THE COURT ORDERED that no one shall publish or reveal the name or address of the children who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the children or any member of their family in connection with these proceedings.

THE COURT OF APPEAL

CIVIL

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 1980
IN THE MATTER OF TWO MINOR CHILDREN OF THE PARTIES (CHILD ABDUCTION: AUSTRALIA, HABITUAL RESIDENCE, WRONGFUL RETENTION, CONSENT AND ACQUIESENCE)

UNAPPROVED
Appeal Number: 2023/271

Neutral Citation Number [2024] IECA 39

Whelan J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

L.O.

APPELLANT

- AND -

M.O.

RESPONDENT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 21st day of February 2024

Introduction

1. The salient facts are set out in detail in the judgment of the High Court appealed against delivered on 4th September 2023. The respondent (the mother) was born in England. She resided in Ireland for a time. In 2010 she moved to Australia. In 2016 she met the appellant (the father), an Australian. They formed a relationship. The mother was granted Australian citizenship in July 2017. They are married to one another. In 2017 they purchased a family home in Australia. The children were born in December 2018 and February 2021. At all material times they all resided in the family home in Australia. The father applied for and was granted long service leave by his Australian employer for a period of three months from November 2021 – February 2022. The family travelled to Ireland on or about the 17th November 2021 on return flights booked by the mother. At that date the older child was 2 years and 11 months, the younger 9 months old. The return flights to Australia for the family were booked by the mother for 23 February 2022.

2. The trip occurred during the COVID-19 pandemic. The family had arranged to stay with the children's maternal grandmother who resides in this jurisdiction. On 11th January 2022 the mother contracted COVID-19. That event precluded the family's scheduled return to Australia as the mother was unable to meet the re-entry and vaccination requirements imposed by the Australian government in respect of COVID-19 travel. The flights were rescheduled by the mother for the entire family to return on 22nd March 2022.

3. In February the older child was admitted to hospital for two days for treatment of an infection. A follow up ultrasound scan was scheduled for 9th June 2022. This meant that the mother and children were unable to return to Australia as intended with the father on 22nd March 2022 when he returned to resume his employment in Australia. Prior to the departure of the father on 22nd March 2022, the mother rebooked the return flights for herself and the

children for 27th May 2022. She also sought to reschedule the June ultrasound scan appointment for the older child for a date earlier than the 27th May 2022 flight.

4. The parties are in dispute as regards their intentions in travelling to Ireland and that being so, weight must be attached to their contemporaneous words and actions when evaluating conflicting assertions as to intention. Noteworthy is the mother's engagement with an Australian Administrative Appeals Tribunal which delivered a decision in respect of her on 25th March 2022. The general thrust of the evidence adduced by the mother before that Tribunal indicated an intention on her part to return to Australia and that a deferral of her return with the children to Australia was necessitated solely by reason of the illness of one of the children.

5. The father appeals from the refusal of the High Court on 5th September 2023 to order the summary return of the children to the jurisdiction of the courts of Australia pursuant to the Hague Convention on International Child Abduction (Hague Convention) and the Child Abduction and Enforcement of Custody Orders Act, 1991. Briefly put, the judge found that the parties had argued for positions which were diametrically opposed to each other but the court was driven by the evidence to conclusions of fact for which neither side had argued (para 1.2). The judge essentially found that the father had on 25 October 2022 consented to the children remaining in Ireland and thereupon both children came to be habitually resident in Ireland and were so habitually resident by the time the father withdrew that consent about 48 hours later on 27 October 2022. The court concluded in consequence that the father had failed to prove that the retention of the children was wrongful within the meaning of Article 3(a) of the Hague Convention since habitual residence of a subject child in the requesting state immediately before the retention of such child in the requested state is a fundamental proof.

High Court judgment

Habitual residence

6. In the course of her judgment, the judge addressed the issue of habitual residence and the burden of proof, considering authorities such as *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309 and also the decisions of this Court in *A.K. v U.S.* [2022] IECA 65 and *Hampshire County Council v. CE and NE* [2020] IECA 100. She observed at 3.7:

> *"The parties disagree as to their intentions in moving to Ireland and disagree as to when, if ever, either of them decided on their future plans for the family. The Respondent argues that the Applicant acquiesced in the children remaining here after the family had moved and had spent a significant amount of time here. He sent two messages indicating his consent but quickly changed his mind and withdrew this consent. If there was consensus, even for a short time, this would be sufficient to establish the fact of habitual residence where a family had spent over a year here and had put down roots. If the children habitually resided here when the Applicant raised an objection to them remaining, the case is no longer one of wrongful retention. The Respondent did not rely on consent as a defence, focusing on acquiescence and habitual residence insofar as the messages of consent affected these issues."* (3.7)

7. On the burden of proof, citing *K v. J* [2012] IEHC 234 (a decision of Finlay Geoghegan J.), the trial judge observed at 3.8 that the latter case had *"confirmed that the onus in that case was on the respondent who sought, as does this Respondent, to show that there has been a change in habitual residence. The evidential burden must be on the Respondent as it is she who seeks to prove that the family's habitual residence changed, from the country in which they lived all their lives until 2021, to Ireland."*

8. The court characterised the onus of proof on the applicant father thus:

> *"... to show that he has custody rights and was exercising them until the date of removal or retention, and that the application for return was made within one year of that date. He must also prove that the children were habitually resident in the requesting state as a matter of fact, which fact is inextricably bound up with the question of whether or not the removal or retention was wrongful."* (para. 3.9)

9. Citing Donnelly J. in *M v. M* [2023] IECA 126, where this Court, having reviewed the jurisprudence, confirmed that it is for the national court in the requested State to establish the habitual residence of a child when an application for their summary return is made, the judge observed at 3.10:

> *"...If [the respondent] argues that the children had changed habitual residence, as a matter of first principles she bears the evidential burden of proof. The party seeking to argue for a change of habitual residence is invariably the respondent who has the means to so prove. Apart from evidential rules, on a practical note, it would be virtually impossible for the 'left-behind parent' to prove that a child had not changed habitual residence as he does not usually have access to most of the evidence in respect of the new residence."*

The judge then reviewed the affidavit evidence and the voluminous exhibits, noting, in particular, that on 25th October 2022 the mother and father exchanged electronic messages in which it was made clear that the mother did not want to return to Australia. The father initially replied that he would not ask her to move the children back. The exchange ended with him saying his place is not in Ireland and that he hopes the children will want to *"catch up"* one day and that later in life *"we can also be best friends"*. Two days later, he had changed his mind and said he had been confused and was seeking advice. The court noted at 4.20 *"the Applicant ....states categorically that he never consented to the children remaining in Ireland, when he clearly did so, albeit withdrawing this consent after two*

days." The father consented on 12th December 2022 to Australian authorities processing an application. The application was signed on 12th January 2023.

10. The court considered and analysed the voluminous exhibited correspondences, messages and electronic communications that passed between the parties, noting *"..the Applicant has not adverted to, or exhibited, the exchange in October in which he agrees to the children remaining in Ireland."* At para. 4.36 the judge noted that the case was unusual *"… in that there is a huge amount of evidence about the intentions of the parties but very little about the daily lives of their children. What is available is evidence of happy, school-going children who appear to be happy in Ireland but had no difficulties in Australia either."* The court noted that only the older child (born December 2018) was old enough to give an account of their views regarding their living situation. The court noted that the overwhelming impression was that the older child was happy but nonetheless missing the father.

