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THE HIGH COURT

FAMILY LAW

[2009 No. 42 H.L.C.]

[2009 No. 104 I.A.]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED)

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

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

AND IN THE MATTER OF COUNCIL REGULATION NO. 2201/2003 (E.C.)
AND IN THE MATTER OF J.S. McB.; E. McB.; J.C. McB. (MINORS)

BETWEEN/

J. McB.

APPLICANT

AND

L.E.

RESPONDENT

JUDGMENT of Mr. Justice John MacMenamin dated the 28th day of April, 2010.

Introduction

1. The circumstances of this complex and troubling case give rise to a consideration of the relationship and interaction between the Hague Convention on the Civil Aspects of International Child Abduction 1980; Council Regulation 2201/2003 E.C. (hereinafter Brussels IIR) and the European Convention on Human Rights (ECHR) as applied in this jurisdiction. The issues also necessitate analysis of E.U. primary and secondary law. The matter concerns the rights of an unmarried father involved in a long-term relationship where the mother, without consent, removed the children to another jurisdiction in the E.U.

The proceedings in England and Ireland

2. J. McB., the applicant, is the father of the three children named in the title of these proceedings. The respondent, L.E., is the mother. The parties were involved for many years but did not marry. On 25th July, 2009, without notice to the applicant, the mother removed the children from this jurisdiction and brought them to England where they are now living. On 2nd November, 2009, an originating summons was issued in proceedings between the same parties in the High Court of England and Wales; on the same date a number of orders were made in aid of the proceedings. On 20th November, 2009, the High Court of England and Wales made a further order permitting the father to bring an application to this Court for a declaration pursuant to Article 15 of the Hague Convention as to whether the mother's removal of the three McB. children was wrongful within the meaning of Article 3 of that Convention. The proceedings before this Court were initiated one month later on 23rd December, 2009, and were heard over a total of seven days in February and March 2010, the Christmas vacation intervening. In these proceedings the applicant seeks broader reliefs than the simple declarations permitted by order of the English High Court, and now claims:

> (i) An order pursuant to s. 6B of the Guardianship of Infants Act 1964, as amended, appointing him as a guardian of the children named in the title;
>
> (ii) An order pursuant to s. 11 of the Guardianship of Infants Act 1964 granting the parties joint custody of the children and regulating the question of access; and
>
> (iii) A declaration pursuant to s. 15 of the Child Abduction and Enforcement of Custody Orders Act 1991 and Article 15 of the

Hague Convention that the removal of the children from their home in Ireland in July 2009 and their continued retention outside of the jurisdiction of this Court was wrongful within the meaning of Article 3 of the Hague Convention and/or Article 2 of Council Regulation No. 2201/2003 EC).

Facts

3. The parties first met eleven years ago in 1999. The applicant was then aged 24 years. He is Irish but was living and working as a plumber in London. He is now aged 34 years. When the parties first met, the respondent was aged approximately 20 years. She had intended studying nursing but ultimately did not pursue this course. She subsequently obtained social work qualifications.

4. In subsequent years the parties lived together in England, Ireland, Australia and Northern Ireland. In November 2008 they returned to this jurisdiction, found a home in an isolated rural location near the applicant's home place and, until July of 2009, lived there. The respondent portrays the relationship as having been unhappy and unstable. She says that the applicant was violent, possessive and jealous. The applicant in turn says that the respondent was erratic and irresponsible and suggests that at one period during the relationship she was neglectful of the children.

5. The eldest child of the relationship is a son, J. McB. junior. He was born in England on 21st December, 2000, and is now therefore aged nine years. The next child, also a son, E. McB. was born in Northern Ireland on 20th November, 2002. He is now aged seven years. The youngest, a daughter Je. McB. was in born in Northern Ireland on 22nd July, 2007. She is now aged two years.

6. Prior to meeting the applicant, the respondent had been involved with another man, M.H. This obviously began when she was very young. There were two children of that earlier relationship. The elder of these two, a daughter A.H., born on 27th April, 1996, has been living with her grandparents in England for the past ten years. She is not involved in these proceedings. The second child, a son of M.H., is K.D.H., (also known as K. McB.). He was born on 2nd January, 1998, and is now aged twelve years. He remained in the respondent's custody when she began her relationship with the applicant. The applicant says that at all times he has treated K.D.H. as being his own son. It appears that this boy only recently discovered his true paternity. He is not involved in these proceedings although he is represented in the English proceedings.

7. The couple's earlier history may be summarised briefly. The affidavits sworn in these proceedings contain a number of other allegations and counter allegations. It is said that the respondent at one stage, when she was very young, became involved in an accusation of drug trafficking as a result of which she spent some seven months on remand in Holloway Prison during which time K.D.H. was born. The respondent denies she was ever convicted of any drug related offence.

8. The applicant became involved with the police in England when arrested on a drink driving charge. He apparently also subsequently came to police attention on an allegation of domestic violence against the respondent. On one or both occasions he apparently gave a false name. It appears that this fact came to the

attention of the police forces in England as a result of which prosecution was initiated against him, and the applicant absconded from bail. It is said charges are still outstanding against him.

9. The picture which emerges from the affidavits is of a rather unstable relationship. It is claimed in the English proceedings that the applicant was violent on a number of occasions to the respondent. He denies these accusations.

10. It is not the function of the Court to deal with the merits in this case, but only the issues of law arising, in particular, whether the issues of custody and access are to be heard here or in England. The fact finding process is limited to that question. I move to the relevant evidence.

The issue of habitual residence

11. The question of the "habitual residence" of the children bears directly on this main issue by reference to legal principles outlined in detail later in the judgment. Two key dates for this purpose are first, the habitual residence of the children on 25th July 2009 when the mother removed them to England; and second, their habitual residence as of 23rd December 2009 when these proceedings were initiated, seeking, as well as the declaration in terms of Article 15 of the Convention, the other reliefs including that the father be appointed a guardian of the children. The place of habitual residence on 25th July 2009 was Ireland. That is not in dispute. The facts relating to habitual residence at the date the applicant brought the case here must be considered in accordance with Council Regulation 2201/2003, Brussels IIR and a decision of the Court of Justice of 2nd April, 2009, *Case A* (C-523/07). The facts necessary for this latter determination are now outlined. The motive and intention of the mother are of particular relevance. To anticipate, the conclusion of the Court is that as of 23rd December 2009, the children's place of habitual residence was England.

Habitual residence up to 25th July, 2009

12. Between 2007 and 25th July, 2009, the parties and the children lived in Ireland. They had an established home in the father's home place. The applicant had family there. The children were in education undergoing religious instruction, and were friends with their Irish cousins who lived close by.

Habitual residence on 23rd December, 2009

13. The judgment now deals with the facts giving rise to the respondent's departure from Ireland, her motive and intention in going to England, and the extent of their connection with their new location.

The facts surrounding the mother's departure

14. While the relationship between the parties appears never to have been a settled one, matters began to come to a head between Christmas 2008 and New Year 2009. Then, as a result of the applicant's alleged aggressive behaviour the respondent decided on a number of occasions to bring the children across the border to a women's refuge in Northern Ireland.

15. On 26th January, 2009, the applicant was served with an application for an interim barring order initiated by the respondent. This followed an *ex*

parte application made to the local District Court on behalf of the respondent. As a consequence, the father left the home, a step which he took on a number of occasions when disputes arose between the parties. The proceedings were returnable for 2nd February, 2009. The applicant attended court with his solicitor on that date, but the respondent did not appear. The respondent claims that she was apprehensive of the applicant and did not wish then to become involved in court proceedings.

16. In early February 2009, the father was still living outside the home. On the 10th February members of his family visited the home. They found that, without leaving any message the mother had left. It transpired she brought the children to visit her family in England. The mother previously had little or no contact with her family in England. The circumstances of this estrangement are not entirely clear. The mother attributes what occurred to the applicant's controlling nature. The father, on the other hand, denies this, and says that the loss of contact arose from causes which had nothing to do with him.

17. Later in February 2009, the mother and the children returned to Ireland. They were then accompanied by the mother's younger sister, her boyfriend, and their baby. The three stayed for a period. The parties to these proceedings remained living separately for a period of two further months, but in or about early April 2009 were reconciled. The quality of their relationship apparently improved, such that they decided to get married. The date fixed for the marriage was 10th October, 2009.

18. Early in July 2009, the applicant went on a training course in Northern Ireland. He was absent from home for ten or eleven days. He remained in contact with the respondent by phone. He says that in one of these conversations the respondent asked him whether he was only marrying her so as to obtain guardianship of the children. This apprehension appears to have been a precipitating factor in what followed.

19. The applicant returned home on 11th July, 2009. The house was again empty. The respondent left a letter behind, saying that she had returned to the refuge. She also said that she had gone through the applicant's papers while he was away. What she found is not specified. In the letter dated 11th July, 2009, she wrote of her concerns about the applicant's alleged gambling, lack of financial responsibility and controlling nature. She expressed the view that he was marrying her only because he wanted to become a joint guardian of the children and to have control over them. She complained of the constant friction between them, and his excessive drinking. While she did not mention any history of violent incidents in that letter, an account of these is given in her affidavit in the English proceedings. These allegations are denied by the applicant.

20. The mother's intention in separating was not immediately clear. In her letter she wrote:

> "…so it's goodbye, you can see the boys and Je. (their daughter) whenever you want to…You can txt. me and I'll reply in relation to the kids only. I would never deprive the kids of you, nor you of them but I will not be answerable to you ever again. I will stay

nearby as long as you leave me at peace."

21. She also wrote:

"I am not taking the kids away from you J., you are a good dad and I have never said any different. It's me, I'm not happy."

Clearly, her idea then was that she and the children would live separately from the father but in a location relatively close to him.

22. The parties never again reconciled, and from then until 25th July, 2009, the mother and the children lived in a women's refuge, although the father had continuing contact with the children, particularly in early July when Je., their daughter, was in hospital with a serious viral infection. There is some evidence that he involved himself in their religious instruction and schooling. On the 25th July the mother and children flew to England.

The extent of the children's connection with their new location

23. The respondent has a large family living in her hometown in south eastern England. Four brothers and four sisters all live locally. Between them, these siblings have eleven children, all of whom are said to be close to each other. Grandparents live close by.

