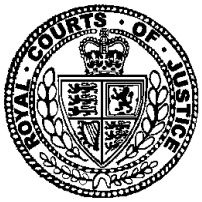

Neutral Citation Number: [2022] EWHC 1827 (Fam)

Case No: FD22P00101

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

K — **Applicant**

- and

N — **Respondent**

- -
- -

Ms Maggie Jones (instructed by **Ben Hoare Bell LLP**) for the **Applicant**
Ms Soraya Pascoe (instructed by **HRS Family Law Solicitors**) for the **Respondent**

Hearing dates: 12 and 13 July 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice MacDonald:

INTRODUCTION

1. In this matter, I am concerned with proceedings under the Child Abduction and Custody Act 1985 in respect of P, a child born on in September 2020 and now aged 1 year and 8 months old. The applicant K is, as now confirmed by DNA testing, the father of P. He is represented by Ms Maggie Jones of Counsel. The respondent, N is P's mother. She is represented by Ms Soraya Pascoe of Counsel.

2. The father seeks the summary return of P to the jurisdiction of the Republic of Ireland pursuant to the provisions of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The mother resists the application on a single ground, namely that the father did not have rights of custody in respect of P for the purposes of Art 3 of the 1980 Convention at the time the mother removed P from the jurisdiction of the Republic of Ireland. Within that context, the mother contends that the removal of P from the jurisdiction of Ireland was not wrongful. The mother does not dispute that P was habitually resident in the jurisdiction of Ireland at the time she was removed to the jurisdiction of England and Wales.

3. By way of evidence, the court has before it two statements of evidence from each of the parents, together with extensive exhibits, and an expert report on Irish law authored by Mr John Healy SC, an expert on the law of the Republic of Ireland. Mr Healy gave oral evidence to the court and was cross-examined. At this hearing, the court further admitted a statement from the applicant's brother, detailing what he says was an encounter with the mother in Ireland some days after the date she claims to have left that jurisdiction and a letter from the father's solicitors in Ireland that was produced by the father today. The court has also been assisted by a Position Statement prepared by Ms Jones on behalf of the father.

BACKGROUND

4. Whilst the statements in this matter go into intricate detail as to the history of the parents' relationship, for the purposes of these summary proceedings, and given the narrow nature of the question that is before the court for determination, the background to this matter can be taken shortly.

5. The parents of P were in a relationship from 2018 to early 2020, getting engaged in November 2019. Following difficulty in conceiving, they sought advice from a fertility clinic and, after making lifestyle changes, conceived P.

6. The mother contends that the relationship with the father was characterised by domestic abuse and coercive and controlling behaviour. Whilst in her statement the mother does not particularise her allegation of domestic abuse and coercive and controlling behaviour, relying on a short letter from a women's refuge evidencing their involvement, she does make a specific allegation of sexual assault against the father on 1 January 2020. In her statement, the mother suggests that P was conceived as a result of this assault although, following the issue of proceedings by the father, the mother also asserted that P was not the father's child. DNA testing has since established that B is the father of P. The father emphatically denies ever having been domestically abusive to the mother or having engaged in coercive and controlling behaviour. He

categorically denies having sexually assaulted the mother on 1 January 2020. The mother confirmed through Ms Pascoe at this hearing that she does not seek to rely on the exception to summary return provided by Art 13b of the 1980 Convention.

7. Both parents concede that their relationship cooled after the mother became pregnant and the father was not present for the birth of P. The mother contends in her first statement that the relationship ended on 10 February 2020, the date she contends she took P to England. The father contends that he provided financial support to the mother and P before and after P's birth. This is disputed by the mother. The father further contends that he had regular contact with P on a weekly basis between September and October 2020, after which the mother refused to permit him access to P. As a result of this development, the father's solicitors wrote to the mother on 2 February 2021 indicating that the father sought joint guardianship, custody and access to P and sought to negotiate the same. Having received no response from the mother, the father made an application to the Irish Court for an order conferring on him legal guardianship for P. In light of the issue that has arisen in respect of the existence or otherwise of rights of custody, it is important to examine the course of those proceedings in a little detail.

8. The father issued his notice of application for relief under s.11 of the Guardianship of Infants Act 1964, seeking directions concerning P and appointment as a joint legal guardian, on 9 February 2021, with a return date of 8 March 2021. An attempt was made to serve the mother with this notice of application by way of pre-paid post but the letter was returned as "not called for". Within this context, the father made a without notice application to the Longford District Court. The District Court heard that application on 8 March 2021 and made an order for substituted service by ordinary prepaid post to the respondent's Longford address, with a return date of 12 April for hearing of the substantive application under the 1964 Act. The original notice of application dated 9 February 2021 was endorsed on 8 March 2021 to reflect the order made on that date. Within this context, Mr Healy confirms, in line with the documents before this court, that the date of service of the notice of application was 12 March 2021. The Irish Court granted legal guardianship to the father on 12 April 2021, the mother having not attended the court. Following that decision, the father attempted to contact the mother but without success.