11. The judge observed at 4.39 that the *"… lack of transparency on both sides makes the affidavits difficult to accept as reliable sources of fact without contemporaneous supporting evidence."* The court noted the contentions of the father that the trip to Ireland was in the first instance a *"holiday"*. She considered *"This ignores his own messages about looking for work and about their possible plans to relocate here."* She noted his contentions that the mother *"never booked alternative return flights and orchestrated a situation in which he would appear to have acquiesced in her remaining in Ireland when she never intended to return."* The judge noted that the mother had not exhibited material in relation to the flights but that *"her own averments and contemporaneous texts suggest that she probably did book more than one flight. Not only this, but the Applicant appears to have accepted this in messages as late as September [2022] and it seems likely that even the last flight mentioned was, in fact, booked this being on the 23rd of December 2022."* (para. 4.40)

In her conclusions on the issue of habitual residence, the judge noted:

> *"For most of 2022, this was a family in flux. Their home, the relevant doctors, schools, friends and some family were all in Australia. The children had always lived there and had some temporary arrangements in Ireland, where they stayed in the home of one of the Respondent's family. The main bank account was in Australia, albeit that the Applicant changed the banking arrangements in July. Even in September, there is no evidence that either party could have said, with any certainty, where they would be in 2023."* (5.1)

She continues:

> *"The children in this case are very young but have lives of their own and are not completely dependent on their primary carer, their mum, such that her decision will dictate where they are resident. However, the intention of their parents is very significant in this case due to their relative youth."* (para. 5.2)

12. On the date of institution of the proceedings before the High Court the children were aged four years and 4 months and two years and 2 months respectively. When the father signed the authorisation for the Australian Central Authority in December 2022, the children were aged almost four years and one year and ten months, respectively. The court noted:

> *"Both children are now in school in Ireland, they live with a close family member who is referred to as often as the child's dad in …[the] assessment report. While [older child] misses the applicant very much, the child's centre of interests was in Ireland by the time of the assessment. The issue is when that change occurred, and if it pre-dates the retention of the children here."* (5.3)

The judge noted that the mother's visits to a lawyer in August 2022, *"…her exchanges with the Applicant in August and September, in particular about the Hague Convention, did not indicate a settled intention to stay in Ireland. It is, at all times, possible that this family will return on the 10th of September as planned. When they do not, there is still evidence on her*

part of the Respondent blaming the Applicant for this and seeking to resolve the issues between the parties, including inviting him to visit them."

13. The court noted that the mother had not rented or purchased a property in Ireland nor was there any evidence of her having found full time employment in the year prior to the hearing. *"In these circumstances, which involved an ongoing discussion between the parties but in respect of their marriage as much as where they would live, only factors such as this would indicate a change of habitual residence unless the intentions of the parties were clear from some other source."* (5.5) The court noted that the mother had unilaterally withdrawn the older child in June from the Australian school originally selected by both parents but observed *"…this is not necessarily sufficient, in all the circumstances, to indicate a settled intention to stay here, as opposed to another delay in their return, now expected on the 10th of September. There was no evidence, for instance, of the children being enrolled in Irish schools for 2023."*

14. The High Court found that the evidence did not support the mother's claim that there was a change of habitual residence by July. Neither had the mother shown that she *"…had formed a settled intention to move to Ireland at that stage. … She continues to reassure the Applicant that she is returning with the children in September."* (5.6)

15. The trial judge considered that: *"The text of the 25th of October changes everything. At that point, there is an unequivocal consent, in writing, from the Applicant, that his wife may stay here with their children."* (para. 5.7) The judgment continues:

> *"The Applicant withdrew that consent two days later, rendering the consent equivocal but by then the habitual residence of the children, a question of fact, had changed. By the 25th of October, with his consent, the Respondent had decided to stay in Ireland and, given their ties with their community and their integration here, it seems reasonable to conclude that the two children were, from the 25th of October,*

habitually resident here. Their mother's intention was then clear, their father agreed, and all circumstances aligned over a period of days to confirm where they would be living for the foreseeable future. His changing his mind could not and did not transfer the country of habitual residence back to Australia." (5.8)

The judge observed at 5.9:

"This exchange on 25th October clarifies the Respondent mother's intention and adds the Applicant father's consent, which is the final piece of the jigsaw. Already the children have school, medical and family factors tying them to Ireland, but they are sufficiently young that their parents' intentions are crucial, particularly those of the primary carer."

The judge concluded at 5.10:

"I find as a fact that this trip was intended to be a holiday but that both parents had considered moving here if employment could be found and if life here suited them. It was submitted that the Respondent was required to show that the length of the stay and the children's integration into their environment during that time outweigh the circumstances of the move and the uncertain nature of the stay. By late October, both parents had agreed that their children would be brought up in Ireland and certainty was achieved, albeit for a short time."

Wrongful retention

16. Of the argument advanced on behalf of the father that the children were wrongfully retained in this jurisdiction in breach of his rights of custody with effect from 27th May 2022, the judge concluded that the said date:

"...cannot be the date of wrongful retention, given the factual findings that this couple had yet to decide where they would live at that time. Until the exchanges in

> *September and October, there was no retention and no change of habitual residence. Had the relationship problems been ironed out, it appeared just as likely that the family would reunite in Australia as in Ireland. This was ruled out on the 25th of October with the exchange in which the Applicant said that he would stay in Australia knowing this meant he would not see his children for some time."*

The judge held that from the 25th October the children were retained in Ireland *"but this was not a wrongful retention as the children were habitually resident here by that time."* The judge noted an email exchange on 27th October wherein the father stated he wanted the children back, but concluded *"at that point, the retention could only be one which was unlawful if, at that stage, the children were still habitually resident in Australia. As that had changed on the 25th of October, by the time the applicant had changed his mind on the 27th of October, the retention was not wrongful."*

17. Turning to the mother's defence pursuant to Article 13(1)(a) that summary return of the children was not mandatory in circumstances where the left-behind parent either consents or has acquiesced in the retention of the children, the judge observed: *"Given the conclusions of the Court, that the effect of the short-lived consent in this case was to change the habitual residence of the children before their mother decided to remain here, neither defence arises."* (7.2) As to the contention that the children had settled in their new environment, the judge concluded that that issue did not arise for consideration as the date of retention was 25th October 2022 *"and the court has determined that the children were habitually resident in Ireland at that date."* The judge concluded there was no wrongful retention of the children by the mother and accordingly the father was not entitled to orders pursuant to the Hague Convention.

The Appeal

18. The father advances 24 distinct grounds of appeal. In the course of the hearing those were distilled down and it appears that the key issues to be determined in this appeal are;

(i) Whether the children were wrongfully retained in Ireland by the mother in breach of the father's rights of custody under Australia law which was the children's place of habitual residence immediately prior to their retention, within the meaning of Article 3 of the Hague Convention.

(ii) If the children are found to have been wrongfully retained in Ireland within Article 3(a) in breach of rights of custody of the father, whether the father either consented or acquiesced to same such that would give rise to a defence under Article 13 of the Hague Convention.

Submissions of the father

19. It was contended that a *"slight oddity"* in the judgment was that the court rejected many of the opposing contentions advanced by both parties and had reached conclusions of fact for which neither side had argued (para. 1.2 of the judgment). It was observed that a further unusual feature was the disagreement between the parties as to whether the burden of proof lay on the father to prove that the children were habitually resident in Australia throughout 2022. A central issue for determination was whether the High Court judge was correct in rejecting the father's contention that on the evidence the critical date was the 27th May 2022 and that the mother's retention of the children in this jurisdiction beyond that date was wrongful and in breach of his rights of custody. The appellant characterised the issue thus: *"whether on the 25th October 2022 the children were, all other things being equal, habitually resident in Ireland and, whether she was correct that the text message of the 25th October had the factual and legal effect found by the Court – a so called 'jigsaw' effect?"*

20. The appellant in particular places emphasis on para. 1.2 of the judgment, pointing out that the court had acknowledged that to resolve the dispute between the parties regarding the respective burdens of proof arising: *"required the Court to select a more likely retention date than those suggested by the parties."*

21. The appellant contends that so long as there was not concretely and unequivocally a permanent move to Ireland, the habitual residence of the children remained Australia. If the mother wished to contend for consent or acquiescence on the part of the father to the children remaining permanently in Ireland, the burden of proof rested with the mother. It was contended that the mother did not discharge that burden of proof and had failed to identify a specific date on which habitual residence of the children purportedly changed. The appellant contends that the trial judge overlooked the importance of events post 27th May 2022. In particular, it is argued that the conduct of the mother from and after the 27th May 2022 amounted to *"creeping retention"*, a concept analogous to repudiatory retention where one parent, temporarily present in a jurisdiction other that the country of the children's habitual residence, by her words or conduct evinces an intention not to return the children at the end of the agreed period of stay. A repudiatory retention normally involves the parent who retains the children in the other jurisdiction forming a unilateral intention to retain the children there, notwithstanding a prior agreement or understanding between the parents to return the children to the place of their habitual residence by a given date.

