# THE HIGH COURT

**FAMILY LAW**

**APPROVED** **REDACTED**

**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**

**AND**

**IN THE MATTER OF BILL, A MINOR**

**[2021 No.3 HLC]**

**BETWEEN:**

**W. B.**

**APPLICANT**

**AND**

**S. McC. & ANOTHER**

**RESPONDENTS**

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 4th of May, 2021.**

## 1. Introduction

1.1 This case deals with an unusual situation in that the Applicant is the father of the child the subject matter of the proceedings but neither Respondent is a parent. The Applicant seeks the return of his 3-year-old son to England. The child, called Bill for the purposes of this judgment, was brought to Ireland in late 2019 by his maternal uncle and aunt, the Respondents, in circumstances where his mother had become unable to care for him. The

Applicant, having initially agreed to care for him, handed Bill to his maternal grandparents indicating that he was not in a position to take the child due to work commitments. Bill was then brought to Ireland, with his mother's consent, and returned to England to spend Christmas of 2019 with his mother, at which time the Applicant had overnight access with him. The child returned to Ireland in January 2020, again, with his mother's consent. It appears that at all times in 2019 and early 2020, this arrangement was a temporary, family arrangement between the mother of the child, who is not a party to this action, and her brother, the Respondent Uncle. The plan at these initial stages was that Bill would be returned to his mother as soon as she was in a fit condition to look after him and in a written document, signed by the mother, the arrangement was initially expected to be for a period of 6 months.

1.2 The application is made under the Hague Convention of the Civil Aspects of International Child Abduction [the Convention] and the issues arising are firstly, whether the Applicant can show that the child was habitually resident, within the meaning of the Convention, in England and that he remained so at all relevant times. If he was, the next question is whether or not the Applicant was *exercising* custody rights in respect of his son; it is not in dispute that he has custody rights. In opposing his application, the Respondents rely on the defence of acquiescence arguing that his failure to seek or to contact his son for over a year amounts to acquiescence in a change of habitual residence and also establishes that he was not exercising custody rights. If the Court finds for the Applicant in respect of residence and exercise of custody rights, the Respondents rely on the defence of grave risk saying that the child's position will be intolerable if he is returned and that he will be put in a situation of grave risk if entrusted to the sole care of the Applicant or, as they argue is likely, if he is then

placed in the care of social services in England. Finally, the Respondents also seek to establish that the child is now well settled in Ireland and should not be returned to England.

1.3 The Hague Convention ensures international cooperation in legal issues concerning child custody and welfare. The Convention requires that signatory states trust other signatories in terms of their social services and the operation of the rule of law in their respective nations. The Convention was created to combat the recurring problem of wrongful removal of children, usually by parents, to the detriment of the child's relationship with at least one parent. This international agreement is a by-product of the continuing, indeed normal, incidence of relationship breakdown, which leads to the division of families between households and, given the ease of global travel and re-settlement, between countries. It is recognised as an important policy objective for signatory states that parents respect the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction.

1.4 The Convention requires an Applicant for return of a child to prove, on the balance of probabilities, that he has rights of custody and that the child was habitually resident in the relevant country at the time of removal or retention. If he can establish these matters, the final proof required of him is *prima facie* evidence that he was exercising his custody rights. If he succeeds in establishing these matters, the burden then shifts to the Respondents who must satisfy the Court that the Applicant was not exercising those rights, that the defence of grave risk arises or that the child is well settled in the requested, or new, state. In the latter cases, if either defence is established, the Court has a discretion as to whether or not the child must be returned. As a matter of law, the Court has no discretion in respect of return, absent a proven

defence, if the Applicant proves the matters set out and his application has been brought within a year of the wrongful removal or retention; in that event, the child must be returned.

1.5 That is the general legal and international background against which the facts of this case must be viewed. The factual background is set out next, then the various issues in the case are identified, discussed and decided in turn. While the Applicant bears the burden of proving habitual residence and establishing exercise of custody rights, and the Respondents bear the burden of proving acquiescence, refuting that exercise of custody rights, or, failing that, a named defence, many of these issues are intertwined and the same facts lead to inferences and conclusions about different issues. As the issues of residence and exercise of custody rights may dispose of the case, these issues are considered before going on to consider grave risk, the claim that the child is well settled and the position of the mother in the case.