9. Within the foregoing procedural context, the mother contends in her evidence before this court that she moved to the jurisdiction of England and Wales with P on 10 February 2021. Her statement exhibits a copy of an e-ticket dated 4 February 2021 for travel between Dublin and Holyhead on 10 February 2021. The father exhibits to his statement an email from the letting agents responsible for the property that the mother was renting with the maternal grandmother prior to her leaving for England. That email states that the keys to the property were surrendered on the weekend of 7 March 2021. The father relies on this evidence to support his contention that the mother did not leave Ireland with P until 7 March 2021. In her second statement (made following the exhibition of the email from the letting agent to the father's first statement) the mother asserted that the maternal grandmother had in fact remained in Ireland until 7 March 2021. To her statement she exhibits the maternal grandmother's booking confirmation for travel to England on 7 March 2021. The court also now has before it a statement from the father's brother. In that statement, the father's brother contends that he saw the mother in Ireland on 6 March 2021.

10. The application before this court was issued on 8 February 2022, although the father had approached the Irish Central Authority in October 2021 and the application to the Irish Central Authority is dated 29 November 2021. Following the father's application to this court, the mother was located in England pursuant to a location order made by Theis J on 14 February 2022. The mother attended a hearing before Morgan J on 25 February 2022 and the time for the filing and serving her response to the application was extended to 4 March 2022. Following a further extension, the mother filed and served her response on 8 March 2022. In light of the contents of that response, on 11 March 2022 Mostyn J gave directions for expert evidence on Irish law. As I have already noted, the expert evidence in this case has been provided by Mr John Healy SC. Mr Healy was asked to answer, and has answered, the following questions in his expert report:

    i) Does the issue of an application for Guardianship in the Irish court act to attribute to the applicant rights of custody for the purposes of Art 3 of the Hague Convention 1980 under Irish law?

    ii) If it is proved that the applicant is not the biological father of the child what impact under Irish law would this have on the Order made by District Judge Seamus Hughes, sitting at the District Court Area of Longford, on 12 April 2021 appointing the applicant as guardian of the child? Specifically, would it be set aside or maintained? If it would be set aside would this require an application by the respondent or would the court do so *ex proprio motu*? Would the set aside take effect *ab initio* or only from the date of the set-aside Order?

    iii) In any event, if the applicant is not the biological father of the child, did the Guardianship order attribute to him rights of custody for the purposes of Article 3 of the Hague Convention 1980 under Irish law on or about 28 April 2021 (being the date on or about which the Applicant alleges the Respondent removed the child from the Republic of Ireland)?

    iv) Please explain the procedure for seeking and obtaining a Guardianship Order and set out the substantive law for a successful application.

11. The matter now comes before the court for final hearing of the father's application for a summary return order pursuant to Art 12 of the 1980 Hague Convention.

THE LAW

12. The removal of a child will wrongful under the 1980 Convention if, *inter alia*, the person asserting that the removal was wrongful had rights of custody and was exercising those rights of custody immediately before the removal or retention. As to the meaning of the term 'rights of custody' Art 5 of the 1980 Hague Convention provides as follows with respect to the meaning of the term rights of custody:

    "**Article 5**

    For the purposes of this Convention –

> (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;"

13. When seeking to apply Art 3 and Art 5 of the 1980 Convention in a domestic context, it is important to recall that the term 'rights of custody' falls to be given its autonomous meaning under the 1980 Convention. Within this context, when the English court is faced with determining whether rights of custody existed at the time of the removal or retention, an important distinction must be drawn between the question of what rights, if any, a parent has under the domestic law of the requesting State and the question of whether those rights amount to rights of custody for the purposes of Art 3 of the 1980 Convention. In this context, Dyson LJ (As he then was) drew the following distinction in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] 2 FLR 1119:

> "[46] There is no longer any doubt as to the approach that a court should adopt when determining whether the removal or retention of a child is wrongful within the meaning of Art 3. As Ward LJ said in *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192, at 196B, the first task is to establish what rights, if any, the applicant had under the law of the State in which the child was habitually resident immediately before his or her removal or retention. I shall refer to this as 'the domestic law question'. This question is determined in accordance with the domestic law of that State. It involves deciding what rights are recognised by that law, not how those rights are characterised. As Lord Donaldson of Lymington MR said in *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654, [1989] 1 FLR 403, at 663F and 413 respectively: 'it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody"'. To similar effect, Millett LJ said in *Re F (P Minor) (Child Abduction: Rights of Custody Abroad*) [1995] Fam 224, [1995] 2 FLR 31, at 235 and 40F respectively, that the Colorado lawyers should not have been asked 'whether the appellant's conduct in removing the child from Colorado was wrongful by the law of Colorado, whether at the time of the child's removal the respondent had what a Colorado court would describe as "rights of custody" or whether the child's removal would be regarded by a Colorado court as being in breach of those rights'. The only question which the Colorado lawyers should have been asked was what rights, if any, were possessed by the applicant in relation to the child at the time of his removal from Colorado.
>
> [47] The next question is whether those rights are properly to be characterised as 'rights of custody' within the meaning of Arts 3 and 5(b) of the Hague Convention. I shall refer to this as 'the Convention question'. This is a matter of international law and depends on the application of the autonomous meaning of the phrase 'rights of custody'. Where, as in the present case, an application is made in the courts of England and Wales, the autonomous meaning is determined in accordance with English law as the law of the court whose jurisdiction has been invoked under the Convention. But as Lord Browne-Wilkinson said in *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872, at 87F and 882 respectively, the Hague Convention cannot be construed differently in different jurisdictions: it must