22. The father contends that there was sufficient evidence before the High Court to satisfy the judge that from and after 27th May 2022 the retention of the children in Ireland was wrongful since from that date the father was unequivocally no longer consenting to their presence in this jurisdiction and had not acquiesced in their retention here. He never agreed to any deferred date later than 27th May 2022 for the summary return of the children. His counsel contended that on 1st July 2022 the father expressly requested the mother that the

children return to Australia as soon as possible and certainly before September 2022. It was said that the actions of the mother in unilaterally cancelling the flights scheduled for 27th May 2022 for her return with the children to Australia and her unilateral cancellation of the enrolment of the older child in kindergarten in Australia clearly breached the terms on foot of which the father had agreed to the children's presence in Ireland in 2022. Significant weight was attached to the conduct of the mother in deferring the return flights scheduled for 27th May 2022 and purporting to reschedule same for 10th September. The September flights were also cancelled by her without any consultation with the father and despite his protests. It was contended that such constituted a clear breach of his rights of custody, he having initially only *"reluctantly consented"* to the original deferral to 27th May for the return of the children.

23. Throughout his submissions the appellant characterises the conduct of the mother as amounting to a *"creeping retention"* where *"the respondent in effect hid her true intention in plain sight "*. Emphasis is placed on sundry *dicta* of the trial judge pointing towards the habitual residence of the children continuing to be in Australia long after the 27th May 2022. For instance, the court, having considered exhibits from July 2022, concluded: *"Every indication is that this future was, at that point, in Australia."* (4.24) Noting that on 21th July 2022 the father was requesting specificity around the return date, the judge stated: *"there is no response to this request, nor is there an indication that they are not returning, however."* (4.26)

24. The appellant posits that the High Court's finding that an unequivocal consent to the children remaining in Ireland occurred on 25th October 2022, means, necessarily, that there was an absence of such consent on the part of the father to the retention of the children prior to that date. It is argued that this lends support to the appellant's contentions that the

wrongful retention of the children occurred when the mother failed to return the children on 27th May 2022 as previously agreed.

Submissions of the mother

25. Comprehensive submissions on behalf of the mother contended that the judgment of the High Court should be affirmed. The limits of this Court's right to review was emphasised, it being contended that it is the intermediate standard of review identified in *Minogue v. Clare County Council* [2021] IECA 98 which was applicable in this appeal. The respondent cited *A.K. v U.S.* (*supra*) – contending that this Court should approach the appeal on a '*somewhat deferential'* basis and that the appellant father must show errors in the findings of the High Court which render the decision of the trial judge untenable. Citing *DM v VK* [2022] IECA 207 in which Donnelly J. noted that the purpose of the Hague Convention is to secure the prompt return of children, it was submitted that the "*prompt return*" is not now possible in this case as the children have spent so much of their young lives in Ireland – nor was it achievable at the time of trial. On the issue of delay, the respondent submits that the appellant delayed in invoking the Hague Convention and that the High Court found that the level of integration and the indicia of habitual residence were accruing during this period.

26. It was contended that the appellant's 'consent' of 25 October 2022 crystallised the change in the children's habitual residence. In that context, emphasis was placed on the length of time the children were in Ireland and their tender ages. It was contended that changes to habitual residence happen more easily when children are younger and of "*conformable*" age. It was asserted that the trial judge had drawn key findings of fact from the affidavits and exhibits. It was submitted that the trial judge correctly followed the rubric set out by Whelan J. in *Hampshire County Council v CE and NE* (*supra*) and the respondent points to examples of same.

27. On the issue of the text communication of 25 October 2022, it was submitted that the appellant's arguments are overly technical and blur the true nature of the High Court's finding. Reliance was placed on the observations of Donnelly J. on the issue of acquiescence in *DM v VK*. It was contended that the text of 25 October provides a clear insight into the father's state of mind and intentions – which led the respondent to believe that he would not assert his rights to summary return – and amounts to a clear and unequivocal declaration of acquiescence.

28. Without prejudice to the foregoing, the respondent submits that regardless of the court's findings in relation to consent/ acquiescence pursuant to Article 13(1)(a), the duration of the children's stay in Ireland could result in a change in their habitual residence. It was contended that the court does not need to agree with the High Court's construction of the text message of the 25 October as a result – citing *G(C) v G(M)* [2015] IESC 12. It was posited that as the children were in Ireland for excess of 1 year prior to the issuing of the present proceedings, in light of Article 12 the question of their return is not mandatory but discretionary and crystallises around the issue of their settlement and integration in this jurisdiction.

Analysis

The standard of review

29. In detailed submissions and arguments to the court, Mr. McBride S.C., counsel for the respondent mother, quite rightly cautioned against interference by this Court with the due exercise of the trial judge's discretion. In particular, reliance was placed on the judgment of Murray J. in this Court in *A.K. v. U.S.* (*supra*).

30. As was acknowledged by the court in *A.K. v. U.S.*, a comprehensive analysis of the standard of appellate review was carried out by Humphreys J. in *Minogue* (*supra*) where at para. 100 he observed:

> *"... one can view the standard of appellate review as falling on a spectrum from a highly deferential approach giving very significant weight to the views of the trial judge, to a situation where the appellate court is somewhat deferential to the trial court's assessment, to a category of re-evaluative situations where deference does not apply and the appellate court simply forms its own view."*

He observed of the first category where an approach that is highly deferential by way of review obtains as arising: *"Where findings of primary fact are made based on oral evidence and where inferences are drawn depending on findings that are based on oral evidence."* Since this case was decided on affidavit the principle of a highly deferential view is not engaged in the instant case. Humphreys J. instances a second category, noting:

> *"Somewhat deferential review applies where the appellate court gives due weight and consideration to the views and findings of the trial court, but is not bound by them to the same extent as would be the case in relation to for example the evaluation of live witnesses generally."*

The instances given include: *"...(b). As regards findings based on affidavit evidence, a somewhat deferential approach should be taken (Ryanair Ltd. v. Billigfluege.de GmbH [2015] IESC 11...and McDonagh v. Sunday Newspapers Ltd. [2017] IESC 46, [2018] 2 I.R. 1."* Humphreys J. observed *"although it must be recognised that an appellate body is not in any worse position than the trial court to evaluate affidavits and form its own view, albeit after having afforded due weight to the views of the trial court."*

He also noted:

> *"(c). An appellate court can form its own view on secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven otherwise than by way of oral testimony: 'per McCarthy J. in Hay v. O'Grady. The basis for this is also that its competence to do so is no less than that of the tribunal of fact (see also Northern Bank Finance per Henchy J. at p. 192). Having said that, it would be inconsistent if an appeal court was completely at large on inferences from admitted facts but had to be very deferential to the trial judge's assessment of affidavits. Both are best viewed as falling into the somewhat deferential bracket, because treating them differently would not make sense"*

The court further observed:

> *"(e). As regards discretionary decision, weight will be given to the decision of the trial judge, but an appellate court will be untrammelled by an a priori rule that it cannot interfere unless some error of principle is disclosed…"*

The decisions in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6 are cited as authority for this proposition.

Humphreys J. at para 100 (iii) observed;

> *"(iii). Non-deferential review arises where the appellate court simply forms its own view of the matter at issue. Examples include the following: (a). Obviously, all questions of law are re-evaluated by the appellate court. The trial court is either right or wrong on legal questions, and there is no room for curial deference in that regard. For this purposes, questions of law includes both those of substantive law and of whether the procedure and process adopted below was correct in legal terms."*

31. As Murray J. observed in *A.K. v. U.S.* at para. 45:

> *"The decision of a court of first instance as to the habitual residence of a child may – depending upon the case – be based upon the resolution of issues of law, findings of primary fact and/or inferences drawn from those findings of fact. In what should be a minority of such cases…the findings of fact may be dependent upon the resolution of conflicting oral evidence, but in most cases they will involve determinations of fact based upon affidavit or documentary evidence and the application of the facts so found to the clearly established meaning of 'habitual residence'."*

Murray J. in *A.K.* noted that there had been no oral evidence adduced in the High Court. Likewise, in the instant case the hearing was conducted based entirely on affidavit evidence. Mr. McBride S.C. observed that this Court should approach the review exercise required on a *"somewhat deferential"* basis and it was for the appellant to show error in the findings to a degree that rendered the High Court decision untenable.

<u>The core issues</u>

32. The core issues in the appeal centre on *"Wrongful Retention"* and *"Habitual Residence"*. The temporal interplay between both concepts is identified by Article 3 of the Hague Convention which provides that:

> *"…the retention of a child is to be considered wrongful where –*
>
> *(a) it is in breach of rights of custody ...under the law of the State in which the child was habitually resident immediately before the ... retention."*

The issues of habitual residence and wrongful retention must be determined as at the date of the alleged wrongful act. Since they are matters which go to jurisdiction pursuant to Article 3, the burden of proof rests on the applicant to establish both on the balance of probabilities. Failure to do so is always fatal to the application. As decisions such as *A v A*

(Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2014] AC 1 (Lady Justice Hale) make clear, the habitual residence of a child is generally considered to be a question of fact rather than a legal concept such as, for instance, domicile. The latter is governed by the rules of private international law and ordain that a child automatically takes the domicile of his or parents.