## 2. Factual Background

2.1 The Respondent Aunt and Uncle have no custody rights in respect of Bill who, as a one-year-old, began living with them in late 2019 with the express consent of the child's mother, whom I will refer to as the Mother for the purposes of the judgment. The Applicant, whether or not he was aware of the arrangement to move the child in 2019, had no communication with the Respondents and made no direct objection to them before October of 2020.

2.2 The Applicant and the Mother have always lived in England. The couple had been in a relationship for some years before Bill was born. Their relationship ended in 2019 and the question of whether they lived together at any time is disputed. This is an issue that it is not

necessary to resolve as the Respondent Uncle accepts (para. 5 of his first affidavit) that the Applicant spent a couple of nights a week at her home as part of his relationship with the Mother so there is undisputed evidence of his involvement in the life of the family. Exhibits include a document dated the 25th of August 2019, in which the estranged couple appear to have agreed a detailed plan for custody of their son which include regular, frequent and overnight access by the Applicant. The provenance and reliability of the document is disputed by the Respondents in the context of his claim that he was exercising his custody rights.

2.3 The Mother's parents also live in England. In late August of 2019 the Mother encountered addiction difficulties which meant that she was unable to look after Bill. Local social services became involved and contacted the Applicant who agreed that the boy could live with him and Bill was collected by him on the 30th of August. He quickly decided that he was not in a position to care for the boy either. The relevant social services in England and Wales did, therefore, place the boy with his father, however fleetingly. The Respondents have submitted that the relevant social services were reluctant to put the child in the Applicant's care and that social services were concerned about the Applicant's violent past and that there is a concern in relation to his use of violence against the mother. These claims are disputed.

2.4 On the 2nd of September Bill was brought by the Applicant to his maternal grandparents and he told them that he was unable to care for the child. The child was said to be in his nappy and without possessions such as a buggy or other clothing. This is disputed.

2.5 While willing, the grandparents were unable to offer full time care to the boy for long. The Respondent Uncle has averred that the Mother was not permitted to visit the child while he remained in his grandparents' care, in September 2019, but the Mother disputes this.

## 3. The First Period in Ireland – late 2019

3.1 In the circumstances outlined above the Mother agreed, in early October 2019, that the Respondents, the Mother's brother and his wife, should take Bill to Ireland where he could live with them and their young children. The local social services in England were told of this agreement and were given contact details for the Respondents. The Respondent Uncle avers [para. 13] that "*it was hoped that the Child would be returned to his Mother if she remained clean for a period of 6 months*." This arrangement was expressed to be for 6 months in a letter signed by the Mother, the contents of which are not disputed. The letter ostensibly gives full custody to the Respondents for 6 months but there is no evidence that the Applicant knew of or consented to the details of this arrangement in advance and it has not been suggested that this could be effective to change the legal status of the child or his parents in terms of legal rights of custody.

3.2 The Respondents aver that the child was under-developed on his arrival in Ireland and point to difficulties in speaking and conduct which caused them concern. Details are set out at paragraphs 16, 17 and 18 of the Respondent Uncle's first affidavit and include inability to walk steadily, recognise his name or talk, and screaming or banging his head. They made comparisons with their own child which led them to consult a public health nurse. The Mother did not permit medical treatment at that time though later gave consent to enable services to be provided. The cause of such difficulties, if any, is disputed by the Applicant. The Respondent Aunt spent a lot of time with the boy and he improved dramatically while in their care. It is not disputed that Bill received excellent care in the Respondents' home.

3.3 On the 7th of October 2019 the Mother attended a clinic for one week to deal with her addiction problem. This appears to have been funded by the Applicant and cost £6,000.

3.4 Bill was brought back to England in December of 2019, to stay with the Mother at her parents' home, at which time the Applicant arranged overnight access with him. The Applicant has exhibited pictures of Bill, who appears to be a happy child, during this visit.

3.5 The Respondent Uncle refers to a view of the relevant social services on the suitability of the Applicant to take the child but there is no supporting documentation in this regard.