> have the same meaning and effect under the laws of all Contracting States. In *R v Secretary of State for the Home Department ex parte Adan; R v Same ex parte Subaskaran; R v Same ex parte Aitseguer* [2001] 2 AC 477, [2001] INLR 44, at 517 and 56 respectively, when referring to the meaning of the United Nations Convention Relating to the Status of Refugees 1951 and Protocol of 1967, Lord Steyn said:
>
> > 'In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.'"

14. Thus, a dispute regarding the first, "domestic law", question of what rights the left behind parent had under the law of the requesting State falls to be determined by reference to the law of that requesting State, ordinarily with the assistance of expert evidence. By contrast, a dispute as to the second, "Convention", question of whether those rights under the domestic law of the requesting State amount to rights of custody for the purposes of the 1980 Convention falls to be determined by reference to the domestic law of the requested State regarding the autonomous meaning of that term in the Convention.

15. Within this context, it becomes apparent that the questions asked of the expert in Irish law in this case as set out above are drawn too widely having regard to the approach endorsed by the Court of Appeal in *Hunter v Murrow (Abduction: Rights of Custody)*. Adopting the approach by the Court of Appeal in that case, the question for Mr Healy was what rights in respect of P did the father have *per se* under Irish law at the time of the removal of P from that jurisdiction. Beyond that, the question of whether those rights amount to rights of custody for the purposes of the 1980 Convention is a matter for *this* court having regard domestic law of England and Wales on the autonomous meaning of that term in the Convention.

16. In the latter context, it is important to note that in determining whether the identified rights under the domestic law of the requesting State amount to rights of custody within the autonomous meaning of that term in the Convention, the English courts have taken a more expansive view of the meaning of rights of custody than courts in other jurisdictions. In *Re K (Abduction: Inchoate Rights)* [2014] 2 FLR 629 the Supreme Court of the United Kingdom identified the limited category of persons who may acquire so called *inchoate* custody rights. The majority of Supreme Court in *Re K (Abduction: Inchoate Rights)* held that such inchoate rights of custody may arise by reason of the following:

    i) Art 3 of the Hague Convention contemplates that rights of custody might arise 'in particular' in three ways, namely (a) by operation of law, (b) by administrative or judicial decision, and (c) by an agreement having legal effect. This does not rule out that such rights might arise in other ways.

    ii) The fact that a case represents a classic example of the sort of conduct which the 1980 Hague Convention is designed to prevent and to remedy is not sufficient by itself to create rights of custody. The court must look for the

existence of a right of custody which gives legal content to the situation which was modified by the abduction.

iii) Inchoate rights of custody continue to be recognised by the courts of England and Wales provided that:

a) the persons asserting the rights were undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child;

b) the persons asserting the rights of custody are not sharing those responsibilities with the person or persons having a legally recognised right to determine where the child shall live and how he shall be brought up;

c) the person or persons must have either abandoned the child or delegated his primary care to them;

d) there is some form of legal or official recognition of their position in the country of habitual residence that distinguishes those whose care of the child is lawful from those whose care is not lawful. For example, the payment of State child-related benefits or parental maintenance for the child; and

e) there must be every reason to believe that, were they to seek the protection of the courts of that country, the *status quo* would be preserved for the time being, so that the long-term future of the child could be determined in those courts in accordance with his best interests, and not by the pre-emptive strike of abduction. Such a requirement is consistent with the twin purposes of the Hague Convention, protecting the child from the harmful effects of international child abduction by recognising that he should not be peremptorily removed from their care and enabling the courts of the child's habitual residence to determine where his long-term future should lie.

17. In taking the foregoing approach, the Supreme Court recognised that, in support of the fundamental purposes of the Hague Convention, the courts of England and Wales have pushed at the boundaries in interpreting rights of custody and had so far upheld inchoate rights of custody, there being little enthusiasm for such an expansive view among a number of other State parties to the Hague Convention. Giving judgment, Baroness Hale articulated the competing approaches with respect to the concept of rights of custody when considering whether it could encompass inchoate rights:

> "[3] The issue, therefore, is between two different approaches to the interpretation of the concept. Is it to be interpreted strictly and literally as a reference to rights which are already legally recognised and enforceable? Or is it to be interpreted purposively as a reference to a wider category of what have been termed 'inchoate rights', the existence of which would have been legally recognised had the question arisen before the removal or retention in question?"