33. Where, as here, there is a disagreement between the parties as to whether an existing habitual residence has continued or has recently changed, the burden of proof shifts to the respondent who is asserting such a change to demonstrate that it has occurred. In reaching its decision, the court should look at the evidence as a whole, a task which is increasingly challenging in the era of social media and electronic communications, as both the English Court of Appeal and the Supreme Court of the United Kingdom have observed in recent decisions, including in *Re C (Children)* [2017] EWCA Civ 980, [2018] 1 FLR 186 at para. 161, a view shared by Lord Hughes on appeal [2018] UKSC 8, [2019] AC 1 at para. 48.

34. Hence, the first step is to locate the earliest date at which, based on the most contemporaneous and reliable evidence adduced before the High Court, it could be said that the retention of the children in Ireland against the wishes of the father occurred. The issue of habitual residence as of that date is to be determined in accordance with the laws of this State as the requested state and in that regard "*habitual residence*" has an autonomous rather than a domestic law meaning. It is not in dispute that the father is the holder of and exercised rights of custody at all material times in respect of both children. Were it in dispute, then proof of foreign law is a question of fact as decisions such as *MacNamara v. The Owners of SS "Hatteras"* [1933] IR 675 at 679 illustrate.

Wrongful retention

35. Reference to "*wrongful retention*" is to be found in Articles 1, 3, 12-16, inclusive, of the Hague Convention. The vindication of the rights of children that they be protected "*from*

the harmful effects of ... wrongful ...retention" enshrined in the Preamble to the Hague Convention in practical terms requires that the court determining an application for the summary return of a child to consider the act of wrongful retention of the child as having occurred at the earliest date or stage as is supported by cogent evidence. In retention cases that date logically occurs whenever it is shown that the parent who is retaining the children abroad first engaged in unilateral acts directed towards and consistent with rendering permanent the children's continuing presence in the new country. This approach substantially reduces (if not entirely precludes) the scope for the abducting parent to surreptitiously establish a habitual residence in the country to which the child has been abducted, as decisions such as that of Lady Justice Hale in *A v. A* (*supra*) illustrate.

36. The trial judge considered arguments advanced on behalf of the father that the "wrongful retention" of the children within Article 3 had occurred from 27 May 2022 and rejected same on the basis that "*the couple had yet to decide where they would live as of that date."* (6.3) The judge instead identified the earliest date on which a wrongful retention could be argued to have arisen as 25 October 2022, noting that up until that date "*Had the relationship problems been ironed out, it appeared just as likely that the family would reunite in Australia as in Ireland*."

37. The judge considered that the father had given "*an unequivocal consent"* on the 25th October 2022 where in a text the father had indicated to the mother that she could stay in Ireland with the children "*knowing that this meant he would not see his children for some time*." The trial judge noted the withdrawal of that consent two days later which had rendered it equivocal but found that, by then, the habitual residence of the children, a question of fact, had changed (5.5 – 5.9 of the judgment). She observes that "*From that date, the children were retained in Ireland, but this was not a wrongful retention as the children were habitually resident here by that time*." (para. 6.4 of judgment) By 27th October, when

the father withdrew his consent to their presence in Ireland, the High Court found that the children had ceased to be "*habitually resident*" in Australia and no claim under the Hague Convention was maintainable.

38. The first question is whether the trial judge correctly located the earliest date on which, on the evidence put before the court, a "*wrongful retention*" of the children within the meaning of Article 3 could be said to have occurred. This involves a consideration of the affidavits and exhibits which are voluminous. They largely comprise of electronic communications. The family travelled to Ireland on return tickets on 17th November 2021. The mother applied for social welfare payments in Ireland but also submitted an appeal to the Australian Administrative Appeals Tribunal ("the Tribunal") in respect of alleged entitlements to family tax benefit. I find the evidence she put before the Tribunal far more reliable as to her true intentions and the common intention of the parties than the strident assertions contained in her affidavits in determining their contemporaneous intentions when they came to this jurisdiction and thereafter. The Tribunal's decision was delivered on 25th March 2022, some three days or so after the father had returned to Australia to resume his employment from which he had obtained leave of absence in November 2021 for the trip to Ireland. It notes:

> *"15 [The mother's] further evidence is that together with her husband and children, she had originally intended to return to Australia on 23 February 2022. They were unable to do so because on 11 January 2022 she was diagnosed with COVID-19 resulting in delay in her recovery and in meeting immunisation requirements. They were rebooked to return on 22 March 2022. Her [older child] developed a serious illness resulting in ... hospitalisation for 2 days and a follow up ultrasound appointment scheduled for 9 June 2022. She is seeking an earlier appointment. She therefore remains in Ireland with the children while her husband is returning to*

Australia for his employment. She has rebooked her and the children's flights for 27 May 2022, hoping to get the earlier ultrasound appointment for [older child]. She is further concerned as to the current heightened risk of international travel because of the war between Russia and Ukraine and the potential involvement of EU countries which might further impact her return travel."

39. This is based on the mother's contemporaneous account to the Tribunal of their circumstances and intentions when the family came to be in this jurisdiction. She confirms the temporary nature of the trip and the common intention of the parents to return to Australia, including the father's return (initially delayed for reasons connected with the COVID-19 pandemic) for work and the inability of the mother and children to travel with him on 22 March brought about solely by health exigencies of the mother and later the older child. She unequivocally identifies 27th May 2022 as the firm agreed date for her return with the children to Australia. It accords with the evidence of the father and is to be preferred to the various assertions and retrospections on her part advancing the defences of acquiescence and/or consent or that the marriage had irretrievably broken down as of March 2022.

40. The statements and representations made by the mother as recorded by the Tribunal offer a contemporaneous insight into her true position and her understanding of the common agreement between the parties when they travelled to Ireland and the agreement between them when the father returned to Australia at the end of March 2022. These are consistent with the family visiting Ireland on a holiday basis with an original intention of returning to Australia on 23rd February 2022. The return tickets were booked by the mother. The return was delayed (for COVID-19 reasons) in respect of the father until 22nd March 2022 and the common agreement of the parents was that the mother and children would follow on 27 May 2022 (for which she had re-booked their flights), after certain medical exigencies had been addressed. Wading through the material exhibited, it becomes very evident that the mother

thereafter took incremental unilateral delaying steps directed towards ultimately reneging on the agreement with the father to return to Australia with the children on 27 May 2022.

41. The unilateral acts of the mother aimed at reneging on the agreement and retaining the children in this state by stealth included; without reference to the father, enrolling the older child in an Irish play school in April 2022. That child had already been enrolled to commence kindergarten in Australia in February of 2022. In a message to the father she remarked that the child was *"so looking forward to kinder in February this year and is so ready for it, it's a no brainer for me."* In another text the mother indicates that with regard to the 27 May 2022 return, she '*[hadn't] heard from quarantine exemption and [was] not going unless they drop the [expletive] over there"*. When the father presses as to why there was a delay with the return flight for the children, she conjures two reasons in a text: *"Next date that was free to change and more chance Australia will let me in"*.

42. There is no evidence that the mother made any reasonable efforts to ensure that the older child underwent an early scan to enable the children return to Australia on the scheduled flight. Neither is there any evidence that the scan in question couldn't be carried out in Australia if the child returned expeditiously. The mother contrived to further delay the return and in a text for instance of 18 May 2022 states: *"So I rang Emirates. Asked about July…$600+ to change flights, same for August. Got 10th Sept for €120, at least the weather should be brightening up by then."* Beyond the representations as to the additionality of costs, there was no evidence put before the High Court to substantiate those assertions. The texts and further rescheduling of flights demonstrate the continuing agreement between the parents that the mother was returning to Australia with the children, precluding the possibility that the father consented or acquiesced to their remaining in Ireland throughout that time.