24. The parties' second son, E. McB. has a serious congenital eye condition. This is known as Best's disease and involves macular degeneration. The condition unfortunately affects a number of members of the respondent's family. She says that E.'s problem was merely suspected until on her first visit to England in February 2009 other members of her family told her about the condition. E. McB. is now under medical care in England.

25. The two elder boys, J. and E. are now enrolled in local schools. According to the mother they enjoy playing in the local football club on Saturdays and attend a group which teaches them how to deejay and street dance. They were due to start involvement in the Boy's Brigade. The girl, Je.'s name is on the waiting list to start at a nursery and also a local ballet class. The eldest son J. was invited to a workshop for gifted and talented children for which he had been nominated by his teacher. The respondent says the children have made friends with their own classmates, their cousins and their friends. She says they now therefore enjoy a wide circle of support.

26. The father sought to trace the mother and the children in September 2009. He went to England, but he did not establish contact with them. The respondent became aware of his presence in her home town and moved to a different location, later moving back to *her home* town as the children had been placed in school there. None of this evidence is controverted.

The applicant's failure to initiate guardianship proceedings in the District Court

27. Events between 15th and 25th July are also critical to the outcome of this case. Under statue law, an unmarried father has no automatic rights of guardianship. As will be explained later, such a father has, simply, an entitlement to apply to court to be appointed a guardian of his children, and for ancillary orders regarding custody and access. Such arrangements may also be made by agreement between the parties. In July 2009, the applicant formed the intention to make such an application to the District Court. He says that on 15th

July, 2009 he instructed his solicitors to prepare such an application.

28. The applicant's solicitor prepared draft proceedings. In a letter of advices sent to the applicant on the same day, the solicitor pointed out that the applicant could not apply to be appointed a guardian of K.D.H. as he was not the child's father. It was intended that the guardianship application be returnable before the local District Court on 9th September, 2009.

29. As a precondition to invoking the jurisdiction of the District Court, it was necessary for the applicant's solicitor to serve the respondent with the proceedings. As will be seen later, the fact of such service, even absent a court hearing, would be sufficient to vest that court with "custody" of the children with the result that their removal from the jurisdiction would have been wrongful within the meaning of the Hague Convention/Regulation. (see *G.T. v. K.A.O.* [2008] 3 I.R.567) The solicitor asked the applicant for the respondent's address. What happened thereafter is a mystery. For some unexplained reason the guardianship proceedings were never served on the respondent. The applicant asserts, though with no corroboration, that the respondent deliberately evaded service of the proceedings. There is no independent evidence of this. Moreover, there is no evidence from the applicant's then solicitor explaining the failure to serve the District Court proceedings. It is unclear whether this was as a result of the applicant's instructions or for some other reason. There is no evidence of any attempt to serve the documents either during the ten day period between the 15th and 25th July, 2009, or at any subsequent time. In the absence of other testimony to explain what happened, I do not think the evidence is sufficiently strong to conclude that the mother deliberately evaded service. It is clear that she stayed in the women's refuge until 25th July, 2009. During that time the applicant and the respondent had ongoing arranged contacts for access to the children. There would therefore have been opportunities to serve the proceedings on her but this was not done.

The mother's motive and intention

30. Between the dates of 15th and 25th July, the respondent changed her mind as to her long term intentions. I am satisfied she finally decided to move to and settle in England with the children. She attributed this final decision to an incident just after mid July when, she says, she found the applicant drunk while he had charge of the children.

31. The respondent made significant preparations prior to her departure. She booked air tickets with the assistance of the Women's Aid Refuge. She decided to go to her home town in England. She contacted the housing authorities there to arrange accommodation.

32. The mother was cross-examined on her affidavit. She testified that she moved to England to establish a new life for herself and the children because she found it increasingly difficult to deal with the applicant's conduct. She again laid emphasis on what she said was his threatening abusive and controlling behaviour. The respondent again accepted that, whatever about the relationship between her and the applicant, he had been a good father to the children. Her intention in removing the children from day to day contact with their father was because she feared his conduct would affect the children's wellbeing. Whatever about her intention, the effect of her action was to deprive the applicant of the

opportunity for day-to-day access. I think this was reprehensible.

Questions for determination

33. I move then to consider further Hague Convention issues which must be determined in these proceedings. The judgment must first deal with a preliminary application made by counsel for the respondent. Thereafter I move to the primary issues. The tests in Hague Convention cases were succinctly put by Finlay Geoghegan J. in *Nottinghamshire County Council v. B*. [2010] IEHC 9. The references throughout the passage now quoted are to the Hague Convention on Child Abduction 1980. The judge summarised the position in this way:

> "13. It is well established, in this jurisdiction and others, that it is for the requested Court, in this case the Irish High Court, to determine whether or not there was a wrongful removal from the State of habitual residence within the meaning of Article 3. Further, that such question potentially requires a determination, *inter alia*, of the following questions:
>
> (i) What rights did the relevant person hold under the law of the State of habitual residence?
>
> (ii) Are those rights, however described, 'rights of custody' within the meaning of Article 5 of the Convention?"

34. The judge continued:

> "14. Whilst each of the above questions are for determination by the requested Court, the first question is one which must be determined in accordance with the laws of the State of habitual residence; whereas the second question is determined in accordance with the Convention, as implemented into the law of the requested State i.e., in this instance, Ireland. Further, the term 'rights of custody'… must be given an autonomous meaning in accordance with the case law on the Convention."

35. Thus relevant issues in this case are: a) whether there was a wrongful removal of the children from the state of habitual residence, that is, Ireland. This necessitates the identifying of the rights of the father in Irish law. It will be necessary then to determine whether any rights of the father can be deemed to be "rights of custody" under the terms of Article 5 of the Hague Convention, or otherwise. Counsel for the applicant contends that the term "rights of custody" must be interpreted broadly, having regard to the terms of Brussels IIR; the European Convention on Human Rights as it is applied in this jurisdiction; the jurisprudence of the ECtHR (European Court of Human Rights); decisions of the E.U. courts; E.U. primary and secondary law, the Lisbon Treaty and the Charter of Fundamental Rights of the European Union. Having identified the appropriate criteria in accordance with the decision of the Court of Justice in *Case A* (C-523/07), the judgment then returns to the mode of determination of the habitual residence of the children as of 23rd December, 2009.

The preliminary application as to jurisdiction

36. To consider the application as to jurisdiction it is necessary to briefly outline

the statutory position.

a) The Hague Convention 1980

37. The Hague Convention has the force of law in this jurisdiction by the Child Abduction and Enforcement of Custody Orders 1991 ("the 1991 Act"). The objects of the Convention are to secure the prompt return of children wrongfully removed or retained in any contracting State thereto, and to ensure that rights of custody, and of access, under the law of one contracting State are effectively respected in the other contracting States. To that end, contracting States are to take appropriate measures to secure within their territories the implementation of the objects of the Convention. The extent to which those objects are achieved in these proceedings, concerning an unmarried father in Ireland who has not applied for guardianship, may be measured in accordance with the outcome.

38. The Convention provides at Article 3 that:

> "The removal or 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 at 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." [Emphasis added]

39. The Convention explicitly draws a distinction between "rights of custody" and "rights of access" in Article 5. That Article provides:

> "For the purposes of this Convention -
>
> > (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> >
> > (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

40. The removal of a child in breach of access (as opposed to custody) rights does not give rise to an order directing the return of the child. Instead this question is dealt with at Article 21 of the Convention which places access rights at a lower level and remits measures in aid of access to be taken by the Central

Authorities established under the Convention which must provide assistance to a parent seeking to exercise access rights. (See generally *Child Law*, Geoffrey Shannon, (Thompson Round Hall 2005) Chps. 10 and 12).

41. Clearly then, in the instant case the father seeks to establish that the rights he claims are custody rights. These latter have an autonomous meaning within the terms of the Hague Convention. It has been held in many other common law jurisdictions that a right of a non-custodial unmarried parent to refuse to consent to removal may render such removal without consent as being "wrongful". This may arise even in the absence of any prior court application for guardianship. This approach is by no means universal, and some contracting states have refused to interpret rights of custody in such a way, relying on the distinction between "rights of custody" and "rights of access" as identified in the Convention. The question arises as to whether such a right of *custody* exists in Irish law *without prior court application*, and if so the source of that right. (See Eimear Long, "The Hague Abduction Convention on Irish Law - rights of custody or rights of access", (2007) 10 (1) Irish Journal of Family Law 12).

42. As will be explained, the clear conceptual distinction between the concepts of custody and access forms the very basis of the Convention and gives rise to a fundamental differentiation in the way in which such rights are protected and vindicated.

b) Jurisdictional remit of the court

43. Counsel for the respondent, Mr. Gerard Durcan, S.C., invited this Court to find that the issue properly before it derived only from the terms of the English High Court order, that is to say, that this Court's determination should be simply pursuant to Article 15 of the Hague Convention, without reference to any other legislative provision. Article 15 of that Convention provides:

> "The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, *where such decision or determination may be obtained in that State*."[Emphasis added].

44. The consequence of acceding to this submission would have been that the Court would have been confined to making a determination as to whether the removal had been wrongful within the meaning of Article 3 of the Hague Convention, the text of which has already been quoted.

45. In 2005, however, the 1991 Act was amended. The purpose of this amendment was to embody Council Regulation (EC) No. 2201/2003 (Brussels IIR) within the statute law of the State. The Regulation is not, strictly speaking an exercise of family law competence, but rather legislation confined to the determination of the jurisdiction of Member States Courts in relation to divorce, legal separation, annulments and parental responsibility. Other substantive matters remain within the competencies of Member States.

46. Thus, s. 15 of the 1991 Act, now stands amended so as to encompass Article 2 of the Council Regulation, and as a result of the enactment of the European

Communities (Judgements in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (S.I. 112 of 2005) the section now provides:

> "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 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 other case, wrongful within the meaning of Article 3 of the Hague Convention." [Emphasis added].

47. The case here concerns two Member States of the E.U. Mr. Durcan, S.C. submitted that the jurisdiction of a court in Hague Convention proceedings to request an applicant to obtain a determination from the authorities in the State of a child's habitual residence is contained *only* in Article 15 of the Hague Convention, and that there is no equivalent provision in the Regulation.

48. While the issue as to whether or not an Article 15 request should be made in proceedings in another jurisdiction is a matter for the court in that jurisdiction, where such request is made of the applicant in those proceedings, the matter then comes before the court in the State of the child's habitual residence. It is a matter for the court in that State to determine whether it has jurisdiction to entertain an application for a determination on foot of an Article 15 request under its own national law. Thus, here, it is for this Court to determine whether it has jurisdiction under Irish law.