18. During the course of closing submissions, the issue of whether Art 15 of the 1980 Convention should be employed to determine the question of whether the father had rights of custody for the purposes of the 1980 Convention at the time P was removed from the jurisdiction of the Republic of Ireland was raised. Art 15 of the 1980 Convention provides as follows:

> "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 a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

19. The question of the probity of engaging Art 15 of the 1980 Convention in the context of an issue concerning the existence of rights of custody was considered by the Court of Appeal in *Hunter v Murrow (Abduction: Rights of Custody)*. Adopting the same analytical distinction between the first, "domestic law" question and the second "Convention", question identified in the passages from *Hunter v Murrow (Abduction: Rights of Custody)* cited above, Dyson LJ (as he then was) held as follows with respect to the role of Art 15:

> "[48] This is the background against which the utility of a request for a determination under Art 15 should be considered. An assertion that the removal of a child is wrongful within the meaning of Art 3 entails three propositions, viz: (i) the applicant enjoys certain rights in relation to the child; (ii) these rights are 'rights of custody' within the meaning of the Convention; so that (iii) the removal of the child is in breach of those rights and therefore wrongful.
>
> [49] The first proposition raises the domestic law question. In many cases this question is satisfactorily resolved on the basis of expert evidence; or in reliance on a certificate or affidavit under Art 8(f) 'emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State'; or by taking notice 'directly of the law of, and judicial or administrative decisions, formally recognised or not in the state of habitual residence of the child, without recourse to the specific procedures for the proof of that law or the recognition of foreign decisions which would otherwise be applicable' (see Art 14).
>
> [50] But it can also be resolved by a determination pursuant to Art 15: a request for a determination that the removal was wrongful within the meaning of Art 3 can include a request for a determination of the domestic law rights (if any) of the applicant in relation to the child. Such a request was made in the present case. Hedley J made a consent order that the father obtain from a court of competent jurisdiction in New Zealand 'a description of any rights in relation to the said child enjoyed by the father'. The decision of a court of competent jurisdiction is, obviously, more authoritative on the domestic law question than the opinion of an expert. In some circumstances,

it is preferable to obtain a court ruling. But delay is inimical to the best interests of the child. The present case demonstrates that there may be a price to pay for seeking an authoritative ruling under Art 15. It is reasonable to believe that the domestic law question could have been determined earlier in the present case if it had been resolved by the courts of this country without invoking Art 15. I hasten to say that I intend no criticism of the New Zealand courts which heard and decided the case and the appeal with commendable speed. But recourse to Art 15 will usually involve delay.

[51] Whether it is right to request a determination on the domestic law question under Art 15 will depend on the circumstances of the case. These will include (i) the nature of the dispute raised by the question, (ii) whether the parties intend to adduce evidence from experts who appear to be suitably qualified to express an opinion on the issues raised by the dispute, (iii) whether the question can be satisfactorily answered on the basis of Arts 8(f) or 14, and (iv) what delay is likely to be caused by the request. In many cases, the court is likely to conclude that the domestic law question can be resolved without recourse to a request under Art 15.

[52] I turn to consider the use of Art 15 to obtain a determination on the Convention question. It is convenient to refer *to Re J (P Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, sub nom C v S (P Minor) (Abduction) [1990] 2 FLR 442. The child was habitually resident in Western Australia and was removed by his mother to the UK. The father issued an originating summons in Western Australia and the judge made an order vesting sole custody rights in the father and declared that the removal of the child was wrongful within the meaning of Art 3 of the Hague Convention. The father then issued proceedings in this country for the return of the child. It was held by the courts of this country that the removal was not wrongful. Although no order had been made pursuant to Art 15, Lord Donaldson of Lymington MR referred to that Article and said at 568D and 446 respectively:

> 'In my judgment, Art 15 and, indeed, Art 14 were intended to assist a court which is asked to order the return of a child to ascertain the law of the other Contracting State, insofar as that law is relevant to whether the removal or retention was wrongful within the meaning of Art 3. It cannot, as I see it, have been the intention that the courts of the other Contracting State should be asked to determine the issue of the applicability of Art 3 insofar as it turns on the meaning of the Convention itself, because that is something which the courts of both countries are equally able to determine. Indeed, they would be expected to arrive at similar determinations. If, unhappily, this did not occur, the court which is being asked to order the return of the child would be bound to apply its own view of the Convention, particularly where, as here, the Convention only takes effect by virtue of a domestic Act of Parliament.
>
> In this case we have had the advantage of the reasons for his judgment which were given by Anderson J when making his ex parte order on the father's application for custody and guardianship. These reasons cover not only the law of Western Australia in relation to custody, but

> also, I think, on a fair reading, his view of the applicability of the Convention on the facts as he knew them. The judge's views on Western Australia law I, of course, accept unreservedly. The latter are in a slightly different category in that, as I say, I think that we are under an obligation to form our own view, albeit it must be one which takes the fullest possible account of the views which have been expressed by the judge.'