43. It is clear that the father never consented to the 10 September (or any date after 27 May 2022) as the deferred return date for the children. This was communicated to the mother on several different occasions. For example, on 1 July 2022 he messages *"September is just too far away"*. He spoke of having spent *"...months without you...and...have been extremely difficult. I miss our family and the life that we have built together in Australia. I feel like I have already missed so much of the [children] growing up. It is time to let me know if & when you and the [children] will be returning home to Australia."*

44. Voluminous communications on file pertain to various domestic issues, such as, a possible sale of the family and a purchase of another or other properties and other permutations and represent a couple in flux, it being by no means certain whether the parties would continue with the marriage or go their separate ways. The mother sought legal advice in this jurisdiction and having regard to the realty and assets of the couple in Australia, it became evident that the mother might need to institute proceedings in Australia to secure the orders she desired in regard to family property. She appeared to be unwilling at one point to identify the exact date in September she was scheduled to return, although her own affidavit deposes that she had rescheduled the return flight for 10 September 2022. She failed to return the children to Australia on the said date. The evidence is only consistent with the mother having agreed with the father to return to Australia with the children on 27 May 2022. He did not consent to any further delays beyond that date.

45. The High Court's approach unduly commingled the Article 3 fundamental proofs as to wrongful retention and habitual residence which go to jurisdiction and which are to be established by the applicant with the defence of "consent" pursuant to Article 13. Consent only comes into play after the applicant has met the proofs in Article 3 and proceeds to seek an order for the summary return of the children under Article 12 where it is demonstrated that the wrongful retention occurred less than one year prior to the commencement of the

proceedings. The structure and preamble to the Hague Convention and indeed the initial words of Article 13, which provide "*Notwithstanding the provisions of the preceding Article…*", suggests generally that it is only after the applicant has met the Article 3 proofs as to wrongful removal/retention and habitual residence that the court would then move to consider any Article 13 defences raised by the respondent and the burden of proof shifts to the respondent to establish same. On the interrelationship between Articles 3 and 13 in the context of the issue of consent Ward L.J. in *Re P (A Child) (Abduction: Custody Rights)* [2004] EWCA Civ 971 observed;

> *"…The policy of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention. If a child is removed in prima facie breach of a right of custody, then it makes better sense to require the removing parent to justify the removal and establish that the removal was with consent rather than require the claimant, asserting the wrongfulness of the removal, to prove that he or she did not consent. Article 3 should govern the whole Convention and Article 13 should take its place as the exception to the general duty to secure the return of the child which is, after all, the basic principle of the Convention."* (para. 33)

46. Ultimately, in the instant case, I do not consider it necessary at all to reach any conclusion as to whether consent can ever come within Article 3 since on the basis of the facts and evidence presented the respondent did not assert that the father had consented to the retention of the children by the mother in this jurisdiction from 27th May 2022 and the issue therefore does not arise as becomes clear hereafter.

47. A failure to identify the earliest date where wrongful retention is identified facilitates the abducting parent in defeating the application for return of the children (as occurred in the instant case) by allowing the abductor to assert that the children's habitual residence had changed before the act of wrongful retention occurs or was discovered by the left-behind

parent. The consequence of that approach to the evidence in the instant case is that no "*wrongful retention"* was considered to have been established by the father within Article 3, resulting in refusal of the reliefs sought. Those errors in the approach, analysis and findings of the High Court amount to errors of law which render the decision untenable and it falls to be reversed.

Delay

48. The judge was unimpressed by the father's lack of candour. Understandably so. That may have predisposed her towards identifying events of late October 2022 as representing a watershed moment where in the court's view a final piece of the jigsaw *"fell into place"* and the father's consent to the mother remaining was forthcoming by text. Such factors, however, fall to be left to one side when determining the precise date when the agreed finite period for retention by the mother of the children in Ireland unequivocally came to an end.

49. The evidence of both parties demonstrates that the latest return date agreed between them was 27 May 2022. Same is corroborated by the Tribunal decision. It is noteworthy that the mother declined to identify any date as being that on which she first retained the children in Ireland. As such therefore she disputed the 27 May as the operative date but adduced no evidence to contradict it, choosing instead to rely only on the findings of the High Court, as she was entitled to do. That decision was not one contended for on behalf of the mother at the hearing in the High Court. The conduct of the mother from and after 27 May 2022 provides clear evidence of her continuing tacit intention to repudiate her agreement with the father to return with the children. Such acts have long been established as amounting to "*wrongful retention*" within Article 3(a) which engage rights under the Hague Convention.

Consent

50. Whether the issue of consent falls to be considered within the ambit of Article 3 (which goes to jurisdiction) or Article 13(a) (as a defence ground which merely opens the

door to the exercise of discretion) depends on the facts in a given case. By 25 October 2022, the mother had been wrongfully retaining the children in this jurisdiction, since 27 May, contrary to the wishes of the father, an undisputed holder of rights of custody within the meaning of the Hague Convention. The mother once more failed to effect their expeditious return on the flight date of 10 September. Her communications suggested that she may have rescheduled to a further date, possibly in December. She did not prove that the father ever consented to the retention of the children beyond the 27 May. The issue of a valid consent to the continued presence of the children in Ireland which would defeat the claim that the retention was "wrongful" and exclude jurisdiction under the Hague Convention did not arise. The father had proven that the children were wrongfully retained in Ireland within Article 3. Accordingly, no issue as to consent in the context of Article 3 was engaged. The trial judge erred in fact and in law in determining otherwise.

The electronic communication from the father sent to the mother on 25 October 2022

51. Counsel for the respondent fairly acknowledged that were the court to determine that a wrongful retention of the children had occurred on 27 May 2022 then the prospect of successfully raising a defence of consent/acquiescence within Article 13 was slender. In that he was entirely correct. However, in deference to his arguments I propose to briefly consider same. In the context of Article 13(1)(a), it was clear throughout the summer of 2022 that the mother was repeatedly asserting that she was returning in September. The father deposed in his affidavit of 12 January 2023 to conversations with the mother in September 2022: *"You said your (sic) coming back in September. I was told to approach a government lawyer but I said no need. I am excited to see everyone again soon. I am paying family car, house, presents and house upkeep for them here."* It is clear from the communications that the children's older sibling, the child of the father from a previous relationship who was going

to school in Australia, was missing them and also anxious to see them and that aspect will be considered further hereafter. In other emails the father states *"All I want is a date your (sic) coming back instead off (sic) past months you told me that never happened and you said when it gets warmer here which is now…"*.

52. The judge analyses the text of 25 October 2022 at para. 4.18 of the judgment. It was noted in the said exchange that the mother had indicated she didn't want to return to Australia and that the father *"initially replied that he would not ask her to move home or to bring the children back."* About 48 hours later, the father communicates, stating:

> *"I am not in the right head space for any of this I thought over and about not seeing the [children] but I just wanted to keep doing these things to make you happy. I think if we are selling the house you need to be here aswell (sic). Started letting people know your (sic) not wanting to come back and the support I'm getting is great. I might see somebody as I think it will be best for me. I also don't know how it will work being married and so far apart. Alot (sic) is going on and I think we need help sort out (sic) everything. I can't not see the [children] as it hurts with [older sibling in Australia] too much. [Older child in Ireland] backed me up the other day and I am not doing anything to back [said child] up. Sorry for the confusion but as I said we both need help to sort everything out."*

53. Viewing the emails in their totality and bearing in mind the swift revocation of the one sent on 25 October, it is clear, in my view, that they could not amount to a valid defence of consent or acquiescence pursuant to Article 13(1)(a). They are inconsistent and ambiguous and are entirely lacking in the type of clarity required for a valid consent in the sense set forth in the jurisprudence such as by Finlay Geoghegan J. in *S.R. v. N.M.R.* [2006] IEHC 10, as upheld by the Supreme Court at [2006] IESC 7 which envisages that it be clear, unequivocal and informed.

54. Generally, to be operative as a valid defence pursuant to Article 13(1)(a) of the Convention consent ought to be unequivocable, clear and informed. The approach to a defence of consent, which at best opens the door to the exercise of discretion by the court as to whether to grant or refuse the summary return of children in light of the context and facts which otherwise would be mandatory, falls to be considered in the context of Article 13(1)(a) jurisprudence which makes clear that even where consent is established, refusal to return is nonetheless still to be the exception to the general obligation to secure the summary return of children which is the guiding and fundamental principle enshrined in the Convention.

55. The evidence in this case illustrates that a defence of consent was never made out. Article 13(1)(a) requires that the mother who opposes the return '*establishes*' consent. The burden of proof lies on her. The burden is discharged by proving consent on the balance of probabilities. There was a high degree of chaos and personal feelings evident in the communications passing between the parties, and a real sense of distress in those sent by the father. The strong indication was that the father wanted to salvage the marriage and resolve matters amicably between the parties. His reluctance to go down the route of engaging in proceedings pursuant to the Hague Convention, of which he was aware since the month of August 2022 at the latest, appears first and foremost to have been informed by his desire not to precipitate litigation which might in turn lead to the irretrievable breakdown of the marriage.