3.6 In January, 2020, the Respondents concluded that the Mother was drinking again and this does not appear to be in dispute. The Respondents claim that contact was made between a sister of the Mother's, who is referred to as Kathy for the purposes of the judgment, and the Applicant early in January. Kathy asked if the Applicant would collect Bill from his grandparents. There was no, or at least no appropriate, response on his part. Nor was there any reference in the text to the child being brought out of England again. A letter is exhibited in which Kathy supports this averment made by her brother, using the words that she asked the Applicant to collect Bill. This letter is not on affidavit, but it is handwritten, signed by Kathy and the contents are not in dispute in respect of other facts therein. It is revealing in that it sets out that Kathy, the writer, who has had "numerous conversations" with the Mother, states as a fact that the Mother is unwell but "*feels that she would see Bill more if [the Applicant] has sole custody of Bill as he has promised her that she could look after Bill while he works and this concerns us"* (Kathy concludes) as the Mother, she states, is not well enough to look after Bill. Kathy goes on to say that the mother "*expressed how she will be helped financially if she went along with this*" and she concludes that Bill is better off in Ireland due to the Respondents' care for him there. The letter is undated but the affidavit is dated the 17th of February 2021 so

it was written within a year of the events described and is supported by a contemporaneous voicemail, the transcript of which is exhibited in the Respondent's second affidavit: SMcC B.

3.7 Throughout this period, it is not in dispute that the Applicant paid £500 per month to the Mother. The Respondent Uncle has characterised this as follows, in para. 5 of his second affidavit: "*The Applicant herein I believe finances the Mothers alcohol and drug misuse as he provides her with an income of approximately £500 every fortnight and has done so at least since the child was born…*"

3.8 The same Respondent has averred that the Applicant was, effectively, responsible for the Mother's decline in 2019 pointing to the breakdown of the relationship as the cause for her relapse. These are his stated beliefs and they are supported somewhat by timing and by agreed facts. There is no reason to suspect that they are anything other than genuine and are caused, at least in part, by his concern for his sister and her child. Taking into consideration these beliefs, coupled with the absence of enquiry from the Applicant, the Respondents' averments that the Applicant did not care who was caring for his child are understandable but not necessarily factually correct and this is considered further in the sections entitled habitual residence, custody rights and acquiescence.

## 4. <u>The Second Period in Ireland – 2020</u>

4.1 The child was brought to Ireland again on the 10th of January 2020. Again, the Mother knew of and consented to this. She appears to have signed a document [SMcC 8] in which she gives custody of the child to the Respondents and this time there is no reference to it being a temporary arrangement. This document is disputed. The Respondent Uncle avers that this

was written in March of 2020. The Mother does not recall it and states that it is a forgery. On balance, this Court finds that it is more likely than not to have been signed by the Mother, whether she remembers it or not. The detail in the Respondent Uncle's affidavit in this regard, including flight information in respect of the trip required, support his version of these events. However, this finding does not and could not mean that the legal custody had thereby passed to the Respondents without consent or acquiescence on the part of the Applicant. The Respondent Uncle adds that he believed that the mother had told the Applicant of "*the ongoing care arrangement we had made for the Child and he was happy with this*." He also avers that the Applicant could have contacted them as he was paying the mother's phone bill and thus had access to their numbers and to Kathy's number also. [All at para 22, first affidavit of SMcC].

4.2 There is no indication at this time as to what, exactly, the Applicant knew of the arrangement, but he has exhibited a letter from a man who states that he recalls the Applicant being in his garage when he heard via a phone call that his son had been taken to Ireland. The letter-writer confirms that he knows the Applicant from servicing his car for many years, had met the child with him on occasion and recalled the Applicant getting the phone call as he appeared to be shocked to hear that the child had left England and spoke to him about it at the time. The contents of this letter are also disputed by the Respondents who point to the nature of the relationship and doubt the credentials of the author. On the 27th of January 2020, there is a note in the HSE records of the paternal grandparents and father of the child making a phone call and the note states that they *were not aware Bill was back in Ireland.* A relationship between a mechanic and a client is insufficient reason or incentive for the author of the letter to concoct a series of lies for a High Court case, in this Court's view. There is no evidence to support the Respondents' belief that the Applicant knew that Bill was to go to Ireland, or that

he approved or consented to this plan. The evidence from Kathy refers only to collecting the child and not to any future plans so his response in that regard cannot refer to anything more.

