31st January 2005.

We also confirm that it is our client's intention that the children are returned to England and will live with her. However, these procedures can take time as Applications are made to Courts and timetables are given. Applications of such nature can take up to 12 months to determine especially as they involve children."

22. The mother did commence working on the 31st January, 2005, and travelled to Ireland on approximately four occasions during the next six to eight months to see the children. She also attempted during this period to arrange legal representation in Ireland. Ultimately in July, 2005, with the assistance of a politician, she obtained an appointment with a legal aid centre in Ireland and states that for the first time she was advised of the possibility of bringing an application under the Hague Convention. These proceedings were commenced following a request made through her legal aid solicitor to the Central Authority of Ireland for the Hague Convention.

23. In the meantime, the father has been caring for the three children. The eldest child is at a local primary school in Ireland. The father's mother assists with the care of the children. Notwithstanding, the father has not pursued any application to be appointed as a guardian of the children. No orders have been made in his favour either by the courts of England and Wales or the courts of Ireland in relation to custody or residence.

### Issues

24. The mother's claim is that there was a wrongful retention of the children in Ireland by the father within the meaning of article 3 of the Hague Convention at the end of October, 2004. Article 3 of the Hague Convention provides:

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

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

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

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

25. It is not disputed that in October, 2004, the mother had rights of custody in relation to the children within the meaning of article 3. On the evidence of the father, I am satisfied that he retained the children in Ireland without the consent of the mother and against her wishes. It is not disputed on behalf of the father that to retain the children without the consent of the mother was in breach of the rights of custody which the mother then had in accordance with the law of England and Wales. Two essential proofs to make the retention wrongful under article 3 were disputed:

(i) That the children were habitually resident in England and Wales at the time of their retention in Ireland in October, 2004; and

(ii) That the mother was at the time actually exercising her rights of custody.

26. The determination by the Court of the habitual residence of a child for the purposes of the Hague Convention is a matter of fact to be decided on all the relevant evidence: *C.M. v. Delegation of Malaga* [1999] 2 I.R. 363. The children in this application were habitually resident in England prior to March, 2004. The father submits that their move to Ireland in March, 2004, was such that they acquired at that time a new habitual residence in Ireland which they did not subsequently lose. Whilst the habitual residence of a child is not governed by any rigid rule of dependency it appears to me on the facts of this case the court in determining the habitual residence of the children must have regard to the fact that the mother is in Irish terms the sole guardian of the children or in English terms the person with parental responsibility. The father is not a guardian and it was not contended on his behalf that he has parental responsibility in accordance with the laws of England and Wales. I have concluded that the children did not acquire a habitual residence in Ireland between the period of March and July, 2004. Whilst the father undoubtedly moved to Ireland with the settled intention to remain here I have concluded the mother did not have such a settled intention. Further, within a short space of time difficulties had arisen and the future of the family unit consisting of the mother, father and the three children had become precarious. The mother was the only person with a legal right to custody of the children. I have concluded that the children did not change their habitual residence to Ireland in the spring and summer of 2004 prior to returning to England with the mother in early July, 2004. They were therefore habitually resident in England when brought to Ireland at the end of October, 2004. Finally, they did not lose their habitual residence in England in the approximate one week period prior to their wrongful retention in Ireland. Even if the mother brought them to Ireland to their father partly at least by reason of an inability to cope and without agreement on a definite date for return I do not consider she then had any settled intention of permitting them to reside long term or permanently in Ireland

27. The mother was caring for the children until she took them to Ireland at the end of October. She was exercising her rights of custody between July and October, 2004. The fact that she may have had difficulty in coping with the children and partly, at least, for that reason brought them to Ireland and placed them in the care of their father for approximately one week does not mean that she should be considered for the purposes of article 3 of the Hague Convention not to be in fact exercising her rights of custody. Also, the alleged wrongful retention only occurred when the mother turned up at the father's house in Ireland, sought to take the children back to England and was refused. In so turning up and requesting the children she was exercising her rights of custody.

28. Accordingly, I am satisfied that immediately prior to the retention by the father of the children in Ireland without the consent of the mother and against her wishes at the end of October, 2004, the children were habitually resident in England and Wales; the retention was in breach of the rights of custody of the mother which at that time were actually being exercised. Hence the retention was wrongful within the meaning of article 3 of the Hague Convention. That being so this Court is bound under article 12 of the Convention to make an order for the return of the children unless one of the defences or situations described in article 13 have been

established such as to give this Court a discretion not to order the return of the children.

29. The father only pursued one matter pursuant to article 13. It is alleged that the mother acquiesced in the retention of the children in Ireland after October, 2004.

#### **Law on Acquiescence**

30. Article 13 of the Hague Convention provides:

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

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

31. The principles according to which this Court should determine whether or not the father acquiesced within the meaning of article 13(a) of the Hague Convention are those set out by the Supreme Court in its decision in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416. In that case judgments were given by all three members of the court (Denham J., Lynch J. and Barron J.).