Habitual residence

56. The issue of habitual residence is a question of fact. It has to be resolved as at the date or time of the alleged wrongful act of retention. Therefore, in the instant case, once the date of wrongful retention is located which I am satisfied, on the evidence before the court, was 27 May 2022, the issue of habitual residence falls to be determined as of that date.

57. There is a great deal of jurisprudence in regard to habitual residence and the factors to be taken into account in the consideration of same. This was all addressed by the parties in submissions and in the judgment of the High Court, including the decisions of this Court in *Hampshire County Council v. CE & NE* (*supra*) and *A.K. v. U.S.* (*supra*) and is not repeated. According all due deference to the trial judge's assessment of the facts, I am satisfied that the weight of the evidence identifies unequivocally to the 27 May 2022 as the relevant date when wrongful retention first occurred and as such the operative date for the determination of habitual residence under Article 12.

58. The conclusion of the judge at 5.8 that *"By the 25th of October, with his consent, the Respondent had decided to stay in Ireland and, given their ties with their community and their integration here, it seems reasonable to conclude that the two children were, from the 25th of October, habitually resident here."*

59. As the judge noted, the jurisprudence of the Hague Convention on habitual residence has aligned with that of the CJEU, citing *Mercredi v. Chaffe*, a case which concerned an infant aged two months. Likewise, the decision in *Proceedings brought by A* (Case C-523/07) EU:C:2009:225 [2009] E.C.R. I-2805 is worthy of note. The CJEU observed:

> *"37. The 'habitual residence' of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case.*
>
> *38. In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment.*
>
> *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 place 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.*
>
> *40. As the Advocate General pointed out in point 44 of her Opinion, the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State."*

It is very evident from that decision that the exercise for the court extends to a comprehensive comparative evaluation of the level of integration of children in the country of origin as well as in the requested State where they currently reside.

Integration - habitual residence

60. It is noteworthy that the affidavit evidence advanced on behalf of the respondent mother provided little tangible evidence about the daily lives of the children or the security of their position where they, apparently, reside with the respondent's mother. Further, as the High Court correctly found, for most of 2022 the family was *"in flux"*. The judge also correctly found with regard to events in August and September that *"the events did not indicate a settled intention to stay in Ireland"*. (5.4) The judge's analysis at 5.5 is correct at the level of principle and, indeed, there was no evidence before the High Court of the children being enrolled in Irish schools for 2023. With regard to the mother, the court was clear that up to the 25th October 2022 that state of flux continued.

61. Thus, it follows that as of 27th May 2022 the mother was demonstrably not habitually resident in Ireland nor indeed were either of the children, it being, in my view, the case that the younger child was not sufficiently individuated from the substantially complete dependency upon the mother to be capable of forming independently an autonomous

habitual residence irrespective of the views or intentions of the mother. In the case of the older child, in my view, there is insufficient evidence, for all the reasons identified above, to find that a change of habitual residence had occurred prior to 27th May 2022.

62. It appeared to be acknowledged on the part of the mother that had there been no text of 25th October 2022 from the father, there would have been no basis for asserting that the habitual residence had changed on that date and no basis at all for any such a finding on the part of the trial judge.

63. There is a distinct lack of evidence put before the court by the mother as to the relative level of integration of both children in each country. With regard to the older child, one need only consider the report of the Family Law assessor to see that although that child was barely three and a half when the father returned to his employment in Australia in March 2022 and that child was four years and six months at the time of interview, the child had deep bonds of attachment to the father, recalling *"When I was a baby I live with Daddy and we went to his house and we went to Neeno's house"*. The child was aware that they had lived in a different country, though the child's knowledge of geography was limited. The child recalled the journey to Ireland: *"Daddy was on the plane and then he said he'd go home and I said no daddy stay here. I had a very very very sad hurt feeling because my daddy is good and he never comed back." "I said to mummy I miss daddy and she said 'I know he'll be back on Monday'. I feel daddy's heart broke as well."*

64. With regard to schooling, this child was in pre-school. Contrary to what is suggested in the judgment (at 4.13, 4.36, 5.3 5.9), the older child had not entered the formal educational system here. With regard to attachments and expectations, the child stated: *"When I grow up…I will just go to a big school in…where daddy lives"*. The child identified other children in the pre-school whom the child considered friends. The child mentioned their older sibling, stating *"Mummy minds me. Daddy is at work looking after [named sibling]"*.

65. With regard to the child's understanding of their future care and living arrangements, the child stated: *"Daddy's house is called England, I never met him. I wish I lived in England because I never saw it and it looks a beautiful place where my daddy lives. I ask can I go to his house but I never do, I don't know why"*.

66. The child also stated *"Well, my mummy never gets me back to daddy's country. I wish my daddy was here, I just want him. He is very nice. He lets me have lots of teddies"*. The child was found by the High Court to have no understanding of the concept of *"Australia"* and was reported to have expressed no view about returning there or not. The child was also noted to express no objection to returning to live in Australia or not. It was noted that the child *"expressed a desire and a need to see the father"*. The report concluded that the child *"was able to identify basic feelings and strong feelings of sadness about leaving…daddy and feelings [they] missed him. …was able to consider the position of another when … described that … Daddy feels that his heart is broken."* The older child had been booked to commence kindergarten in Australia in February 2022, the initial return date booked by the mother for the family's return to Australia.

67. Integration of the children into the social and family environment to establish an alleged change in habitual residence of the children, such as was claimed by the mother in this case, must be directed to the date when the father ceased to consent to their continued presence in Ireland. For all the reasons stated above that date was 27 May 2022 and not late October as the High Court considered. The proper assessment of integration in the context of *habitual residence* calls for a comprehensive evaluation of the relative extent of integration of each child in both countries. Decisions such as *In Re G-E (Children) (Hague Convention 1980: Repudiatory Retention and Habitual Residence)* [2019] EWCA Civ 283, [2019] FLR 17 – demonstrate that a comparative exercise is desirable whereby the court inquires into and considers the factors which connect each child to each state - the requested

state and the requesting state - where there is a dispute regarding the habitual residence of the child or children in question (see para. 5.9 of the judgment of Lord Wilson). The circumstances and intentions of the parents vis-à-vis the children's life in Australia arguably warranted more careful scrutiny even in relation to a finding of change of habitual residence in October - an issue that does not now arise since the retention without consent occurred on 27 May. The following factors are relevant:

(a) The parents owned a home in Australia where they resided with the children.

(b) The father worked there and the children had lived there from birth.

(c) The children's brother resides in Australia and the older child in particular has a relationship with him.

(d) The arrival of the family here coincided with COVID-19. Opportunities for socialisation and integration into a community were at a minimum.

(e) The older child commenced attending pre-school for a few hours per day from late April 2022 awaiting the return flight scheduled for 27 May. Enrolment was effected without the knowledge or consent of the father.

(f) Neither child had commenced formal schooling within the Irish educational system. The older child was booked to commence kindergarten in Australia.

(g) The playschool facility was part of a government scheme which was free and the mother characterised availing of it as *"a no brainer"*.

(h) The older child may not have referenced "Australia" specifically but clearly stated her understanding and expectation that she would be attending school where her father lived "*I'll just go to a big school in …where daddy lives."*

(i) There was no evidence of the mother being employed in Ireland in 2022, with the exception of one pay slip for January 2022.

(j) There was no evidence that she had taken any steps to acquire accommodation independent of a relative with whom she was residing.

(k) The security of tenure of accommodation arrangements in Ireland was not clear.

68. The judge correctly analysed events surrounding the enrolment of the older child in the playschool though erroneously considered that it was the younger child that was so enrolled and also erroneously considered that the child was enrolled *"in school"*. The judge correctly concluded *"the logical implication"* was that the enrolment was *"only for a few weeks before their probable return"*. In fairness the respondent's counsel did not assert that the integration of the children in Ireland had occurred as of 27 May 2022. In that he was correct. There was no evidence to support such a proposition. The requisite degree of disengagement of the children from family life in Australia coupled with the requisite degree of integration of the children as of 27 May 2022 into a social and family environment in Ireland sufficient to displace their habitual residence of origin was not established by the mother.