4.3 The Respondent Uncle avers that in April of 2020 he had a conversation with a social worker in England who would not recommend the Applicant as a carer for Bill but could not tell him why. There is no further detailed support for this assertion, so it remains hearsay without specific reasons given for the view stated and no opportunity to test or refute it.

4.4 In June of 2020 the Respondent Uncle avers that further addiction issues meant that the mother was leading a more destructive lifestyle and she had told the Respondents that the Applicant threatened to kill her and was stalking her. He goes on to state his belief that there was significant violence in the relationship and that the Mother had reported the Applicant to a range of bodies, including the police. This will be considered in the context of grave risk. The use of violence against the mother is disputed by the Applicant and by the Mother. The Respondents point to her financial dependence on the Applicant to explain her stance on this.

4.5 The Applicant states that he learned that the child was to remain in Ireland in June. In July of 2020 he sought legal advice and various emails show the delay between his initial query and his appointment with a lawyer in November. In October, in the meantime and as set out above, he wrote to the child's maternal grandparents, twice, seeking information about the whereabouts of his son and including his contact details.

4.6 Meanwhile, in August of 2020, the Respondents made a guardianship application in the district court in Ireland. This was for the stated purpose of consenting to any medical treatments Bill might need and to obtain services for him. The Mother did not enter an appearance to object to the application. In the application form, the Respondents stated that

the "*whereabouts of the child's father have always been unknown*." The Respondents, asked to clarify the meaning of this phrase, confirmed to the court that they never knew the father's address. It was not intended to suggest that nobody knew where the father was. No custody rights were sought by them from the district dourt. Text messages from the time support the conclusion that the application was made for purposes of enabling consent to be given for medical aid and state services and this does not appear to be in dispute.

4.7 On the 1st of July, in texts exhibited by the Respondents [Exhibit SMcC 9], the mother asked them for permission to come and see her child. The Respondents refused. It is clear from other texts that there had been previous plans for her to see the child which had fallen through due to the Mother's addiction issues. On the 23rd of July [Exhibit SMcC J] the Mother states that she is desperate to see her beautiful son.

4.8 On the 12th of August 2020 the following exchange took place:

Mother - *I wanted to chat nicely*

Respondent Aunt – *[Name], I'm more than happy to chat nicely im not getting upset but Bills welfare and needs has to come first now and if it upsets you I'm sorry. It doesn't mean you don't have custody over him it means that [Uncle] will be allowed to make decisions on your behalf here in Ireland.. school, speech are the most important as he's struggling & he will really benefit it and will be easier for you when your ready to take him back?*

Mother - *His my son, I will not give it too no one, you go over my hea[d] to get it, this will never be a family again, 6-9 months pure clean of alcohol and I feel ready I want him back, I might feel ready at 6m or 7m when I'm truly ready I want him back, your not his mother [Aunts name], I gave birth to him, he will catch up, you don't decide nothing.*

4.9 On the 10th of October, 2020 the Mother was admitted to hospital, remaining under treatment until the 23rd of November. On the 13th of October, the court granted the Respondents temporary guardianship of Bill. The court documents also show that the second named Respondent signed an application for HSE disability supports filled out by a public health nurse and dated 19th October 2020 (at p. 45 and 47, internal pagination, handwritten HSE documents, exhibit SMcC 1, Respondent Uncle's supplemental affidavit). In this document, the Respondents are identified as the legal guardians, the Mother is named and, where the father's name (Parent 2 Name) is to be filled in, the word "*unknown*" appears.

4.10 In letters dated the 13th and the 20th of October 2020, the Applicant wrote to the Mother's parents describing the Mother's paranoid and strange behaviour, asking where his son was and setting out his contact details. The Respondents received the first of these letters on the 15th of October, according to the Respondent Uncle's affidavit.