49. While counsel may be correct in his submission that the jurisdiction to request an applicant to seek a determination as to wrongful removal derives directly from Article 15 of the Hague Convention, and that there is no equivalent provision in the Regulation, I must reject the submission that the statutory remit of this Court should be confined to determine whether the removal was wrongful within the meaning of the Hague Convention, as opposed to the Regulation. No authority was cited on this question. It appears not to have been previously decided elsewhere.

50. This is an application concerning two Member States of the European Community. Section 15 of the Act of 1991, *as amended*, is engaged. In the circumstances of this case, therefore, the jurisdiction of the court is now conferred *only* by s. 15(1) (a) of the Act of 1991, as amended by the Regulation of 2005. Thus, in national law, the obligation of this Court is to make a determination in terms of s. 15(1)(a), that is to say, decide whether a wrongful removal or retention occurred within the meaning of Article 2 of the Council Regulation, Brussels IIR.

51. I consider there is support for this interpretation by reference to other parts of the same legislation. For example, s. 2(2) of the Act of 1991, as now inserted

by article 8(a) (iii) of the 2005 Regulation provides:

> "References in the Act to the Hague Convention shall, where the context requires in relation to applications under the Hague Convention to which the Council Regulation relates be deemed to include references to the Council Regulation." [Emphasis added].

52. Thus, where two Member States are involved, references to the Hague Convention are deemed to include references to the Council Regulation. I conclude that, in cases where the Regulation applies, the Court must now determine whether there has been a wrongful removal from or retention in a Member State within the meaning of Article 2 of the Council Regulation. What is in question here is a Regulation directly applicable in the State (Art. 288 T.F.E.U., ex Article 249 T.E.C.). Such interpretation is necessitated by the canons of interpretation which are now applicable as a consequence of E.U. membership. These necessitate that national legislation should be interpreted so as to conform with the objective intent of the Regulation which is, as it were, to graft the Regulation onto the Hague Convention. While the introduction of the Brussels II Regulation was not free from controversy, it is of legal force, and national legislation must be read in a manner conformable with it. It is the duty of the State and the Court to implement and apply a Regulation, and the objectives therein identified as part of E.U. law and as if it were national law.

53. Moreover, to conclude otherwise could give rise to an anomaly where, in the absence of fully expressing and giving effect to the Regulation, provisions or decisions of Member States might give rise to divergent interpretations of what is to be an *autonomous* code. This, clearly, would be at variance from the intent of the Regulation which governs the situation regarding two or more Member States.

The issue implicit in the preliminary application

54. There was significantly more to this preliminary application than met the eye. As will be seen, counsel for the father, Ms. Dervla Browne, S.C., in reliance on the decision of this Court in *G.T. v. K.A.O*. [2008] 3 I.R. 567, submitted that the terms "wrongful removal" and "rights of custody" as used in both the Hague Convention *and* Brussels IIR are, in fact, capable of *distinct* meanings under each instrument and that, in particular, the term "rights of custody" as used in the Regulation must be given an interpretation compatible with the law of the European Union. Counsel submitted that the term "rights of custody" used in the Regulation is capable of a broader meaning, based now on E.U. law, which draws *inter alia* from the jurisprudence of the ECtHR and the Charter of Fundamental Rights of the European Union. She submitted that the term "rights of custody" as used in the Regulation, is capable of a meaning so as to include a person in the position of an unmarried father, who, as in this case, at no stage had formally acquired any statutory rights such as guardianship or custody of the children. Counsel relied on the decision by the High Court in *G.T. v. K.A.O* as authority. She submits the High Court so found that the unmarried father in that case enjoyed "rights of custody", as well as finding that the District Court proceedings vested a right of custody in the court. However, on appeal, the Supreme Court confined itself to holding that the initiation of District Court proceedings was sufficient to vest "rights of custody" to that court thereby rendering the removal wrongful. Thus that court did not proceed to consider the

"broader meaning" issue on the appeal before it.

The applicant's case outlined in greater detail

55. Counsel for the applicant submits that the rights of the applicant in national law go considerably further than a mere statutory right to apply to the District Court for guardianship custody or access, and for his rights to be vindicated it is necessary to apply or imply a right of veto on removal of the children, even if *no* court application has been made. Ms. Browne, S.C., submits that a legal protection of that right necessitates that any lapse of time or other events do not predetermine the issue before a court, or render the right to apply null or void; and that the statutory right to apply for guardianship is to be vindicated with regard to the constitutionally based right of the child to have his/her welfare taken into account and to have the court act in his/her best interest. It is said that the principle of equality under the Constitution necessitates that a child born outside marriage has the same rights as a child born within marriage to have decisions made about his/her future on the basis of his/her welfare; and that the harmful effects or abrupt removal of a child from its environment, and particularly from the care of a parent who has exercised day-to-day care and control, should be prevented. Counsel submits that in national law, what have been termed elsewhere on decided authorities as a father's "rights of interest and concern" have been recognised, and that these should be in direct proportion to the circumstances that exist in a relationship between the applicant and the children. Therefore, it is contended, such rights or body of rights contains an implicit recognition that certain factual situations in relation to children born outside marriage and raised for a substantial number of years by both father and mother, are matters of importance in relation to the welfare of children who have constitutional protection.

56. In whatever terms the applicant's case is couched, I consider that fundamentally it hinges on ascribing rights to the father which derive from his status as member of a "*de facto* family". This must in turn depend on whether this concept is cognisable in Irish law. The children are not joined in these proceedings as parties. Their views and interests are not represented. The applicant is not entitled to invoke the rights of persons who are not parties to the proceedings and thus, as reflected in the submissions, the focus in this case was upon those rights claimed by the applicant himself.

57. The method whereby it is contended these rights should be recognised derives first from the inter-relationship of Brussels IIR and the Hague Convention. I move then to a brief further consideration of that issue, already touched on earlier in considering the preliminary application as to jurisdiction.

The interrelationship of Brussels IIR and The Hague Convention

58. I interpret the effect of the provisions of s. 2(2) of the Act of 1991, as inserted by article 8(a)(iii) of the 2005 Regulation (already quoted), to be that Brussels IIR is to be integrated into the provisions of the Hague Convention and read as one. References to the Hague Conventions are to "include" the Council Regulation. An Article 15 Hague Convention application is to be determined within the meaning of Article 2 of Brussels IIR in this case, having regard to the provisions of s. 15 of the Act of 1991.

59. The relationship between the two instruments was considered by Thorpe L.J.

in *Vigreux v. Michel* [2006] 2 F.L.R. where he observed, "that the intent of Brussels IIR was to be a "fortification" of the Hague Convention. At para. 37 of his judgment Thorpe L.J. said:

> "The provisions relating to the return of abducted children were the most contentious and therefore the most difficult of resolution during the negotiation of the Regulation. The resolution of the resulting impasse was the retention of the operation of the Hague Convention throughout the European region but with the fortification of what were seen, in the light of nearly twenty years of operation, as weaknesses or loopholes through which abductors were escaping."

60. Recital 17 of Brussels IIR identifies 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 of 25th October, 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11." [Emphasis added].

The term "complement" is defined in the Shorter Oxford English Dictionary 1973 as meaning to "complete or make perfect". The objective then is to "make complete", "perfect" or "fortify" the Hague Convention.

61. Article 60 of the Regulation also points to the nature of the relationship between the two Instruments in the case of Member States. It is headed "Relations with Certain Multilateral Conventions". It provides "in relations between Member States this Regulation shall take precedence over the following Conventions insofar as they concern matters governed by this Regulation…". Included in the identified Conventions at subpara. (e) is the Hague Convention. Thus, in case of conflict, the Regulation must take precedence over the Hague Convention 1980.

62. A number of consequences flow from this. The first of these is that I can find nothing to suggest that the two instruments are to be seen as permitting divergences in meaning or interpretation: to the contrary. Second, insofar as concerns Member States, the text of the Regulation is explicit – the role of this Court is to make a determination pursuant to Article 2 of the Council Regulation; not Article 3 of the Convention as it stood previously. In the case of inconsistency the Brussels Regulation takes precedence over the Hague Convention.

63. Such interpretation obviously precludes a juridical outcome which might give precedence to the terms of the Hague Convention over Brussels IIR. The paramountcy of the latter is clearly established. It is to take precedence in all Member States. No divergent interpretation of the combined instruments is permissible in any Member State.

64. By way of further illustration it would surely be incongruous, at minimum, that the provisions of the Regulation could have an effect that a removal of a child to, or retention, in a Member State, might be unlawful pursuant to the provisions of Article 2 of the Regulation (which defines "rights of access" and "wrongful removal or retention"), while a removal to, or retention in a non-Member State in the same circumstance could be seen as or interpreted by the court in another Member State as being lawful. This is not of course to suggest

that non Member States have been "signed on" to Brussels IIR, but rather to illustrate an inconsistency that might potentially arise were divergent interpretative approaches adopted, and what I consider to be the duty of courts in E.U. Member States. Having outlined a number of Hague Convention criteria, I now turn to Brussels IIR.

The relevant provisions of Brussels IIR

65. It is appropriate at this stage to advert to a number of specific provisions of the Regulation as they bear on the facts of this particular case. The question here is whether it permits of a broad interpretation of the term "rights of custody" as urged by the applicant. The Regulation is intended to apply to the issue of attribution, exercise, delegation, restriction or termination of "parental responsibility" (Article 1 (b)).

66. The term "parental responsibility" is defined as meaning "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall also include rights of custody and rights of access". (Article 2 (7)).

67. The distinction between the two concepts, those of "rights of custody" and "rights of access" are reflected in Article 2 (9) and 2 (10). "Rights of custody" are defined in the former as including: "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". Whereas; the term "rights of access" is defined as including: '… in particular the right to take a child to a place other than his or her habitual residence *for a limited period of time"*' [Emphasis added]. Thus any right of access must be constrained as opposed to rights custody which are not so (unless such rights of custody are being exercised jointly). The distinction lies (i) in the right to *determine* the place of residence in relation to custody rights and (ii) the limitation as to time in relation to access rights. As illustrated by some of the English case law there may be circumstances in which the rights overlap, but this does not arise here.