Very young children

69. In reaching conclusions with regard to habitual residence, at 5.2 the judge remarked: *"The children in this case are very young but have lives of their own and are not completely dependent on their primary carer, their mum, such that her decision will dictate where they are resident. However, the intention of their parents is very significant in this case due to their relative youth."* The judge went on to note, again erroneously, that the children were *"in school in Ireland"* and they live with a close family member who is referred to as often as the child's dad in the assessment report concerning the older child. The latter was noted to miss the father. The judge noted *"the child's centre of interests was in Ireland by the time of the assessment. The issue is when that change occurred, and if it pre-dates the retention of the children here."*

70. On 27th May 2022, the older child was three years and five months, the younger one fifteen months. It is to be noted that as of 25th October 2022 the older child was three years and ten months, the younger one twenty months. The question arises as to how the so called integration test is to be applied in cases concerning very young children who have not attained a level of individuation or personal autonomy which I find this child had not.

71. In the case of the older child, applying a child-oriented approach towards the inarticulate expressed wishes, views and understanding of that child, there is no suggestion that they understand or express a wish to reside permanently in their current circumstances. The child anticipates going *"to big school" ... "where daddy lives".* It is evident from the interview with the child, such as it is, that the older child's insights into the arrangement don't suggest an understanding of a continued presence in this jurisdiction nor was there the necessary degree of stability and understanding that they would be residing here for the foreseeable future and not returning to where their father and brother resided.

72. Of course, the views and intentions of parents are merely a factor among many in assessing whether any integration has taken place and in assessing the degree, nature and extent of integration of each child into the social and family environment in Ireland. It is necessary to assess the integration of the mother in Ireland only to the extent that the integration of the younger child aged fifteen months as of 27th May 2022 was dependent on the level of integration of the mother upon whom that child was substantially, if not entirely, dependent. It was evident that the mother was contemplating the institution of proceedings in Australia pertaining to the breakdown of the marriage and property issues and indeed such litigation could not have been prosecuted in this jurisdiction, as the mother had been legally advised. I am satisfied that the mother had not sufficiently integrated into this jurisdiction such that her own habitual residence had changed to that of Ireland. She had taken no formal or irrevocable step consistent with having made a definitive decision to reside permanently

in this jurisdiction. Her conduct was consistent with creating a state of affairs whereby through mechanisms of delay, prevarication and the ever protracted deferral of the flight dates, the matter could be indefinitely deferred to a point where she might successfully resist a summary return under the Hague Convention.

73. In the case of the older child, it is significant that they have meaningful and deep connections with the father and referenced their brother (a school child in Australia) by name and clearly had a relationship with him. The older child had anticipated going to kindergarten in Australia, was aware of that plan and had looked forward to it, as the mother's messages indicated. The greater a young child's level of integration into the social and environmental life in the country of origin, the slower will such a child be to achieve the necessary degree of integration in the new state.

74. Although the older child's knowledge of geography of the relevant distance between Ireland and the Antipodes was understandably lacking, nevertheless the assessment report indicates the child's clear sense of missing the father and wishing to reside where he resided. The report tends to support overall a conclusion that the child had a greater sense of social and familial ties and belonging in the place where they had lived all their lives and exhibited little substantive attachment to Ireland.

75. Relevant also is that contrary to the assertions of the mother, the parents did not intend a permanent move to Ireland at the time they arrived in this jurisdiction in November 2021. No doubt various discussions took place between the parties, but the mother's own statements to the Australian authorities entirely undermine her contentions that the children were habitually resident in this jurisdiction at that time.

76. The children's home and place of residence when they travelled to this jurisdiction was clearly Australia. They were both habitually resident there. They travelled here on return tickets scheduled to return as a family to Australia in late February 2022. COVID-19

put paid to that initial plan, deferring the family's return to late March 2022. The father returned to Australia in March 2022. A further deferral was necessitated for medical reasons on the part of the mother and children at that point. Those deferrals arose because of exigencies which must be taken at face value as having been *bona fide.* The deferrals of the flights for the stated medical reasons could not in and of themselves give rise to a change in habitual residence. The father's concurrence to further deferrals ended when the mother failed to take the children on board the flight on 27th May 2022. There followed thereafter unilateral "*creeping*" retention by the mother in this jurisdiction which I am satisfied, on the basis of the evidence, was wrongful since it was in breach of the rights of custody of the father and a constituted continuing breach with effect from 27th May 2022, a date when the habitual residence of the children remained Australia**.**

77. At its height, the "consent" of 25 October operated for about 48 hours. No substantive reliance was demonstrated by the mother to have been placed upon same. It evidently occurred in the context of an impetuous exchange between the parties at a time of heightened tension and distress particularly evinced by the father who appeared to have become increasingly desperate to secure the voluntary return of the children by the mother. The mother did not establish that she placed any substantive reliance on the alleged "consent" which was revoked expeditiously. I am not satisfied that the mother has established that the father acquiesced in fact in the children remaining in this jurisdiction such as to engage a valid defence pursuant to Article 13 of the Hague Convention which again, if established, would go no further than opening the door to the exercise of discretion. The assertion hinges on the email of 25th October 2022. The subjective intention of the father is a question of fact for the High Court judge to determine and the burden of proof rested with the mother to demonstrate that a valid acquiescence was proven. Acquiescence, in the language of Lord Browne-Wilkinson in *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72 in the House

of Lords, is: *"Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."* The claim of acquiescence called for an assessment as to whether the mother understood and was thereby caused to act on the basis that the father was agreeing to the permanent retention of the children in Ireland.

78. The impetuous email swiftly retracted does not meet the threshold of conduct by words or actions that could reasonably be considered so unequivocal that a court could be satisfied that it operated on the mind and affected the subsequent conduct of the abducting parent to such a degree that summary return of the children ought not now in good conscience be ordered or that justice so required.

79. Ultimately the mother placed no reliance on the email, save praying in aid its content in resisting orders being made under the Hague Convention. She simply pursued the path that she always had done, as the email exchange between the parties indicated, prevaricating but also signifying the ongoing possibility of deferrals of the flights. Hence no defence has been made out which would warrant the refusal of a summary order for the return of the children to Australia pursuant to Article 12 of the Convention.

80. The material situation facing the children upon their return and their mother (should she choose to return) can be addressed by an undertaking to be given by the father enabling them to reside in the family home pending determination of all issues by the courts in that jurisdiction. It would disproportionately undermine the spirit and intendment of the Convention were the court, on the facts presented in this case, to refuse to order the summary return of the children even if the email could ever have been found to amount to either consent or acquiescence of the children's residence permanently in this jurisdiction.

On balance, the vindication of the children's rights under the Hague Convention require that the order of the High Court be set aside and in lieu there will be an order for their summary return to Australia, subject to appropriate undertakings to be furnished by the father.

Conclusions

81. According all due deference to the trial judge's findings as to fact, I am satisfied that the trial judge erred in finding that although the children were retained in Ireland, this retention was not wrongful as habitual residence had changed or 'crystallised' on 25 October. With regard to the 27th May, it is clear that same is a pivotal date. It was very obvious to the respondent mother from the communications from mid May 2022 and thereafter that the father was not in agreement with the delays in her returning the children at any later or deferred date. In effect the mother was "stringing along" the father, playing on his uncertainties and his anxiety to restore the relationship between them to secure her voluntary return to Australia with the children rather than having to take formal steps pursuant to the Hague Convention which risked undermining the prospects of a reconciliation.

82. In arriving at a conclusion that retention first occurred on 25 October and was not wrongful by reason of the father's consent of that date the trial judge erred in fact and in law in co-optating the issue of consent unnecessarily into the assessment as to whether the retention was wrongful within Article 3. The facts of this case demonstrated that the retention of the children in Ireland was no longer agreed to by the father from and after 27 May. Where possible a balanced approach to construction and operation of the Convention's should be followed whereby, in general, Article 3 should be considered to govern the whole Convention and Article 13 should be viewed as encompassing specific exceptions (which at best open the door to the exercise of judicial discretion) to the general duty imposed on the

courts by Article 12 to secure the prompt return of children to the place of their habitual residence. Locating the retention at the earliest date supported by the evidence achieves that balance and obviates considerations of consent in the assessment of whether the father has discharged the burden of proof pursuant to Article 3, which I am satisfied he clearly has.

83. In resisting the application for the return of the children, the burden rested with the mother to adduce evidence of a change of their habitual residence. She has failed to discharge that burden. Whatever her undisclosed intentions, no weight can be ascribed to same. In her outward behaviour towards the father she was repeatedly devising reasons for having to defer the flight further.