4.11 The Mother was on diazepam at the time of the district court application and, in text messages set out in full both above and below, it is clear that while she made no formal objection to the application at the time, she had objected in circumstances where she now suspected the Respondents of refusing to return her child and she wanted him back. It is disingenuous to say she is not supporting the application for the return of the child; as a matter of fact, this Court finds that she is. The Respondents seek to refute this, pointing to her text to the effect that she does not accuse them of abducting Bill, but this message must be read in context and the context is set out in full below.

## 5. The Text Messages in January 2021 - Exhibit "SMcC C "and "SMcC 7"

5.1 Exhibit SMcC 7 is a letter from Kathy confirming that she asked the Applicant to collect Bill from her mother's and that he responded with a crude message. The text itself is not exhibited. The Applicant puts the Respondents on proof in this regard. It is unnecessary to decide if this exact exchange occurred. While it is partly supported by a later text (set out in part below) where the Respondent Aunt repeats the allegation and the Mother does not refute it, neither of these was party to the original alleged message. It is a single exchange and the general content of it is more important than the terms in which it was expressed, particularly as it is not in issue that these two people had a very poor relationship. I am satisfied, on the balance of probabilities, that an exchange of this type did occur. Not only is it an unusual fact to concoct, had the Respondents wished to put the Applicant in a bad light or to fabricate evidence of acquiescence, they could have created more damning allegations, it seems to this Court. The most that this message proves, if true, is that he failed to collect the child on this occasion and did so in unpleasant terms, not that he refused to have anything to do with Bill. The alleged conduct is also consistent with the undisputed nature of his relationship with this sister, Kathy and with his poor parenting generally, in that it was unhelpful both to her and showed a lack of concerned engagement in respect of his child. The Court notes that, at this time, as far as he was aware, the child was living in England again.

5.2 What is more significant is a transcript of an audio message which recounts Kathy's view that he will have Bill when he's older [SMcC B]. This is wholly inconsistent with the claim that the father has abandoned Bill, that he had never been involved with him or that his name or whereabouts were unknown to the Respondents.

5.3 There is a further exchange of messages in January which is important in seeking to understand the positions of the Respondents and the Mother and most of the conversation is set out. From the 25th to the 28th of January 2021, the following exchange occurred:

On the 25th January 2021

Mother: *I have not supported any abduction letter. Show me where it says I've supported send me it.*

Second Respondent [*Sends letters in which return of child is sought]*

Mother - *This is [Father] application not mine. Just give him Bill, to avoid all this drama please, I will fight [Applicant] for him when his back in this country. It's not your fight it's to much, it's mine* x

Second Respondent – *No Sorry. There's no drama [Mother], the truth will get told by all and it will then be down for the judge to decide what's best for Bill. We all know you and [father] both knew Bill was here, social services will confirm that. [Father] left Bill on a doorstep in a nappy, [first named Respondent] had to go to Argos and buy him a new buggy because [father] brought him back to two disabled people with nothing. After all he done to you abuse and all [recounts abusive messages to Kathy in which other allegations are made] you still take him back and stand by him? I know your using him for money, new flat car etc but is this a bloke you want your son growing up around?? A bloke who takes drugs, abuses women and isn't a nice guy not only to you but never there for Bill when Bill needed him? Seriously??*

Mother - *I haven't to justify myself, but I will. [Father] and me will never ever be a couple again, but be able to be civil for Bill. My only concern is seeing Bill, and staying clean and well. [Father] application is so he has full custody of Bill, not me . How you and [first named*

*Respondent] can justify me not seeing Bill, is not in Bills best interest [second Respondent] he is and always will be my son and it kills me every day not to be near him, I blame no one for that, but myself. I will never ever give up on my son living with me again whether you and [first named Respondent] have him or [Father] has him.*

Second Respondent - *How have we ever justified you not seeing Bill ever? You were supposed to fly in feb? I have never ever stopped you or [Father] seeing Bill at all. You had 4 flights booked and never went on any of them. I have sent you pictures and videos every day of Bill since Bill came here in October 2019. You stopped calling Bill an FaceTiming Bill because it was too hard for you so how you expect Bill…* [ends]

On the 28th January 2021

Second Respondent- [illegible documents]