[53] In the House of Lords, Lord Brandon of Oakbrook made no reference to Art 15 but at 577H and 453 respectively said:

> 'I recognise that Anderson J thought fit to make a declaration that J had been wrongfully removed from Australia. I pay to his decision the respect which comity requires, but the courts of the UK are not bound by it and for the reasons which I have given I do not consider that it was rightly made.'

[54] In that case, the court of Western Australia had made a ruling before the matter came before the courts of this country. In those circumstances, one can well understand why Lord Donaldson of Lymington MR said that it was necessary to take the fullest possible account of the views expressed by the Australian judge, and why Lord Brandon of Oakbrook paid them the respect which comity required. But those views were in no way binding on the courts of this country.

[55] When Lord Brandon of Oakbrook spoke of paying 'respect' to the views of the Australian judge, I understand him to have meant no more than that. This language is in substance no different from that of an appellate judge who, when overruling the decision of an experienced judge, says: 'the views of Judge X in this area of the law deserve the greatest respect, but in my opinion he reached the wrong conclusion'. In saying this, the appellate judge is not paying deference to the decision of the judge below in the public law sense, or allowing a margin of appreciation in the sense explained in the Strasbourg jurisprudence, or according latitude to a person who is exercising a discretion. He is merely saying: 'this is an experienced judge whose views must always be taken seriously, but in my view on this occasion he is wrong'.

[56] In my judgment, therefore, no useful purpose is served in asking for a determination solely on the Convention question. Take the present case. The courts of New Zealand are no better placed than the courts of this country to decide whether the rights enjoyed by the applicant in relation to the child according to New Zealand domestic law amount to rights of custody within the autonomous meaning of Arts 3 and 5 of the Hague Convention. It is regrettable, but perhaps inevitable, that there are divergences of view as to the international meaning of concepts such as 'rights of custody' and 'rights of access'. The present case illustrates this only too vividly, and shows why there is no point in obtaining a ruling on the Convention question."

DISCUSSION

20. Having regard to the evidence before the court, I am satisfied in this case that the father did not, at the time P was removed from the Republic of Ireland, have rights of custody in respect of P. In the circumstances, whilst the court deprecates strongly the actions of the mother in this case, the mother's removal of P was not wrongful for the purposes of Art 3 of the 1980 Hague Convention. My reasons for so deciding are as follows.

21. In my judgment, and having given the matter careful consideration, it is not necessary in this case to make a request pursuant to Art 15 of the 1980 Convention to answer the first, "domestic law", question in circumstances where the court has before it an expert report on the law of the requesting State, in this case the Republic of Ireland. I am further satisfied having regard to the decision of the Court of Appeal in in *Hunter v Murrow (Abduction: Rights of Custody)*, that it would not be appropriate to make an Art 15 request in this case to answer the second, "Convention", question in circumstances where that question falls to be determined by reference to the law of England and Wales concerning the autonomous meaning of the term rights of custody in the 1980 Hague Convention.

22. Within this context, I turn to answer the first, "domestic law", question of what rights the father had *per se* at the date P was removed by the mother from the Republic of Ireland. In answering this question, it is necessary to consider first the competing cases of the parents as to the date on which the mother left Ireland with P.

23. As I have noted, the mother contends in her first statement that she moved to the jurisdiction of England and Wales with P on 10 February 2021, relying on an e-ticket dated 4 February 2021 for travel between Dublin and Holyhead on 10 February 2021. That ticket was booked at 1.28pm on 4 February 2021 (two days after the mother was written to by the father's solicitors indicating he was seeking joint guardianship, custody and access to P). The ticket indicates that one adult and one child were travelling and gives the registration number of the car that is the subject of the reservation. To her second statement the mother exhibits the receipt for that booking, which lists the passengers as herself and P. The mother also exhibits to her second statement a copy of the boarding pass dated 10 February 2021 for two passengers and one vehicle. In response to the father's assertion that an email dated 15 March 2021 from the letting agents responsible for the property that the mother was renting with the maternal grandmother stating that they keys to the property were surrendered on the weekend of 7 March 2021, the mother contends that the maternal grandmother remained in the property alone until that date. To her second statement the mother exhibits a further e-ticket for travel between Dublin and Holyhead on 7 March 2021 for one passenger and a car with a different registration number listed on the e-ticket for 10 February 2021. The document lists the maternal grandmother as the subject of the booking. The email from the letting agents does not relate who returned the keys on weekend of 7 March 2021.

24. Assessing the available evidence in a manner commensurate with the summary nature of these proceedings, I am satisfied on the balance of probabilities that the mother departed the Republic of Ireland with P on the afternoon of 10 February 2021 as indicated by the boarding pass. The reservation for 10 February 2021 is for one adult and one child, supporting the contention that the mother and maternal grandmother travelled on different dates. This conclusion is reinforced in circumstances where the

receipt for the ticket for 10 February 2021 lists only the mother and P as passengers. The return of the keys on weekend of 7 March 2021 is consistent with the maternal grandmother departing Ireland separate from the mother, as indicated by the separate e-ticket for one passenger on 7 March 2021 which contains the maternal grandmother's name. Whilst the court has before it a statement from the father's brother in which the father's brother contends that he saw the mother in Ireland on 6 March 2021, I am satisfied that I can attach little weight to that statement. The sighting alleged by the father's brother is entirely inconsistent with the clear documentary evidence before the court and the statement was provided very late and only after the departure date of the mother became an issue in the case.