84. Counsel for the respondent quite properly and sensibly acknowledged that if the wrongful retention is found to have taken place on 27th May 2022, arguments based on the potential defence of the children being well settled in their new environment were not viable to any realistic extent.

85. This is correct having regard to Article 12(2) of the Hague Convention. Article 12(1) is essentially mandatory insofar as it provides:

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

86. Since it has not been demonstrated that twelve months had passed prior to the return proceedings having been initiated – the latest date for which must be the 17th April 2023 – a ground of opposition to the summary return based on the children being now settled in their new environment is not maintainable under Article 12 as a matter of law.

87. The clear error of the trial judge on a pivotally material issue, namely, the date when the wrongful retention occurred and consequentially the status of the children's habitual residence as of that date, requires the order of the High Court be set aside. The exigencies of time in the context of the Convention and the urgency with which such applications are to be determined warrant that this Court carry out the necessary exercise since this case was heard exclusively on affidavit before the High Court. It follows from the evidence that Article 4 of the Convention was engaged vis-à-vis each child since both were habitually resident in Australia immediately before the breach of the rights of custody of the father occurred on 27th May 2022, the date when the "*wrongful retention*" of the children by the respondent occurred within the meaning of Article 3.

88. I am unable to accept the contention that there never was a clear and unequivocal request for the children to be returned. That is not a requirement of the Convention in any event. Return flights were being maintained by the mother, a measure which was on balance designed to lull the father into a false sense of security as to the children's pending return.

89. Any delays, particularly from 25th October to December, when the father submitted his request to the Central Authority of Australia to take steps to secure the summary return of the children pursuant to the Hague Convention, represent less than two months and are not significant.

90. In the instant case the evidence is consistent only with actual wrongful retention of the children by the mother from and after 27 May 2022 when she failed to return the children to Australia which was, on that date, the place of their habitual residence. Thereafter, the retention was wrongful and in clear breach of the father's rights of custody. As and from 27 May 2022 the agreed finite period of care by the mother of the children in Ireland was at an end. There was no evidence to support consensus or any valid agreement thereafter on the part of the father to the children remaining in this jurisdiction. The trial judge erred in finding

otherwise. In particular, the clear evidence before the High Court demonstrates that the retention of the children by the mother first occurred on 27 May 2022, a date when they were habitually resident in Australia. The retention was in breach of rights of custody vested in and being exercised by the father. It was therefore "*wrongful*" within the Hague Convention giving rise *prima facie* to an entitlement to an order for the summary return "*forthwith*" of the children to Australia. The fundamental errors in the conclusions of the High Court stem from its rejection of 27 May 2022 as the date of the "*wrongful retention*" of the minors in Ireland. The finding that the retention by the mother first occurred after 25 October is contrary to the evidence and the weight of the evidence and is erroneous, as is the consequential assessment that such retention was not wrongful because after that time (and prior to 27 October) the children's habitual residence had changed irrevocably by virtue of a "*consent*" of the father considered to have been given by text on 25 October 2022 to their remaining in this jurisdiction.

91. The failure of the father to trigger the Hague Convention proceedings earlier, for instance, from June 2022 onward can be readily understood when one reads the voluminous email and text communications exhibited. He was seeking to salvage the marriage and save the relationship. He was fearful or concerned that instituting or, to use his own language, *"triggering"* the Hague Convention could lead to an irretrievable breakdown in the marriage. Nevertheless, the mother could not have been in any doubt, as of that time, that he was not consenting to the continued presence of the children in this jurisdiction and was pressing for their early return to Australia.

92. The children were at all material times prior to 27 May habitually resident in Australia. The father no longer consented to their presence in this jurisdiction after that date.

93. At best, the "*consent*" of the father of 25 October was fleeting, given under pressure and lasted no longer than 48 hours. At that time, undoubtedly, the children were being

wrongfully retained by the mother, by stealth, in breach of the father's rights of custody under the laws of Australia. The mother's decision to remain in Ireland with the two children was a unilateral decision which in substance repudiated the father's rights of custody. There is no evidence that she took any step of an irrevocable nature in the 48 hours between 25 October 2022 and 27 October 2022 when the father clarified his position and revoked the consent, such as it was. I am satisfied it was not clear and unambiguous.

94. The text of 25 October lacked the qualities necessary for a valid consent which should be real, positive and unequivocal. The respondent failed to establish on the balance of probabilities that there was a valid consent within Article 13(1)(a).

95. The judge erred in failing to carry out a more comprehensive global analysis of the circumstances of the children's lives and family ties (including with their older brother) in Australia as well as the circumstances that led to their presence in Ireland and how their lives here had evolved. A fuller analysis required to be carried out of the circumstances of the children's lives in Australia and the common intention of the parents up to 27 May 2022.

96. Merely acquiring some degree of integration in Ireland does not have the effect *per se* of extinguishing either child's habitual residence of origin in Australia. What was called for was a careful comparative calibration of the nature and extent of the integration of the children in both jurisdictions and the factoring in of the respective conduct of the parties and the intentions, decisions and wishes of the parents as elements in the process of analysis.

97. The conduct of the father did not at any point amount to either a consent or acquiescence such as would give rise to a valid defence pursuant to Article 13(a) of the Hague Convention. Even if there had been established a defence of either consent or acquiescence within Article 13(1)(a), the spirit and intendment of the Convention is such that it would on the facts of this case, warrant the exercise of the discretion in this instance

to direct the summary return of the children to the state of their habitual residence in Australia.

Order

98. It follows that the court declares that the children have been wrongfully retained in this jurisdiction, in terms of Article 3, in breach of the appellant's rights of custody. Accordingly, the court further orders the return of the two children named in the title to these proceedings to the jurisdiction of the courts of Australia forthwith and in any event on or before Saturday 9th March 2024, subject to the undertakings hereafter stated being provided to this Court by the respondent. Subject to the undertaking (below) on the part of the father being forthcoming in writing, the court orders that the children be returned to the jurisdiction of the courts of Australia on or before Saturday 9th March 2024.

Proposed Undertakings

99. The parties travelled to Ireland on 17th November 2021 as a family and at that point the marriage between the parties was subsisting. A full analysis of welfare and such issues as future custody, if needs be, can be addressed either by consensus between the parties or by the Australian authorities upon the children's return home.

100. To minimise any upheavals or inconveniences and to ensure a smooth and expeditious return of the children to Australia, on a preliminary basis this Court proposes that the appellant father furnish the following undertakings concerning the return and immediate conditions in which the children will live upon their return:

1) That in the event the mother is not in a position to avail of the return part of the tickets previously purchased, the father will pay for the costs of the flights to Australia for the two children.

2) If the mother wishes to return with the children, that should be facilitated. It is a matter for the mother to pay for her own travel costs.

3) That upon her return to Australia, the father should facilitate the children and the mother residing in the family home.

4) If the mother decides not to return to Australia, the children are to be handed over to the father to effect their return on an agreed date on or before Saturday 9th of March 2024.

5) All other issues pertaining to the future welfare of the children are matters for the courts in Australia.

The within proposed undertakings are proposed purely to minimise any delay or disruption. There was no necessity to seek undertakings to obviate any risk to the children. No risk to the children was ever identified *quo ad* the father. Rather the within undertakings are being proposed to ensure that they have a safe and secure place to reside, initially, pending the courts of the children's habitual residence in Australia being actively seised of proceedings if either party considers that recourse to those courts is necessary or appropriate. Undertakings in respect of payment of maintenance in my view fall outside the scope of the Hague Convention and are not generally appropriate In coming to that view, I share the analysis of the English Court of Appeal in the matter *Re S (A Child) (Hague Convention 1980: Return to Third State)* [2019] EWCA Civ 352. Should either party contend for further or different undertakings, then the court office to be notified within 2 days from the date hereof for an expeditious hearing to address same.

Costs

101. The parties were very ably represented by the Legal Aid Board and were the beneficiaries of civil legal aid. In addition, the court had the assistance of highly experienced and able senior counsel on both sides which expedited the hearing of the case and the determination of the matter. It is proposed to make no order as to costs herein, having regard

to the public interest and welfare issues at stake. Should either party contend for a different order as to costs, they should notify the registrar within seven days of this judgment and furnish a short written submission (no longer than 1,000 words) identifying the bases on which an alternative order is sought. The court will give in due course a ruling thereon.

102. Ní Raifeartaigh and Power JJ. concur in this judgment.