*Wish you all the best and hope works out for you.*

Mother- *I do not agree with [father] that you abducted Bill what so ever and I would come to Ireland and say that in court. What is upsetting is you went for guardianship when I was mentally unwell and now your refusing to give him me back*

Second Respondent – *[Mother], I have talked to you numerous of times since January last year about guardianship because Bill needs speech therapy. You knew before you went into the hospital as you spoke to Kathy and [REDACTED] about the court case. You…* [ends]

5.4 As can be seen clearly above, while the Mother does not accuse the Respondents of abduction, it is clear that she wants her son back and they will not return him, invoking the courts and a judge who will decide based on the welfare of the child. This is the text relied upon by the Respondents to show that the Mother is not supporting this application under

the Convention. The ambiguity is in the use of the word "abduction" in this context. The Mother recognises that they did not abduct the child, in that they did not steal him away or take him without consent, but it is also clear from the exchanges set out here that she wants her child back and that she believes that they will not return the child to her.

5.5 Exhibit SMcC 11 is a text from the Mother exhibited to show that she was very unwell and to suggest that she is unreliable as a witness of fact as she has averred that she had only experienced one severe episode. The text also shows that, as early as February of 2020, she wanted her son back but the Mother added at that time "*that it's up to you and [the Respondent Aunt] to decide*."

5.6 The first named Respondent accepts at para. 33 of his third affidavit that they excluded the Mother from Christmas celebrations in 2020 as they thought seeing her child happy with them could lead her back to abusing alcohol. There is a series of allegations made against the Mother in the Respondents' affidavits, most of which are related to her addiction problems and many of which may be true. True or not, they have little bearing on this Applicant's case. The Respondents sent updates and pictures to the Mother until February 2021, according to the Respondent Uncle's affidavit. They say that they would have done the same for the Applicant but that he did not contact them. The third affidavit concludes with a description of the child's, no doubt, happy life with them and the deficiencies of the parents of the child.

5.7 It was argued that the Applicant never mentioned, in any contemporaneous document, that the child was lodged temporarily with the Respondents. However, there is ample evidence that the arrangement was exactly that, at least until the middle of 2020. As the Mother was in contact with the Applicant, this was her understanding, and as he has averred that he too understood as much, it is probable that he too took the arrangement to be

temporary. The Court's findings in respect of the facts set out can be summarised by saying that the child was with the Respondents temporarily, initially with the consent of the Mother and the acquiescence of the father, the child was returned to them in January 2020 again with the consent of the Mother. The Applicant probably acquiesced in this arrangement also. He knew of it, albeit not in advance, and made no effort to seek the return of the child. The Respondents were very generous to Bill, treated him as one of their own children and he has been very happy with them. He has also made progress in walking, talking and general development. However, the Mother wants her child returned to her and the Applicant now also seeks the return of the child. The difficulty here is that, at all relevant times, the child's residence with the Respondents was expressly understood to be a temporary one. All parties were aware of this and there is no evidence to refute the Applicant's averment, which is in line with all other facts in the case, to the effect that he only found out in June of 2020 that the Respondents intended to keep his son. For the avoidance of doubt, this Court's view is that neither parent consented to or acquiesced in anything other than a temporary arrangement.

## 6. The Hague Convention – Objectives and Neulinger

6.1 According to Hale J. in *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392, considering the defence of grave risk, "*the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there*". This quotation was approved by the Supreme Court in *AS v PS (Child Abduction)* [1998] 2 IR 244 (Denham J.) and both judgments are discussed by Collins J. in *CT v PS* [2021] IECA 132. There, Collins J. delivered the decision of the Court of Appeal, outlined the history of the cases

relevant to an understanding of the objectives of the Hague Convention and considered the effect of *Neulinger and Shuruk v Switzerland* 54 EHRR 1087 (2010) 28 BHRC 706, [2011] 1 FLR 122 on Convention cases. The latter case caused concern about the necessity for an in-depth examination of the child's circumstances in the requested state. Such a requirement appeared to replicate the kind of exploration more often seen in a case concerning the welfare of the child rather than one which was intended to achieve the prompt return of children who had been wrongfully removed or retained in another jurisdiction. The judgment in *Neulinger* involved detailed consideration of the interplay between Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [the ECHR], guaranteeing respect for privacy and family rights, and the Hague Convention.