25. With respect to the rights that the father had in respect of P under Irish law *per se* as at the date of removal on 10 February 2021, as I have noted the questions asked of Mr Healy ranged too widely having regard to the approach to the question of the existence of rights of custody identified in *Hunter v Murrow (Abduction: Rights of Custody)*. In the circumstances, whilst Mr Healy's report deals in detail with the approach taken by the Irish court to the question of the existence of rights of custody for the purposes of Arts 3 and 5 of the 1980 Convention because that is what he was asked to do, the relevant parts of Mr Healy's expert report are in fact those that deal with the first, "domestic law", question of what domestic rights the father had under Irish law *per se* at the time P was removed from that jurisdiction. The subsequent, "Convention", question of whether those rights amounted to rights of custody for the purposes of the 1980 Convention being a question for this court to be determined by reference to the law of England and Wales concerning the autonomous meaning of the term rights of custody in the 1980 Hague Convention.

26. In circumstances where the questions asked of Mr Healy were not strictly the correct ones in seeking to answer the first, "domestic law", question, I have considered carefully whether it is possible to extract from his report the necessary information on what rights the father had under domestic Irish law at the time P was removed from that jurisdiction or whether it is necessary to direct that further questions be put to him. Having done so, I am satisfied that the expert report of Mr Healy does contain the information the court requires. In particular, I am satisfied that the following points set out by Mr Healy articulate the extent to which the father benefited from rights in respect of P at the relevant time:

    i) Automatic guardianship is created in Ireland for father's who are married or in civil partnership with the mother of the child, or who have cohabited with the mother for at least 12 months, or who has entered a consent based declaration with the mother.

    ii) The father was not married to the mother, did not cohabit with her for the requisite period and the parents did not enter into an agreement.

    iii) Section 6(4) of the Guardianship of Infants Act 1964 provides that where the mother of a child has not married the child's father, she, while living, shall alone be the guardian of the child unless there is in force an order under s.6A or a guardian has otherwise been appointed under the 1964 Act.

    iv) Section 6A of the Guardianship of Infants Act 1964 expressly provides for the biological father of the child to apply to be appointed as guardian for the child.

v) Within this context, prior to 12 April 2021 the only *personal* right the father was the right to apply to be appointed as a guardian pursuant to s.6A of the Guardianship of Infants Act 1964.

vi) As noted above, on 9 February 2021 the father commenced an application under s.11 of the Guardianship of Infants Act 1964 for directions concerning P and seeking appointment as a joint legal guardian, with a return date of 8 March 2021 for the application to be made. Within this context (and whilst an expert opinion on the Irish interpretation of the meaning of rights of custody for the purposes of the 1980 Convention), Mr Healy relates that, by reference to the decisions of the Supreme Court of Ireland in *HI v MG* [2000] 1 IR 110 and *T v O* [2008] 1 IR 567, an Irish family court in which a person has brought proceedings under the Guardianship of Infants Act 1964 will have attributed to it rights of custody, which rights of custody can be enforced directly by the parent bringing the proceedings under the 1980 Convention.

vii) The father acquired personal rights in respect of P when he was appointed as guardian pursuant to s.6A of the Guardianship of Infants Act 1964 on 12 April 2021, including the right to give or refuse his consent to the removal of P from the jurisdiction.

27. With respect to the question of rights attributed to the Irish court by reason of the existence of proceedings and enforceable by the parent making the application, Mr Healy appends to his expert report the authorities from the Supreme Court of Ireland that deal with the attribution to the court of rights that can be directly enforceable by an applicant parent. As to when such rights might become attributed to the Irish court, Mr Healy relates that in the case of *T v O* the Supreme Court of Ireland suggested that such attributed rights would arise as at the return date of the application made to the court. Whether such rights could be attributed at an earlier date, such as the date of service of the application, was left open by the Supreme Court of Ireland in circumstances where that question did not arise in *T v O*. However, in *obiter* statements by McKechnie J at first instance in *T v O*, it was suggested that it would be difficult to see how rights could be attributed to the court (and hence enforced by the parent) any earlier than the date of service, unless it was necessary to lodge the initiating documents in court.