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

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

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

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

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

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

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

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

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

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

"I agree. In my view, acquiescence in the context of the Convention means an acceptance of the changed circumstances arising from the wrongful removal and/or the wrongful retention, as the case may be, by a parent in such circumstances

that it is reasonable that he or she should be bound by it. It must be such that it would be inconsistent for the parent who has acquiesced to seek later to rely upon the rights given to such parent under the Convention to have the child or children returned summarily. The acceptance may be by words or conduct."

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

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

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

#### **Findings on Acquiescence**

40. In accordance with the above principles the onus is on the father to establish that the mother acquiesced in the retention of the children in Ireland after the end of October, 2004 within the meaning of article 13 of the Convention. On the facts of this case he must establish that the mother either actively or passively accepted the retention of the children in Ireland after the end of October, 2004. No evidence was adduced which would support the exception cited by Lord Browne Wilkinson in the extract from *re H. (Abduction: Acquiescence)* [1998] A.C. 72 cited above.

41. The court must assess the alleged acceptance in the context of all the relevant circumstances of the case which are highly unusual. The relevant circumstances appear to me to include the nature of this family and the fact that the father has no legal right at present to the custody of the children. Also, the circumstances in which the wrongful retention occurred. Such circumstances include the move of this family to Ireland in March, 2004, the subsequent return of the children to England in July, 2004, and the fact that the mother brought the children to Ireland at the end of October, 2004 to the father notwithstanding the prohibited steps order of Brentford County Court.

42. Relevant also are the individual characteristics of each of the parties as I observed them. The mother as I have already stated appears a person psychologically frail, volatile and unable to cope well with adversity. She was in an unwell state in the latter part of 2004. The father by contrast appears a much stronger person and one who seeks to control his life by taking steps which he considers appropriate in the interest of himself and his children.

43. Considering all the evidence, both oral and on affidavit in accordance with the principles set out above I have concluded that the father has failed to establish, on the balance of probabilities that the mother did either actively or passively accept the retention of the children in Ireland. I find that there was no active acceptance by the mother. The only potential evidence of active acceptance is the letter to the father from Lloyd Brennard of 21 January, 2005. As already stated I accept the mother's evidence as to the circumstances in which it was written. It should not be regarded as determinative for the reasons set out above by Balcombe L.J. Further, the steps taken by the mother to preclude the father pursuing his application to the District Court are inconsistent with active acceptance.

44. Inactivity and delay in commencing an application under the Convention for approximately 9 months as there was in the case may often be facts from which a court will infer passive acceptance. However, in the unusual circumstances of this case I am not satisfied that acceptance by the mother should be inferred from such inactivity and delay. I have concluded, particularly having regard to my findings as to the mother's make-up and understanding or lack of understanding of the legal position, the procedures available to her and the necessity for lawyers in Ireland that such inactivity and delay was caused by an inability of the mother to arrange for the proceedings and not by reason of any acceptance by her of the retention of the children in Ireland. I find that at no material time after the end of October, 2004 did the mother accept that the children remain in Ireland.

45. Accordingly, I am not satisfied that the father has discharged the onus of establishing that the mother did acquiesce in the retention of the children in Ireland within the meaning of article 13 of the Convention and this Court is bound to make an order for the return of the children under article 12 of the Convention.

46. The children have been in Ireland living with the father since October, 2004. The children are very young. Fifteen months is a long period for children who are so young. The eldest child has spent more than one year at a school in Ireland. It is important that the return of the children be carried out in a way which is appropriate and in their interests. In the course of the hearing I was informed that the mother, would if an order for return was made have to arrange with her local authority to obtain appropriate housing in which she could live with the children. It is important that this be done prior to any order for return.

47. As I observed in the course of the hearing the determination of this application is not and should not be regarded as a determination in accordance with the welfare of the children as to their appropriate future care and where they should reside. The Court is bound to make an order for return where no defence under article 13 is made out. Custody/residence, access/contact and other welfare issues will now be determined by the courts of England and Wales if the parties are not able to reach agreement between them. The father, to date has not chosen to participate in proceedings in England and Wales. If he does intend bringing an application before those courts in relation to the care of the children then it may be appropriate that this be commenced as expeditiously as possible in order that appropriate arrangements are in place between the parties prior to the coming into effect of the order now made by this Court for the return of the children.

48. I propose placing a stay on the order being made and putting the matter in for mention at a future date and on that date will hear submissions as to the necessity for any undertakings by either party in relation to the return of the children and the timing of the coming into effect of the order for return. I will hear Counsel on the period of the stay and future date.

**Article 11.2 of Regulation 2202/2003**

49. Article 11.2 of Council Regulation 2201/2003 which applies to these proceedings obliges the Court to ensure that a child is given the opportunity to be heard in proceedings when applying articles 12 and 13 of the Hague Convention "unless this appears inappropriate having regard to his or her age or degree of maturity". Having regard to the age of each of the children to which these proceedings relate it appeared inappropriate that the Court should hear the children.