6.2 In the words of Collins J., describing the Convention aims at para. 61, "*there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention*."

6.3 In *X v Latvia* [2014] 1 FLR 1135, the Grand Chamber of the European Court of Human Rights clarified the relationship between Article 8 ECHR and the Hague Convention and examined the extent to which a requested state must enquire into the circumstances of each case so as to determine the best interests of the child. The crux of the case, quoted in full by Collins J., contains the following comments:

> "*104. … the Court observes that the Grand Chamber judgment in Neulinger and Shuruk … may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors…*

*105. Against this background the Court considers it opportune to clarify that its finding in paragraph 139 of Neulinger and Shuruk does not in itself set out any principle for the application of the Hague Convention by the domestic courts.*

*106. The Court considers that a harmonious interpretation of the European Convention and the Hague Convention … can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention*.

6.4 The court then stated that what *Neulinger* imposes is a procedural obligation, when assessing an application for a child's return, to consider allegations of a "grave risk" and to give specific reasons for any ruling on these allegations. The passage [para. 107] continues: *Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention."* The paragraph concludes with the admonition that the reasoning employed must not be "*automatic and stereotyped but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly*" so as to enable European court supervision of the domestic court's decision in this regard.

## 7. Habitual Residence

7.1 In *Mercredi v Chaffe* (C-497/10) the Court of Justice of the European Union [CJEU] considered the circumstances in which habitual residence of a very young child was to be determined and concluded that it would ordinarily follow the habitual residence of the parent having day-to-day custody. The Court held (at para. 56):

> "[W]*here the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case."*

7.2 In *A Reference for a preliminary ruling: Korkein hallinto-oikeus – (Finland)* (C-523/07), the CJEU set out the factors that are relevant to the question of habitual residence for the purposes of Regulation 2201/2003/EC (paragraphs 38 - 40):

> *"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.*

*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.*

*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*." (emphasis added)

7.3 This approach was expressly endorsed by MacMenamin J. in *G v G* [2015] IESC 12. While the Council Regulation (EC) No 2201/2003 ('Brussels IIa') no longer applies as the United Kingdom has left the European Union, when dealing with core concepts such as habitual residence, the CJEU jurisprudence is persuasive as such concepts must be given a consistent interpretation across the Hague Convention and Brussels IIa, as discussed in this Court's judgment in *Le J v T* [2021] IEHC 219 at para. 6.6.

7.4 Bill's stay in Ireland was expressed to be for 6 months, while his mother underwent treatment. His mother had, until then, been his primary carer. He had always lived in England until that time, his maternal Aunt Kathy and his maternal and paternal grandparents remain in England. Most significantly, of course, both parents remain in England. The child's mother has selected the school which she has "always wanted" her son to attend, near her home. While the family has links in Ireland, primarily these Respondents, the overwhelming weight of connections are with England and in particular, it bears repetition, the boys' parents both reside there and not here, in Ireland. While he had been in Ireland for just over a year when this application was first made, the initial months of that stay were expressly for a

temporary stay to allow time for his mother to seek treatment. Even well into 2020 text messages from the Respondent Aunt referred to (or did not dispute) the Mother's hopes that her son would be back with her within a few months when her addiction issues had been addressed. Considering these facts, notwithstanding the excellent care given to Bill by the Respondents, it is clear that he is not, and was never intended to be, permanently or habitually resident in Ireland. Certainly, this was the case insofar as both his parents, the only persons with rights of custody, were concerned. He remains habitually resident in England within the meaning of the Convention as his stay here, insofar as either of his parents consented to it or acquiesced in it, was temporary.

7.5 In *K v. J* [2012] IEHC 234, Finlay Geoghegan J. held, at para. 37 that: "*In general, one parent cannot unilaterally change the habitual residence of a child. It requires at a minimum the acquiescence of the other parent or a court order to the change of the place of residence*". Even had the Mother consented to a change in habitual residence, therefore, one parent alone cannot make that decision if the other parent is exercising custody rights but, on the facts of this case, it does not appear that the Mother consented to a change in habitual residence.