68. The definition of the term "wrongful removal" contained in Article 2 of Brussels IIR closely resembles the definition of the same concept in Article 3 of the Hague Convention quoted earlier. (See under heading "The Hague Convention 1980"). A "wrongful removal or retention" is defined in Article 2 (11) as arising in circumstances where such an act:

> "(a) is in breach of *rights of custody* acquired by *judgment* or by *operation of law* or by an agreement having legal effect under the law of the Member State where the child was *habitually resident immediately before the removal or retention* and [Article 2,11 (a)] and 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 responsibility cannot decide on the*

> *child's place of residence without the consent of another holder of parental responsibility*.' [(Article 2.11 (b)] [Emphasis added].

69. Each of the terms emphasised falls to be considered. Thus for there to be a "wrongful removal" it must be in breach of a "right of custody" as defined, which has legal effect in the law of the Member State where the child was habitually resident immediately before the removal. Such *rights of custody* would have to be actually exercised jointly or alone. The question here is whether in accordance with the legal authorities, the applicant enjoyed any such custody right, or indeed even a right of access.

70. As will be explained later, Article 9 of Brussels IIR also has a particular significance. It, too, deals with habitual residence and mandatorily defines which national court should have seisin of the substantive case. It is headed "Continuing jurisdiction of the child's former habitual residence" and provides:

> "1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall by way of exception to Article 8 retain jurisdiction during a three month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former residence …"

71. The general provisions in Article 8 are that the court of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State "at the time the court is seised" of jurisdiction. But it will be noted that Article 9 is triggered if the removal of a child is lawful, and when the child has acquired a new habitual residence.

72. The provisions entail that jurisdiction generally is to be exercised by the court where the child is habitually resident *at the time when that court becomes seised of the case*. Thus, in the instant case, if the children were moved lawfully, the effect of subsequently finding that the children were habitually resident in England by the time the Irish court became seised (23rd December 2009), will be that the English court must exercise jurisdiction. The residual status of a court in the place of a child's former habitual residence is such as to retain jurisdiction only during a three month period following the move for the purpose of modifying a judgment "on access rights issued in that Member State before the child moved". No such question arises here. There is no extant judgment on access rights.

73. The provisions of Article 11 of Brussels IIR also point to the interweaving between the Brussels Instrument and the Hague Convention. Under Article 11 (1) of Brussels IIR, it is provided that where a person applies to a competent authority in a Member State to deliver a Hague Convention judgment for the return of a child on the basis of wrongful removal paragraphs 2 – 8 of that Article shall be applicable. The criteria to be applied in such application resonate

with those in the Hague Convention. It is unnecessary to detail them.

74. As is provided in Article 19(2) of Brussels IIR, where parental responsibility proceedings involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. This again resonates with the Hague provisions. This case involves precisely an exercise of establishing the range of jurisdiction of the court first seised, the English court, at the request of that court. The question is whether this Court has any jurisdiction to entertain the broader claims brought by the father in regard to guardianship, custody and access.

The applicant's case under the Hague Convention; Brussels IIR and the ECHR

75. The applicant asserts that the rights of custody under the Hague Convention to care for the person of a child, and to determine its place of residence, should be understood in a manner which recognises the respect explicit in Article 8 of the ECHR, (private and family life), and Article 14 of the ECHR, (which prevents discrimination including on the basis of marital status). It is submitted that rights asserted by the applicant in a "*de facto*relationship" are recognised in Strasbourg jurisprudence; and that now, by reason of the recognition which is given in E.U. law to Strasbourg decisions as being a source of E.U. human rights law, these "ECHR" rights, as recognised in ECtHR decisions, must now be cognisable in Irish law. But, in fact, it is clear a *de facto* family relationship is a concept not cognisable in Irish law as explained later. This unresolved paradox lies as an ineradicable fault line in the reasoning behind the applicant's case.

76. Insofar as the applicant's own position is concerned, he had no *right of custody* as defined under the Hague Convention 1980. The applicant did not at any stage, or in any of the States in which he resided with the respondent, apply to a court to be made a guardian of the children for reasons which are not explained. In Ireland a District Court order would have determined and regulated the extent of his rights to care for the child and (if a custody right) "in particular to determine the child's place of residence" (Article 5 Hague Convention). The logical consequence of this situation is that the applicant is, per-force, constrained to argue on the basis of his having a form of "right of custody", whether by virtue of the existence of the "*de facto* family relationship" as recognised by the ECtHR in its decision, an inchoate right as recognised in some common law jurisdictions, or such "inchoate" right as defined in Strasbourg decisions. I move then to these issues.

The ECHR jurisprudence on family life and privacy

77. Counsel for the applicant draws attention to the fact that the European Convention on Human Rights: (1) guarantees the right to respect for family life under Article 8, and the right to non-discrimination in the enjoyment of rights as identified under the Convention (Article 14); (2) recognises that the margin of appreciation given to contracting States in deciding custody issues is a wide one, but (3) applies a more stringent standard of review with regard to measures which can affect access to children and the safeguards protecting family bonds. Counsel submits that, as a matter of ECHR jurisprudence, the obligation devolving on a State is positive, *i.e.* to ensure that a tie or bond of a family nature develops. She submits that a State cannot discriminate purely on marital

status on matters of this kind; and that a failure to attribute to a father in a "*de facto* relationship" the same status as a married father is in breach of Article 14 of the Convention (non-discrimination) in conjunction with Article 8 (respect for family life) is discriminating under ECHR. Counsel concedes that, while certain aspect of family life would clearly only amount to giving rise to rights of access rather than custody, nonetheless family life which approximates to that of a married status merits protection at a higher level.

78. The applicant relies on a number of decisions of the ECtHR including *Marckx v. Belgium* [1980] 2 EHRR 330; *Johnson v. Ireland* [1987] 9 E.H.R.R. 203, *Keegan v. Ireland* [1994] E.H.H.R. 342; *Gorgulu v. Germany* (Application No. 74969/01) decision of 26th May, 2004; *Sommerfeld v. Germany*[2003] 36 E.H.H.R 33, (2004) 38 E.H.R.R.; *Zaunegger v. Germany* (Application No. 22028/04); and *Lebbink v. The Netherlands* (40 E.H.R.R. 18). Each case relates to the issue whether contracting States to the ECHR had sufficiently respected procedural rights in a manner sufficient to provide those in a position of "family life" with protection of their interests.

79. As has been pointed out the use of the term "family life" has led the ECtHR to develop jurisprudence on the scope of the provision and this flexible approach has allowed the concept to evolve gradually over the years. (See Kilkelly *Children's Rights in Ireland*, *Law Policy and Practice* (Tottel Publishing, 2008) at p.101). In summary, it can now be said that the European Court of Human Rights recognises family life between parents and their children without regard to their marital status, living arrangements, or even a lack of commitment to their children. In *Keegan v. Ireland* [1994] 18 EHRR 342 the ECtHR recognised the "family life" link of an unmarried father to a daughter whom he had met once prior to the mother seeking to place that child for adoption. Such recognition was based on the family situation of the parents at the time of the child's conception. More recently, one of the tests applied in *Gorgulu* was whether the applicant had been involved in the decision making process in relation to a child sufficient to provide him with the required protection of his interests. However the jurisprudence of the Strasbourg court acknowledges that State authorities, when deciding on issues such as custody enjoy a "wide margin of appreciation", although "stricter scrutiny is called for as regards further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life". (*Sommerfeld* at para. 63). In *Sommerfeld* the court held that very weighty reasons needed to be put forward to justify a difference in the treatment of a father of a child born of a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship (*Sommerfeld* at para. 93).

80. In *Zaunegger v. Germany* the ECtHR considered a situation where, under German law, an unmarried father was excluded from the outset by force of national law from seeking a judicial examination as to whether the attribution of joint parental authority served the child's best interest. Under German law, joint custody for parents of children born outside marriage could only be obtained by a joint declaration. The ECtHR observed that a child born out of a *de facto* family relationship is: "*ipso jure* part of that 'family' unit from the moment and by the very fact of his birth." (para. 37). The Court held such a relationship fell within

Article 8 of the Convention and therefore Article 14 (prohibition of discrimination) was applicable.

81. The Court observed at para. 60:

> "… that although there exists no European consensus as to whether fathers of children born out of wedlock have a right to request joint custody even without the consent of the mother, the common point of departure in the majority of Member States appears to be that decisions regarding the attribution of custody are to be based on the child's best interest and that in the event of a conflict between the parents such attribution should be subject to scrutiny by the national courts."

82. The ECtHR pointed to the Convention as being a "living instrument" subject to evolution. It concluded that the plaintiff had been discriminated against contrary Article 14 in that Germany had established no "reasonable relationship of proportionality between the general exclusion of judicial review of the initial attribution of sole custody to the mother and to the aim pursued, namely the protection of the best interests of the child born out of wedlock" (para. 63).

83. The extent of recognition of such rights perhaps reaches the highest point in the decision of *Lebbink v. The Netherlands* [2005] 40 E.H.R.R. 18, where the applicant, the father, had a relationship with a woman, and had a child with her. The mother of the child obtained a guardianship order pursuant to Dutch law. The parents did not formally cohabit, but the father was able to visit his child on a regular basis. The father did not formally recognise the child under Dutch law as the mother refused to give him permission for this, and her family were opposed to such recognition. The father could have sought judicial consent for recognising the child but he did not avail of this possibility, considering that it would stand little chance of success. Moreover, he preferred to respect the mother's position and maintain the *de facto* family ties he had with his daughter rather than establish formal legal ties with her. When the relationship between the parents broke down, the father applied to the Netherlands court requesting access to the child. The mother argued there that the father's request should be declared inadmissible in that there had never been any family life within the meaning of Article 8 of the E.C.H.R. or that if it had existed it had ceased to exist at the end of the relationship. The Dutch regional court accepted that there was family life within the meaning of Article 8 of the Convention, but this finding was reversed on appeal, and the ultimately appealed to the European Court of Human Rights (see paras. 11-13 of the judgment).

84. The ECtHR held that there had been a violation of Article 8 on the basis that there existed "family life" between the father and his child, notwithstanding the fact that the father was not cohabiting with the child, and his relationship with the mother had broken down. The Court therefore held that the decision of the Netherlands Court of Appeal, as upheld by the Netherlands Supreme Court, not to examine the merits of the father's request for access, but to declare it inadmissible on the basis of a finding that there was no family life between them, was in breach of the father's rights under Article 8 of the Convention. The court did not, however, determine that the father was entitled to automatic rights in relation to the child, rather that such rights should have been

determined on the facts of the case by the courts in the Netherlands.