28. Within this context, the document initiating the father's application to the District Court in Ireland under s.11 of the Guardianship of Infants Act 1964 dated 9 February 2021 is contained in the bundle. Mr Healy was not able to assist with a definitive view on whether that document would have been lodged with the court. However, with respect to that question, I note that in his expert report Mr Healy opines as follows:

> "[37] In terms of the procedures applicable to a guardianship application made by a biological father who is not married to the mother, the relevant District Court Rules (Order 58)14 require such proceedings to be initiated by completion of the requisite form (notice of application, aka summons) and service of that form on the respondent. Order 58, rule 5(1) provides: "Where the Court's direction is sought under section 11 of the 1964 Act, the application shall be preceded by the issue and service of a notice in the Form 58.17 Schedule C upon each other person who is a parent or guardian of the child concerned."

29. A plain reading of the document dated 9 February 2021 indicates that it is a summons or notice of application that was prepared by the father's Irish solicitors. It is expressed to be a notice of application under s.11 of the Guardianship of Infants Act 1964 for directions regarding matters concerning P and the appointment of the father as joint legal guardian of P. It is signed by the father's Irish solicitor and is addressed to the mother and to the District Court Clerk. As I have noted, an attempt was made to serve the mother with the notice of application by post but this was not successful.

30. Within this context, as to the date on which the Irish court, as opposed to the father himself, could have had rights attributed to it which the father would have been at liberty to enforce, Mr Healy opines as follows:

> "The notice of application under the 1964 Act (dated the 9th of February 2021) and the *ex parte* papers for substituted service (dated the 24th and 25th of February 2021) were completed and presumably lodged ahead of the application to the Longford District Court on the 8th of March 2021. In view of McKechnie J's dicta in *T v O*, if documents were lodged in Longford District Court earlier than the date of service (the 12th of March 2021), that earlier date may constitute the date when Longford District Court acquired 'custody rights' in the terms of Articles 3 and 5 of the Hague Convention. The prospect also arises that it would be the date when Longford District Court made the *ex parte* Order for substituted service of the Notice of Application, after the initial attempt to serve the proceedings in February 2021, namely the 8th of March 2021."

31. Drawing these threads together to answer the first, "domestic law", question of what rights the father had *per se* at the date P was removed by the mother from the Republic of Ireland, on the expert evidence before the court I am satisfied that the position with respect to the *personal* rights from which the father benefited in respect of P as at the date of her removal from the jurisdiction of Ireland on 10 February 2021 is clear. Namely, that prior to 12 April 2021 the father had no personal rights in respect of P beyond the right to apply to be appointed as a guardian pursuant to s.6A of the Guardianship of Infants Act 1964.

32. The position in respect of whether the father benefited from being in a position to enforce rights attributed to the Irish court as at the date of P's removal from the jurisdiction of Ireland on 10 February 2021 is much less clear. In circumstances where I am satisfied that P was removed from the jurisdiction of Ireland on 10 February 2021, having regard to the expert report and to the decisions of the Supreme Court of Ireland appended to it, the only action potentially capable of attributing to the Irish court rights that the father could enforce would be the lodging with the District Court in Longford of the notice of application prepared by the father's solicitor and dated 9 February 2021, no effective service of that notice having taken place on the mother by 10 February 2021 (and Mr Healy having in oral evidence comprehensively rejected the other actions put to him by Ms Jones, including the letter written to the mother on 2 February 2021 by the father's solicitors, relied on by the father as attributing rights to the Irish court).

33. On the expert evidence before the court, there are a number of difficulties in this case with the proposition that the lodging of the notice of application dated 9 February 2021 acted to attribute rights to District Court that the father could enforce. First, there is no definitive Irish case law establishing that such a step is capable of attributing rights to

the Irish court that are thereafter enforceable by the father, the suggestion that it *may* have that effect deriving from an *obiter* comment at first instance. Within that context, and at its highest, the expert evidence before the court is that a notice of application *may* have the effect of attributing rights to the Irish court *if* it was lodged with the court. On that latter point, and perhaps more fundamentally on the facts of this case, it is far from clear whether the notice of application was lodged with the court and, if so, whether it was lodged with the court prior to 10 February 2021. The father has adduced no evidence to demonstrate this was the case. In the circumstances, whilst the fact that the notice of application is addressed to the District Court Clerk might, as a matter if logic, suggest that the notice was lodged, there is no evidence to confirm this in fact occurred and that it occurred before the mother departed the jurisdiction with P on the afternoon of 10 February 2021.

34. Within this context, in my judgment it would not be safe having regard to the expert evidence on Irish law for this court to conclude that the father's notice of application dated 9 February 2021 attributed to the Irish court rights capable of enforcement by the father by way of an application under the 1980 Convention. The position in the present case is, in my judgment, very different to that which pertained in *Re H (P Minor)(Abduction: Rights of Custody)* [2000] 1 FLR 201. In that case, the father's application under the Guardianship of Infants Act 1964 had already had an on notice hearing before the Irish Court and had been adjourned by consent with contact agreed, although I do note that on appeal in *H (P Minor)(Abduction: Rights of Custody)* [2000] 2 AC 291 Lord Mackay held observed that, with respect to the question of when the court might have attributed to it rights in consequence of their being proceedings in place, there is much force in using the service of the application as the time at which the court's jurisdiction is first invoked.