85. A common but not universal thread underlying a number of such decisions is the extent to which the court was prepared to give recognition to fathers who had sought to vindicate their rights before national courts at an early time, or who for good reason had not done so. The ECtHR has been prepared to recognise that there exists between a child and his parents a bond amounting to family life and that the immediate enjoyment by a parent and child of each other's company constitutes a fundamental element of that right even if the relationship between the parents had broken down. Such recognition has given rise to declarations under Article 8 and Article 14.

ECtHR decisions – The rights of an unmarried father where there is no formal order as to custody.

86. But there is a contrasting jurisprudence from the same court. In example, in *B. v. U.K*. [2000] 1 F.L.R. 1, the unmarried father of a child applied for parental responsibility and contact orders, the mother then removed the child from England to Italy. The English courts dismissed the father's application under the Hague Convention on the basis that he did not have any formal right of custody under English law. The father took the case to the ECtHR complaining that unmarried fathers were discriminated against in the protection given to their relationships with their children by comparison with the protection given to married fathers.

87. The ECtHR concluded that the complaint was inadmissible because there was what it termed an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights which related to the range of possible relationships between unmarried fathers and their children. Fathers who had children in their care to any degree had different responsibility to fathers who simply had contact, this distinction was sufficient to justify the difference in treatment between those with parental responsibility and those without.

Guichard v. France

88. Ultimately, however, on the sixth day of this hearing, it emerged that there was Strasbourg jurisprudence which directly addressed a set of facts almost identical to this case. *Guichard v. France*, Case Number 56838/00, 2nd September, 2003, is, I consider, a case directly on point. The parallels are remarkable. In *Guichard* while the father, a French citizen, had made a joint declaration with the mother recognising his son, he did not avail of certain statutory provisions under the French Civil Code. These provided that parental responsibility was to be exercised by the mother, but gave the father the possibility by a decision of a matrimonial causes judge, to exercise that authority, either alone or jointly with the mother, and, if appropriate, to have the home designated as the child's habitual residence. The mother, a Canadian national, unilaterally decided the take the child away to live with her in Canada, giving rise to litigation in the French and Canadian courts. The French courts concluded that the father had not exercised "parental responsibility" for his son at the time the child's mother took him to Canada. Accordingly, he did not have rights of custody over the child on that date for the purposes of Article 5 of the Hague Convention and did not have a right to determine the child's habitual residence. The father sought to bring proceedings to the ECtHR. He alleged

violations of Article 8 and Article 14. His application was dismissed as manifestly ill-founded. The Court heavily emphasised the margin of appreciation which is applicable in custody cases. It emphasised that its task was not to substitute its view for the domestic authorities in the exercise of legal responsibilities regarding custody and access. It referred to two previous decisions also closely on point. But the Court emphasised that:

> "Firstly, that during their life together the parents did not make use of the opportunity provided for by … the Civil Code to share parental responsibility by making the appropriate application to the guardianship judge."

The Court noted that only after the removal, had the applicant made an application for parental responsibility to the French courts. It concluded that the refusal of the French authorities to grant the applicant rights could not be regarded as infringing his right to respect for family life. It drew attention to the fact that fathers of children born out of wedlock could at any time apply to have the arrangements relating to parental responsibility varied. Thus it concluded, that there had not been a breach of the father's Article 8 rights, nor had there been any breach of his rights under Article 14 by reason of the fact that there was provided by the State a legal mechanism for the vindication of his rights, of which the father had failed to avail. Insofar as Strasbourg jurisprudence is relevant it seems to me that *Guichard* is the decision most on point. It does not favour the applicant. The *ratio* of the case must form part of the framework of reference. *Guichard* was not, to my knowledge, cited in any earlier case in this country where issues such as these arose.

89. Insofar then, as the applicant seeks to rely on Strasbourg jurisprudence, I do not consider that, as it stands, it is of assistance to his case. Consequently insofar as the applicant seeks to introduce or apply this jurisprudence by an E.U. "avenue", as it were, I do not think it avails him in the case most resembling this one.

Inchoate rights as recognised in the neighbouring jurisdiction by reference to Article 8 ECHR.

90. In the course of arguments I was referred to a number of decisions of common law courts which touch on the question of inchoate rights insofar as they should be recognised under Article 8 of the Convention on Human Rights. A number came from the neighbouring jurisdiction. These include *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249; *Re F* [2003] 1 F.L.R. 839; *Re O* [1997] 2 F.L.R. 702.

91. The term "inchoate" is defined in the Shorter Oxford English Dictionary in the following way:

> "just begun, incipient; in an initial or early stage; hence elementary, imperfect, undeveloped, immature."

The English utilitarian philosopher Jeremy Bentham considered that natural rights were a "contradiction in terms" or "nonsense on stilts". Bentham claimed that language which sought to describe such rights was in fact suggesting what rights there ought to be rather than what rights there actually were. In his work *Anarchical Fallacies* (1834) asserted "a reason for wishing that a certain right were established, is not that right; want is not supply; hunger is not

bread." The common law jurisprudence which has been developed in this area, however surely indicates that Bentham went considerably too far in condemning such rights out of hand, but the problem of identification and categorisation remains. What is the source of such rights? Some might suggest they are "natural rights" cloaked in positivist language. They are sourced in the connection by blood and upbringing of parent and child.

92. Whatever their philosophical basis, they are, as has been observed, good examples of common law courts seeking in a pragmatic way to do their utmost to protect children from being taken away from their primary carers; this being a classic case of abduction in the public mind. As in the case of *G.T. v. K.A.O.*, very many of the cases are highly persuasive on their merits. A common strand in many of the decisions in England is where the natural mother has abandoned her rights. This is not the case here. Thus even were this Court persuaded to travel this avenue, it would, unfortunately for the applicant, lead to a "blind alley". There is no suggestion here that the respondent has abandoned her rights.

More recent persuasive authorities on rights of custody

93. I should add that insofar as a "right of custody" for the purposes of Article 3 of the Hague Convention jurisprudence is asserted, a recent English decision would not appear to assist the applicant in this case.

94. In *AAA v. Ash & Others* [2010] F.L.R. 1, Sumner J. pointed out that:

> (i) The rights which exist under the Human Rights Convention allow for distinctions between the status of married and unmarried fathers. They are not rights at large;
>
> (ii) That earlier jurisprudence from the Strasbourg Court such as *McMichael v. United Kingdom* [1995] 20 E.H.R.R. 205 demonstrates that the European Court of Human rights was prepared to uphold the aim of legislation which identified "meritorious" unmarried fathers who might be awarded parental responsibility as compared to an automatic award to married fathers.

95. But returning then to the applicant's main argument, *Guichard* being the last word on Strasbourg jurisprudence, I find that even were E.U. law to provide a vehicle for the applicant to bring Strasbourg "rights" to bear, such rights would not avail him. This Court is constrained on binding authority not to give effect to inchoate rights. I turn first to a consideration of the rights of the applicant, in national law, and the limits of recognition for Strasbourg *determination* decisions.

The rights of the applicant in national law

96. As identified in *Nottinghamshire County Council* the first question is as to what rights the father held under the law of this State, being the State of habitual residence of the children at the time of the removal. In particular, does the father have rights as being a member of what is termed a "*de facto* family"?

Can "family life" be equated with "the family" as defined in the Constitution of Ireland so as to give rights to the applicant?

97. The Constitution of Ireland recognises the family in a very specific way. It is described in Article 41.1.1 as being the "natural primary and fundamental unit group of Society". By reason of that defined primary status, the State makes certain guarantees for the family, both by way of the Constitution itself and in statute law, as being those based on this "primary and fundamental unit". The family is identified as being "the necessary basis of social order" and "indispensable to the welfare of the Nation and the State" (Article 41.1.2). The "unit group", as defined in the Constitution, is recognised as being a "moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". The terms of the Constitution are very specific; by way of contrast to Article 8 of the ECHR the recognition is given to the family as defined by marriage, and not any broader concept such as contained in Article 8 "family life" which results in the recognition given by the ECtHR to the "*de facto* family" in some but not all circumstances, as illustrated by *Guichard*.

98. More than forty years ago, in *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, the Supreme Court stated definitively that the concept of a "*de facto* family" was not cognisable under the Constitution. This declaration of principle was reiterated as recently as December 2009, in *McD. v. L*. [2009] IESC 81, discussed below. In *T.F. v. Ireland* [1995] 1 I.R. 321, Hamilton C.J. pointed out at para. 372 that the constitutional pledge was not simply "concerned with marriage itself or with the spouses in a marriage, but also with the common good". In *McD. v. L*. the Supreme Court specifically referred back to previous decisions, in particular, *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567; *G. v. An Bord Uchtála* [1980] I.R. 32; and *W.O'R. v. E.H. (Guardianship)* [1996] 2 I.R. are authorities to the same effect.

99. In the national legal order, the identification of this constitutional line of demarcation does not, of course, operate as a complete bar to recognition of long-term relationships outside marriage.

100. As was pointed out by the Law Reform Commission in its report on '*Rights and Duties of Cohabitants*' (LRC 82-2006) in 2006, there has been a substantial growth in cohabitation. The Commission Report states at pages 10 and 11:

> "Though the situation is changing in some contexts, the current legal framework does not reflect this social reality. In general, cohabitants are left to a patchwork of common law and legislative remedies which lack coherency and certainty."

101. A number of these issues have been and are being addressed in the legislative process. Proposals for reform in the law on the subject matter of this case have been mooted over a number of years, (see also, Irish Human Rights Commission 2006: *The Rights of De Facto Couples*; Law Reform Commission Constitution Paper 2009: *The Legal Aspects of Family Relationships*). A court must refrain from making any comment on such questions however. The obligation of this Court is to interpret and apply the law as it presently stands. Any question of change in the law is one for the legislature or, where necessary, the people of Ireland speaking through a referendum on any constitutional provisions engaged. The decision here is unavoidably one of fundamental

principle, not as to how the facts might be interpreted in the light of long established case law.

102. The manner in which the Supreme Court has interpreted the relevant constitutional provisions is of vital concern in this case. That interpretation is based on the recognition given to the family. In *W.O'R. v. E.H*. [1996] 2 I.R. 248, for example, the natural father applied pursuant to s. 6A of the Guardianship of Infants Act 1964 to be appointed guardian of his two children from a long term relationship that had recently ended. In that judgment, a majority of the Supreme Court affirmed that natural fathers had no constitutional rights in respect of their children, and that such rights and interests as the father might enjoy from family connection were factors to be taken into account by the courts in seeking to identify the welfare of the child *where* that father had exercised his statutory right to apply for guardianship, custody or access.

103. In *W.O'R*. Murphy J. trenchantly expressed his opposition to any "natural" (as opposed to statutory) rights AT P. 294 as follows:

> "1. What are described as 'natural rights' whether arising from the circumstances of mankind in a primitive but idyllic society postulated by some philosophers but unidentified by any archaeologist, or inferred by moral philosophers as the rules by which human beings may achieve the destiny for which they were created, are not recognised or enforced as such by the courts set up under the Constitution.
>
> 2. The natural rights aforesaid may be invoked only insofar as they are expressly or implicitly recognised by the Constitution; comprised in the common law; superimposed onto common law principles by the moral intervention of the successive Lord Chancellors creating an equity jurisdiction of the courts, or expressly conferred by an Act of the Oireachtas, or other positive human law made under or taken over by, and not inconsistent with, the Constitution.
>
> 3. The Constitution does not confer on or recognise in a natural father any right to the guardianship of his child (see *State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, and *J.K. v. V.W*. [1990] 2 I.R. 437."

104. In his concurring judgment in *W.O'R*., however, Barrington J., took a different approach, arguing (at p. 280) that the decision of the Supreme Court in *Nicolaou* was based upon a false syllogism *viz.* (to paraphrase) "many natural fathers show no interest in their offspring and the State may exclude them from a say in their children's welfare: the prosecutor is a natural father; therefore the State might properly exclude him from all say in his child's welfare". In Barrington J.'s view by reason of the blood relationship between a parent and a child there existed a connection of moral rights and duties which the law was obliged to respect, which rights might be referred to either as "natural" or "constitutional" rights and duties. I touch on these observations because they perhaps find a resonance in the judicial discussions in other common law

jurisdictions between the application of a "positivist approach" to the rights of unmarried fathers, by contrast to a reliance in other authorities on the concept of inchoate rights. But here the views expressed by Murphy J. have found favour subsequently as will be seen.

105. It is quite clear that there is a very real distinction between the constitutional recognition given to natural mothers, who enjoy a personal right to custody of their children, and the very limited right vested in natural fathers. (See the passage from O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32, 55 cited below).

The decision of the Supreme Court in McD. v. L.

106. It is now necessary to address directly whether the concept of a "*de facto* family" is cognisable in national law. The relevant principles have been authoritatively outlined by the Supreme Court in the recent decision of *McD. v. L*. concerning the rights of a sperm donor father. It is the law which this Court is constitutionally constrained to follow and apply. It goes directly to the first of the questions identified earlier, that is, as to what rights the father held under the law of habitual residence at the time of the children's removal, namely Irish law. As a matter of national law as it stands, the answer is that the right the father held was a right to apply to the District Court to have the question of guardianship, custody and access rights determined by that Court.

107. The focus, for the moment, must be on the judgments by Denham J. and Fennelly J.

108. Denham J., in the course of her judgment, refers to the earlier decisions regarding the nature of the family as recognised under the Constitution, and its inextricable connection with marriage. (*Murray v. Ireland* [1985] I.R. 532; *O.B. v. S.* [1984] I.R.316, and the clear statement of principle in*State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, where Henchy J. stated at p. 622:

> "For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1°, to guard with special care the institution of marriage."

109. Denham J. went further to state definitively at para. 63 of her judgment:

> "63. There is no institution in Ireland of a *de facto* family."

She explained that while reference had been made in earlier cases to the term, "*de facto* family" it was to be seen as a shorthand method of referring to the circumstances of a settled relationship in which a child lives.

110. Fennelly J. pointed out that national law ascribes particular importance to the unique role and consequent natural right of the mother of a child. He referred to the judgment of O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32 at 55 wherein the then Chief Justice stated:

> "As a mother, she has the right to protect and care for, and to have the custody of her infant child … This right is clearly based on the natural relationship which exists between a mother and

child …".

111. Concerning this passage, Fennelly J. pointed out:

> "65. The right here recognised is a personal right protected by Article 40, s. 3 of the Constitution. Articles 41 and 42 apply only to families founded on marriage. Section 6(4) of the Act of 1964 provides statutory support for the constitutional position of the mother: "*The mother of an illegitimate infant shall be guardian of the infant*."

112. The judge then turned to consider the rights or interests of a natural father to be appointed as guardian or to be granted access. He found it was a right to apply to court, but no other right. This positive right, of application, is identified in s. 6(A) of the Guardianship of Infants Act 1964 (as inserted by s. 12 of the Status of Children Act 1987). Having considered the authorities, Fennelly J. summarised the position of a natural, non-marital father in this way:

> "76. The legal position as it emerges from these cases is that the natural or non-marital father:
>
> 1. has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;
>
> 2. has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;
>
> 3. the strength of the father's case, which is described in the three judgments from which I have quoted as consisting of "rights of interests or concern," will depend on an assessment of the entirety of the circumstances, of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of "*small weight*;"
>
> 4. both Hamilton C.J. and Denham J. [in earlier cases] spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;
>
> 5. the father's rights, *i.e.*, right to apply, if any, are in all cases subordinate to the best interests of the child."

113. It will be seen therefore that as matters stand, the legislative onus lies on the father to initiate proceedings and make out his case. There is now no further legislative presumption involved. The judge also specifically referred to a phrase used by Finlay C.J. in *J.K. v. V.W*. [1990] 2 I.R. 437 at p. 447, that is the natural father's "rights of interest or concern".

114. Fennelly J. specifically explains that this concept of "rights of interest and

concern" had not been further analysed, and was to be seen in its contents as an expression designed to lay emphasis on the interests of the child. He said at para. 77 of the judgment the phrase was not intended "to confer any distinct rights on the father".

115. This finding is binding on this Court. I must find that these explicit statements of principle are determinative of a number of questions. This Court is precluded as a matter of national law from giving recognition to the concept of a *de facto* family. As a matter of national law, the father in this case has no constitutionally recognised rights of guardianship, custody or access. He holds a right to apply to court. The Court has already found there was a failure to apply to the court at any time during the currency of the relationship. It follows then the father has no right under statute to custody or access by reference to national law. It would necessarily follow that, at the time of the removal of the children, the father had no right of custody within the meaning of Article 5 of the Hague Convention. But as has been seen that is not the totality of the applicant's case.

116. It is now necessary to advert to another relevant aspect of the decision in *McD. v. L.*, that is to say, the manner in which the European Convention on Human Rights is recognised in national law.

The recognition given to the ECHR and judgments of the ECtHR

117. The manner in which recognition is given in national courts to judgments of the ECtHR has now been explicitly and authoritatively outlined. In his judgment in *McD. v. L.*, Murray C.J. points out:

> "The relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism the effect of which finds expression in Article 29.6 of the Constitution. According to the concept of dualism, at national level national law always takes precedence over international law. At international level, as regards a state's obligations, international law takes precedence over its national or internal law which is why a state cannot generally rely on their own constitutional provisions as an excuse for not fulfilling international obligations which they have undertaken. Coming back to the national level the dualist approach means that international treaties to which a state is a party can only be given effect to in a (*sic*) national law to the extent that national law, rather than the international instrument itself, specifies."

118. The Chief Justice explicitly referred to Article 29.6 of the Constitution which provides:

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

119. Having referred to the judgment of the then Supreme Court in *Re Ó Laighléis* [1960] I.R. 93, the Chief Justice observed:

> "This is not to take away from the fact that recourse may and has been had by our courts to the case law of the European Court of Human Rights (ECtHR) for comparative law purposes when a court is considering the import of a right under our law which is the same or similar to a right under the Convention."

120. He then observed:

> "In passing I would note that treaties established the European Communities and the European Union, with a consequential creation of a*sui generis* and autonomous legal order within the European Union according to which European law is a part of the domestic law of the State, is a wholly separate matter. The fact that the law of the European Union is directly applicable and may *to the extent permitted by the Constitution* take precedence over national law stems from the particular manner in which the State became party to those treaties by way of specific constitutional amendments adopted by the various referendums." [Emphasis added].

121. He continued:

> "The State did not rely on Article 29.6 as a means of incorporating European Union as a part of domestic law. Indeed, the Lisbon Treaty may have further consequences for the reception of the provisions of the European Convention on Human Rights (ECHR) in national law *in those areas governed by the law of the European Union*." [Emphasis added].

122. He added:

> "The European Convention may only be made part of our domestic law through the portal of Article 29.6 and then only to the extent determined by the Oireachtas subject to the Constitution…"

123. Fennelly J., no less definitively, observed that the provisions of the ECHR:

> "…as this court has repeatedly stated, do not have direct effect in our law. The contracting states are under an obligation in international law to secure respect for the rights it declares within their domestic systems. The European Court has the primary task of interpreting the Convention. The national courts do not become Convention courts."

124. He quoted with approval the speech of Lord Bingham in R. *(Ullah) v. Special Adjudicator* [2004] 2 A.C. 323, to the effect that:

> "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time; no more, but certainly no less".

Fennelly J. then observed at para. 102 of his judgment:

> "A court can only depart from that national law interpretation for the purpose of making any such national rule compatible with the State's obligations under the Convention."

125. It is true, of course, that pursuant to s. 4 of the European Convention on Human Rights Act 2003, judicial notice is to be taken of the ECHR provisions and of

> "(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction … and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

126. The term of recognition identified in the statute is that of "judicial notice". It is to be read and applied insofar as such ECtHR determinations generally are compatible with the terms of the Constitution of Ireland. This is the effect of the dualist approach. It is true also that the courts are under a duty to interpret the

law in a manner compatible with the State's obligations under the ECHR insofar as is possible. But it follows that a concept or right (recognised elsewhere), but not compatible with the terms of the Constitution must *pro tanto* be subordinated to the provisions of the Constitution as interpreted in national law. If the concept is not cognisable, by definition it gives rise to no constitutionally recognised rights. Section 2 (1) of the European Convention on Human Rights Act puts a duty on the Court as far as possible (and subject to applicable interpretative rules) to interpret the S.I. 112 of the 2005 Regulation in accordance with the ECHR. Even leaving aside *Guichard* the interpretative obligation could not go so far as to require the Court to pronounce new rights where statute law does not confer them and current jurisprudence expressly precludes them.