35. Having established the position, in so far as the court is able on the expert evidence before it, in respect of the extent of the father's rights under Irish law *per se* as at the date of P's removal from that jurisdiction on 10 February 2021, I turn to the second, "Convention", question of whether the rights of the father under Irish law amounted to rights of custody for the purposes of the 1980 Convention having regard to the law of England and Wales concerning the autonomous meaning of the term rights of custody in the 1980 Hague Convention.

36. Within the foregoing context, I am satisfied that it cannot be said that the father had choate rights of custody for the purposes of Art 3 of the 1980 Convention as at the date of P's removal from Ireland. As set out above, prior to 12 April 2021, the *personal* rights of the father in respect of P were limited to the right to apply to be appointed as a guardian pursuant to s.6A of the Guardianship of Infants Act 1964. Within this context, the father had no right to determine where P should live or to object to her removal from the jurisdiction of Ireland. For the reasons I have already given, I have also not been prepared on the expert evidence before the court to conclude that as at 10 February 2021 the Irish court had attributed to it rights capable of enforcement by the father. In these circumstances, I am satisfied that it cannot be said that the father had rights of custody by operation of law, judicial or administrative decision or an agreement having legal effect at the time P was removed from the jurisdiction on 10 February 2021.

37. As I have noted, the United Kingdom Supreme Court in *Re K (Abduction: Inchoate Rights)* considered that the combination of the use of the phrase "may arise in

particular" in Art 3 of the 1980 Convention and a purposive interpretation of that convention means that rights of custody can be derived from a wide range of sources and not just by operation of law, judicial or administrative decision or an agreement having legal effect. Within the context of the jurisprudence of this jurisdiction on the autonomous meaning of custody rights under the 1980 Convention, this then leaves question of whether it can be said on the facts of this case that the father had inchoate rights of custody in respect of P as at 10 February 2021, the question of inchoate rights going to the second, "Convention", question. Applying the criteria articulated by the United Kingdom Supreme Court in *Re K (Abduction: Inchoate Rights)* I am not satisfied that the father has demonstrated that he had inchoate rights of custody immediately before 10 February 2021.

38. It is the case that, as the subsequent course of his application in Ireland demonstrated, there is every reason to believe that, were the father to have sought the protection of the Irish courts to prevent P's removal, the *status quo* would have been preserved for the time being, so that the long-term future of the P could be determined in the Irish court in accordance with his best interests. However, the other criteria set out in *Re K (Abduction: Inchoate Rights)* are more problematic in this case. It is not the case that immediately prior to 10 February 2021 that the father was undertaking the responsibilities entailed in the primary care of P such that he was enjoying the concomitant rights and powers consequent thereon. As at 10 February 2022, the mother alone had the legally recognised right to determine where P should live and how she should be brought up. She had not abandoned P nor had she delegated the primary care of P to the father. Whilst the father had the right to apply for guardianship under the Guardianship of Infants Act 1964, there was at 10 February 2022 no legal or official recognition of the father's care for P nor, in the circumstances, could there have been where the father was not undertaking the responsibilities entailed in the primary care of P.

39. In short, on the evidence before the court I must concluded that there was no legal content in the factual situation relied on by the father immediately before P's removal from Ireland by the mother on 10 February 2021 capable of grounding inchoate rights of custody. Accordingly, I am not able to conclude in this case that the situation of the father in Ireland as at 10 February 2021 conferred on him inchoate rights of custody.

CONCLUSION

40. In conclusion, I am satisfied that the father did not have rights of custody in respect of P immediately before her removal from the jurisdiction of the Republic of Ireland on 10 February 2021. In the circumstances, I am further satisfied that the removal of P from Ireland on that date was not wrongful for the purposes of Art 3 of the 1980 Hague Convention. As such, the father's application must be dismissed.

41. This is in many respects an unsatisfactory outcome in circumstances where the mother's actions constitute on their face a clear act of child abduction. The outcome is also uncomfortable in circumstances where the result would likely have been different had the father been married to the mother. However, as observed by Lowe *et al* in *International Movement of Children* (2016) 2nd Edn. at [19.19] whilst there are advantages in a flexible approach to what constitutes rights of custody in order to meet the aims of the Convention, it is important that in order to regulate their lives, citizens are entitled to be able to ascertain their rights and obligations with some degree of

certainty. Although, as noted by Lord Mackay in *Re H (P Minor)(Abduction: Rights of Custody)*, it is right that the 1980 Convention should be given a purposive construction in order to make as effective as possible the machinery set up under it given that it falls to be applied under a variety of systems of law, the search for inchoate rights of custody must accordingly have its limits. Those limits have been reached in this case.

42. In the circumstances, I must dismiss the father's application under the Child Abduction and Custody Act 1985. The remaining issues between the parties with respect to P's welfare will, subject to any remaining arguments as to jurisdiction, now fall to be adjudicated by the courts in this jurisdiction and I will give prospective directions with respect to the proceedings the father is likely to pursue in order to secure contact with P.

43. That is my judgment.