The absence of recognition for inchoate rights in Irish law

127. With regard to inchoate rights, the applicant faces the difficulty that there is explicit authority to the effect that such rights of custody are not to be recognised in cases of this type. In *H.I. v. M.G*. [2000] 1 I.R. 110, Keane J. (as he then was), giving the majority judgment of the Supreme Court, considered the question of custody and inchoate rights in the context of the Hague Convention.

128. He pointed out (at p. 130 of that judgment) that rights of custody are essentially protected under Article 3 of the Convention, whereas the machinery for enabling arrangements to be made for securing the effective exercise of rights of access appears in Article 21. He referred to the explanatory report to the Hague Convention which drew a clear distinction between custody and access rights.

129. Having considered the manner in which the courts of the state of habitual residence might give effect to rights of custody or alternatively, access, Keane J. then went on to express the views of the court in this way on the matter of inchoate rights: "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 being 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." (p. 132 – 133)

130. In England where recognition has been given to inchoate rights there is persuasive authority on the question as to whether a potential (but not actual) right of veto could ever constitute a "custody right". This is to be seen in addition to the earlier observations of this Court in relation to the*AAA* case and abandonment. In *Re D. (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 the House of Lords had to consider a case where a mother in Romania on a divorce had been given custody of a two year old child, the father being granted what was termed "staying contact" or access for a total of 78 days per year. The mother subsequently took the child to England without the knowledge or consent of the father, who issued proceedings in the High Court seeking return of the child to Romania under Articles 3 and 12 of the Hague Convention. He asserted that the removal of the child had been in breach of his "rights of custody" as

defined by Article 5 of the Convention and was therefore a wrongful removal within the meaning of Article 3 requiring the court to make an Article 12 order for return. The mother contended that the father's rights to the child were no more than rights of access, the breach of which did not engage Article 3.

131. Having found that an actual right of veto would amount to a "right of custody" within the meaning of Article 5A of the Hague Convention, Baroness Hale then said:

> "38. I would not however go so far as to say that a parent's *potential right of veto* could amount to 'rights of custody'. In other words if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to 'rights of custody'. To hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' altogether." [Emphasis added].

The observations of Baroness Hale are particularly *à propos* on the facts of the present case when analysed. No matter what the other merits of the case may be, the start point is that the applicant is in the unfortunate position that the right enjoyed by him was to go to court by way of application on the questions of guardianship or custody and relocation. This right of application was not exercised. Had the father made such an application the outcome of this case could well have been radically different.

132. In the light of these clear binding statements of the Supreme Court in *H.I. v. M.G.*, I am unable to find that this Court should recognise, or give expression to inchoate rights on the facts of this case.

133. One might well envisage circumstances where an absence of recognition of rights recognising the close connection between a natural father and a child might have other consequences as acute as the present case. Where the mother is deceased, for example, or has abandoned a child, could it be said then that a natural father, no matter how deserving or meritorious had no superior or antecedent claim over a stranger, a relative or a state agency without a court order? However this is not such a case.

Family rights elsewhere in substantive E.C. law.

134. Can the applicant then gain support from E.U. fundamental rights law? The issue of "family rights" in E.C. law has thus far only arisen obliquely. Excluding Brussels IIR, the E.C. Court has thus far not given expression to any general family law competencies. There are measures which concern long term relationships. They arise in the context of employment and freedom of movement. E.C. law in these jurisdictions does not prohibit discrimination on marital status. Instead, equality of treatment as between such couples is attained on sex gender and sexual orientation grounds. The definition of a family has not yet arisen as a direct issue in E.C. law. The significance of the ECHR in the identification of fundamental rights in Community Law has been repeatedly recognised. The Court of Justice has emphasised that in the realm of *fundamental* rights it draws inspiration from the constitutional traditions common to the Member States and have recognised the ECHR's "key significance in that respect". The Court of Justice has recognised that the ECHR is one source

of "inspiration" for that court, one of the constitutional traditions common to the Member States. In*European Parliament v. The Council of the European Union*, Case 540/03 the Court of Justice observed:

> "35. Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect …"

The Court pointed out that Article 6 (2) EU states that:

> "The Union shall respect fundamental rights as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States as general principles of Community law."

Thus far, however, the Court of Justice has not taken any steps which go beyond "family life" rights as recognised in ECHR jurisprudence. The question has arisen only indirectly in the definition of the terms spouse or family in connection with the issues identified. Insofar as the ECJ might consider such a question ECHR jurisprudence is represented by the decision in *Guichard v. France*. This would not assist the applicant. In fact a consideration of decisions of the Court of Justice to date identifies a further limitation – that is the extent to which the term long term partner or spouse is recognised not in one, but all Member States of the E.U. A regulation or Directive cannot be given a simply national interpretation derived from social developments in one Member State as explained below. The extent of E.C. jurisdiction or competence is yet to be defined fully.

135. The ECJ has paid particular regard to Article 8 of the ECHR in the context of family reunification (*European Parliament v. Council of European Union*). But the right to respect for family life contained in Article 8 (1) ECHR is not absolute. Thus, for example, the right of non-nationals to enter a country is not guaranteed under Article 8 of the ECHR. However the only permitted limitations on Article 8 (1) rights are those identified in Article 8 (2). However authorities which haven been cited to this Court such as *Netherlands v. Reid* [1986] ECR 1283 establish that for example, for the purpose of interpretation of the free movement directives or regulations, the term "spouse" did not include a non-marital partner within a stable relationship.

136. In *Reid* the ECJ rejected a submission that a long established relationship extant for more than five years should be deemed a "spouse". The ECJ reasoned that the term "spouse" must be given a Community law meaning, and it should take into account legal and social developments in the whole of the Community and not just one State:

> "12. According to Article 189 of the E.E.C. Treaty Regulation No. 1612/68 has general application, is binding in its entirety and is directly applicable in all member-States.

> 13. It follows that an interpretation given by the Court to a provision of that regulation has effects in all member-States and that any interpretation of a legal term on the basis of social developments must take into account the situation in the whole Community; not merely in one member-State."

The ECJ did not consider that social developments in the whole of the Community could lead to the conclusion that "spouse" could be interpreted so as to include unmarried cohabiting partners. However, it held that these stable relationships *if* recognised by the national law of a Member State may nevertheless benefit from certain provisions of the Article. This is not the position here.

137. The subsequent judgment of the Court of First Instance in *Arauxo-Dumay v. Commission* ECR 1993 II – 97 demonstrated the reluctance of that court to widen the judicial interpretation of such terms as "spouse", "widow" and "married" in the context of cohabitation. It considered that change on that scale could only be made by the Community legislature, if it considered such a change to be necessary. There is no indication thus far, that the Court of Justice or the Court of First Instance (now the General Court) taking a broad application of ECHR jurisprudence in this area. The Regulation of family rights in areas such as these is seen as falling within the remit of national courts. As recognised in *European Parliament v. Council of the European Union* Member States have a margin of appreciation which in terms of identification of family rights or children's rights which is seen as being a wide one.

Secondary law

138. A number of areas of E.U./E.C. secondary law which clearly identify a distinction between spouses and partner have been cited in the course of argument but I do not consider it necessary to refer to them here in detail. In each instance the definition of spouse or family member in a broad way is phrased so as to encompass a recognition of long term relationships only when "registered" in accordance with the legislation of a host state, (Article 2 (2) Directive 2004/58); or duly attested membership of a long term relationship (Article 4 (1) Directive 2003/86 E.C.; Article 2 (d) Directive 2003/9/E.C.)

The Lisbon Treaty

139. The applicant also argues that the passing of the Lisbon Treaty necessitates that some, if not all, of the provisions of the Charter of Fundamental Rights of the European Union must now be of direct effect in domestic law. It is argued also that the rights enumerated in the Human Rights Convention are now enforceable nationally as part of European law. The applicant in this context relied on the judgment of Murray C.J. in *McD. v. L*. to support this proposition.

140. As indicated earlier, what Murray C.J. actually stated in that case was that the Lisbon Treaty "… may have further consequences for the reception of the provisions of the European Convention on Human Rights (ECHR) in national law in those areas governed by the law of the European Union." I do not understand the Chief Justice's observations as having gone further than this precisely worded proposition. As indicated both ECHR and ECJ jurisprudence recognise the

broad parameters of margin of appreciation, discretion and broad consensus. I do not interpret the Chief Justice's observations as intending that the ECHR will have direct effect. The ECHR does not produce free standing rights in national law, but rather is an instrument which must be seen as one source of law in the resolution of disputes, in those areas governed by European Union law, the other being national constitutional law and European Union law. With the exception of Brussels IIR considerations the E.U. has not taken on any family law function.

The Charter of Fundamental Rights

141. I am unable to find in any provision of the Charter of Fundamental Rights an indication that it carries with it any radical change to the existing sources of law in this area. The Preamble to the Charter specifically recites that the rights contained therein are "reaffirmed". Furthermore, it will be recollected that the E.C. has not yet acceded to the ECHR. An indicator of the cautious approach adopted by the Court of Justice is to be found in the *European Parliament v. Council of the European Union* where the court was careful to indicate that Article 7 of the Charter of Fundamental Rights, which recognises respect for private and family life, did not confer entitlements any more extensive than those which might be enjoyed under Article 8 of the European Convention of Human Rights. The issue of discrimination between married and unmarried couples has not attracted consensus among signatories of the ECHR or among Member States of the E.U. There is no judgment from the ECJ on the issue.

142. As indicated earlier, by *Arauxo-Dumay*, the Courts of the E.U./E.C. have demonstrated reluctance to express a broad competence in family law. The Charter of Fundamental Rights does not expand competence in this respect (Article 51 (2)). Nowhere in the Charter is there to be found any reformulation of E.C.H.R. rights or any broadening thereof. While Article 21 of the Charter provides a lengthy list of grounds prohibiting non-discrimination none of these refer to marital status. I move next to two further observations which are also relevant. They relate to the recognition of the right in the manner formulated by the applicant.

The concept of certainty under E.C. law

The consequence of recognising the right asserted by the plaintiff

143. First, the recognition of broader rights such as those highlighted in this case would I think raise questions regarding the principle of legal certainty, a fundamental precept of Community Law recognised by the European Court of Justice (see *Belgium v. Commission* [2005] E.C.R.I -2801;*Owusu v. Jackson* Case (C-281/02), 1st March, 2005.) The issues of when and in what circumstances such "rights" arise might be recognised do not lend themselves to easy answers, and certainly not on a case by case basis.

144. Second, I would add that a determination of this type might also raise a fundamental question as to the proper function of a court seised with an application of this type which might well have implications for the law not just in this State but throughout Europe and beyond. In the light of the decision of this Court it is not necessary to further consider this point.

Conclusions

145. I conclude that insofar as the right asserted has its origins in the ECHR the

answer to that question is now to be found in the judgment of the Supreme Court in *McD. v. L*. The first step where the plaintiff's case weakens lies in the recognition of the family under the Constitution and the denial of any recognition of the *de facto* family in our national jurisprudence. The Constitution deals not with "family life" but with the family. It has not been shown that any part of national jurisprudence lies outside the consensus or margin of appreciation enjoyed by Member States of either the ECHR or the E.U./E.C. This Court must only follow clear and constant jurisprudence of the Strasbourg Court. It cannot be said that there is clear jurisprudence in relation to the right claimed. The contrary is true, (*Guichard v. France*). Even if such rights had been recognised it would not be for this Court to seek to "directly apply" a Convention. Such a practice was specifically deprecated in *McD. v. L*. A fortiori it would apply in the light of the specific constitutional recognition of the family therein.

146. I interpret that the Hague Convention and Brussels IIR are to be seen as part of a holistic unitary code. I am unable to conclude that E.U./E.C. jurisprudence accords recognition to decisions of the ECtHR such as may assist the applicant in this case. The national courts now have had the benefit of a recent authoritative reaffirmation of the recognition to be given to the family.

A question of precedent

147. It follows from the factual findings herein that the case here is distinct in nature from that which gives rise to the primary finding of the High Court and on appeal, the Supreme Court in *G.T. v. K.A.O*. [2008] 3 I.R. In *G.T.* the finding of both Courts was that the service of District Court proceedings on the respondent created a situation wherein pursuant to the Hague Convention, and Brussels IIR, the Court had "rights of custody" which had been breached. Insofar as the High Court judgment recognised the applicant's role within the family unit as conferring upon him rights of custody under Article 2 of Brussels II bis, and that any other interpretation would in itself amount to an interference with Article 8, I must now conclude that such findings albeit very much in accordance with the merits of that case have been superseded by the findings of the Supreme Court in *McD. v. L*. recited earlier. The decision in *Guichard* is relevant here also.

148. I consider that the Court is bound by the fundamental findings in *H.I. v. M.G.* and must apply them here. This Court cannot recognise inchoate rights.

A summary

(a) I do not consider that the applicant enjoys the benefit of a right as asserted by him to any right of custody within the meaning of the Hague Convention as complemented by the Brussels IIR Regulation.

(b) I consider the recognition of the asserted right would be contrary to and inconsistent with the terms of and the principles underlying the Hague Convention as complemented by Brussels IIR.

(c) I consider that I am constrained to follow the decision of the Supreme Court in *McD. v. L.* in rejecting any

recognition in Irish law of the *de facto* family, or any direct application of Article 8 of the European Convention on Human Rights.

(d) It will be recollected that a fundamental aspect of the Hague Convention regime is that the right in question should have been attributed to the person or body concerned under the law of the State of the habitual residence. The same principle is reflected in the Brussels IIR Regulation (Article 2 (11)). It is inescapable that the logic of the applicant's case would be that the recognition of the asserted right would necessitate that the threshold for "rights of custody" throughout the European Union would be the existence of the ECHR concept of "family life" as identified therein rather than rights pursuant to the law of the Member State from which the child was removed. I can find nothing in the Brussels IIR Regulation which would suggest that such a fundamental change was envisaged or intended.

149. I move now to consider how the Brussels II Regulation and the Hague Convention should be applied to remaining aspects of the case. In doing so I would also make the fundamental point that to grant the broad reliefs sought by the applicant would involve giving no voice to the views of the children in these proceedings where there is no scope for their views to be heard or assessed.

Further application of the Hague Convention and Brussels IIR.

a) Was the asserted right (if it existed) exercised jointly or alone?
150. Both the Brussels II Regulation and the Hague Convention are clear that the removal or retention of a child to be "wrongful" must not only be in breach of rights of custody, but that such rights of custody must have been "actually exercised either jointly or alone or would have been so exercised but for their removal or retention". (Article 2. (11)(b) Brussels IIR quoted earlier under the heading "The Relevant Provisions of Brussels IIR"). There is, surely a paradox between asserting that the "right" of custody should actually have been exercised at the time of removal, on the one hand, and on the other an assertion that a breach of what are identified as "potential or inchoate rights" could render a removal or retention wrongful. By definition such a "right" was not being exercised – it was, for want of a better term, "inchoate". Thus it begs the question of what in the applicant's case was the "right" actually being exercised pursuant to the Regulation. This does not allow for an easy answer. I consider that the qualification of the term "right of custody" by the use of the words "actually exercised" shows that the wrongful removal or retention only occurs where there is a breach of existing or exercised right of custody (see the decision of the Supreme Court of Canada in *Thompson and Thompson*[1994] 3 S.C.R. 551, La Forest J.). I cannot find there has been a breach of any "existing" or "exercised" right of custody for reasons which have been explained.

151. Having outlined the scope of Brussels IIR, I move finally to consider the application of that Regulation to the determination of the present habitual

residence of the children.

b) The present habitual residence of the children

152. I turn to the issue of the present habitual residence of the children. This bears on the question of whether the English or Irish courts should exercise jurisdiction and whether this Court would have jurisdiction to entertain any of the broader claims made by the applicant in these proceedings, (Article 19 (2) Brussels IIR). The question turns on a determination as to whether there was a "wrongful removal or retention". If the removal is in fact lawful then the court must go on to consider whether the removal did in fact change the habitual residence of the children. If both steps are satisfied it follows under Article 19 (2) that this Court is that "second seised" and must stay its proceedings in favour of the English Court.

153. It is clear that the habitual residence of a child is a question of fact to be determined having regard to all the circumstances of that child which pertain at the relevant time. (See judgment of McGuinness J. in *C.M. v. Delegacion de Malaga* [1999] 2 I.R. 363 and judgment of Macken J. in *S. v. S*.).

154. However, in the case of a *lawful* removal of a child from one Member State to another, change of habitual residence can take place in a very short period of time. The three month period specified in Article 9 of Brussels IIR (cited earlier in this judgment) begins: "following the move"; but the jurisdiction vested in the courts of the Member States of the child's former residence is to vary access arrangements. It would follow that the reference to a "three month period" implies that it was contemplated that a child could ordinarily acquire a new habitual residence during that period. This conclusion is acknowledged by the opinion of Advocate General Kokott at para. 43 of her opinion in *Case A* (C-523/07) [2010] Fam. 42, [2010] 2 W.K.R. 527. It is also reflected in the judgment of the Court of Justice, where the Court concluded at para. 39:

> "39. In particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that state, the child's nationality, the places and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

While *Case A* was not, strictly speaking, one of child abduction, it specifically refers to the manner in which Brussels IIR should be interpreted.

155. In her opinion the Advocate General had observed earlier:

> "43. In the case of a lawful move, habitual residence can shift to a new state even after a very short period. That is indicated by Article 9(1) of Council Regulation (EC) No. 2201/2003. Under that provision by way of exception to Article 8 the courts of the Member State of the child's former habitual residence retains jurisdiction during a three month period following the move for the purpose of modifying a judgment on access rights …"

In certain cases a court may seek to discover whether there was a corresponding common intention on the part of the parents to settle permanently with the child in another state. The habitual residence of a child

may *ipso facto* be the habitual residence of his or her parents (see the judgment of Macken J. speaking for the Supreme Court in *S. v. S.* [2009] IESC 77).

156. However, in the case of the child of unmarried parents, where the father does not have a right of custody at the time of movement of the child, then I must find that it is the intention of the mother which must be considered and ascertained as she was the only person who had lawful authority to determine the place of residence of the child. Among the factors which this Court should take into account are therefore the degree of integration into a social or family environment, the duration, regularity, conditions and reasons for the stay and the family move including the child's nationality, place and condition of attendance at school, linguistic knowledge and family and social relationships. The court must also have regard as to whether it is the intention of the parent having lawful custody to settle permanently with the child in another Member State as manifested by tangible steps such as the purchase or lease of a residence.

157. Here on the facts there are two relevant dates. The first is in regard to the claim that the removal was wrongful. This was the date of removal being the 25th July, 2009. The second relevant time is the date upon which this Court became seised with the applicant's application for guardianship and joint custody, that is 23rd December, 2009.

158. The children were prior to 25th July, 2009, habitually resident in Ireland. The removal was not wrongful for the reasons identified.

159. It will be recollected that the respondent swore (and this was not contested) that she had moved to reside permanently with the children in England on 25th July, 2009. She did so with the intention of establishing a life for herself and the children free from the father. Having regard to the totality of the evidence I must find that her intention was to move to England on a permanent basis with a view to establishing a new life there. By 23rd December, 2009, the respondent and the children had been living in England for a period of five months. The evidence with regard to their social circumstances, including attendance at school, social and family integration, friendships and access to medical treatment has been described earlier. I must find therefore that the criteria identified in *Case A* point to the children being habitually resident in England by the time this Court became seised of the matter in December, 2009. The new residence of the mother and children reflected not just a degree of integration but went further than that.

160. It follows from these conclusions that the English Courts should exercise jurisdiction on the substantive issue and not the Irish Courts. It also follows that the plaintiff is not entitled to any of the reliefs sought in these proceedings.

161. At the outset I observed that this was both a difficult and troubling case. The law protects those who hold custody rights. In this case the applicant father never applied to be appointed a guardian of the children. Nonetheless he had a significant and long term relationship with them. It was never denied that he had been a good father to them although clearly there were real issues between the applicant and the respondent. As matters stand, in the absence of agreement, the rights of unmarried fathers must be determined by the Courts. (I

should also perhaps add that the father will have a full opportunity to make submissions and be represented at the hearing of proceedings in England in relation to the custody of and access to the children, with a view to those Courts determining what is in the best interests of the children.)

Decision

162. It follows from the findings in this judgment that the Court must decline the applicant's claim for the reliefs sought. The Court must therefore conclude that the removal of the children was not wrongful within the terms of Article 3 of the Hague Convention and/or Article 2 of Brussels IIR.