7.6 The Applicant's conduct in failing to challenge what all understood to be a temporary situation may, in this Court's view, indicate that he acquiesced in the removal of the child, but it does not indicate that he acquiesced in Bill's residing in Ireland on a more permanent basis or that he consents to or acquiesces in a change of habitual residence in respect of the child. His failures, whether to travel to Ireland or to contact or seek to speak to his two-year old child, while surprising and even disappointing, do not indicate an abandonment of his son to the care of his uncle but at its height, his conduct indicates acquiescence in a temporary stay

in Ireland. His conduct did not amount to acquiescence in a change in habitual residence for his son given his reaction to the proposal that his son remain here.

7.7 The Respondents argue that the Applicant, having failed to care for his son in September 2019 has thereby abandoned him and that his failure cannot be excused. The Court understands why this couple should feel that way and notes that most parents would have been more engaged in caring for and in maintaining contact with their son. The law does not permit the Court to choose which person might be the most appropriate guardian on the facts of this case but is restricted to examining the facts on affidavit and determining if the child must be returned, or not, to his country of habitual residence and setting out the reasons for that decision. On the issue of habitual residence, the familial, temporal and social facts of the case point strongly to the child having retained his habitual residence in England.

7.8 Finally, in this regard, the Court notes the Applicant's reliance on the fact that the Respondents did not seek a direction under section 6C(9)(a) of the Guardianship of Infants Act 1964 (as amended), which means that the right to decide on the child's place of residence remains with the parents. Given that the papers lodged with that court indicated that the whereabouts of the child's father had always been unknown, it would be difficult to stand over such a direction had the court been asked to do so, leaving aside the Mother's potential objections to such an application, in the absence of contact with the Applicant, particularly if this indication was never corrected after the Applicant's letter, requesting news of his son.

## 8. Exercising Custody Rights

8.1 Article 5(a) of the Convention provides that "rights of custody" include the right to determine the child's place of residence. Article 5(b) provides that "rights of access" include the right to take a child for a limited time to a place other than the child's habitual residence. Article 3 provides that the removal or retention of a child is wrongful where (a) it is in breach of rights of custody attributed to a person, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Under Article 13(a) of the Convention, the Court is not bound to order the return of a child if the party which opposes return establishes that the person having the care of that child was not "*actually exercising the custody rights at the time of removal or retention*...".

8.2 The Respondents argue that the Applicant did not live with the mother of the child at any time. However, that is not the key issue which would determine whether or not the Applicant was exercising rights of custody in respect of his son and the Court has already noted that, at the very least, the Applicant had shared the Mother's home for a couple of days a week while the two were still in a relationship.

8.3 The Respondents rely on the judgment of Ms. Justice Ní Raifeartaigh in *N.J. v E. O'D* [2018] IEHC 662 insofar as the facts there, as here, they submit, show that the Applicant made no attempt to contact his son for a lengthy period. Ní Raifeartaigh J. reviewed the authorities and summarised the situation saying that the courts must take a liberal view on the question of the exercise of custody rights, the focus of the inquiry should be on whether the parent sought to have a relationship with the child, not merely on issues of financial assistance, for

instance, and, she concluded, it may be that personal contact between a parent and child is precluded by other factors, but that is something to consider as a matter of fact in each case.

8.4 The burden of proof, not in dispute here, is on the Applicant to establish that he was, *prima facie*, exercising custody rights and the burden shifts thereafter to the Respondents to prove that the Applicant was not exercising custody rights at the time of removal or retention.

8.5 To use the language adopted by Ní Raifeartaigh J. in *N.J.*, evidence that this Applicant sought to sustain a relationship with his son will defeat the Respondents' claim that he was not exercising rights of custody. In that case, for a period of approximately 15 months, the applicant did not see his daughter. He met her by chance on the street on one occasion and sought to rely on this as an exercise of his custody rights. His main argument was that the respondent was preventing him from having access to the child. But, the Court pointed out, that applicant took no action to seek access or any form of decision-making power in respect of the child herself.

8.6 Applying that rationale to the facts of this case and bearing in mind the overall purposes of the Hague Convention, the following appear to be decisive factors here: the Mother, who is not a party to these proceedings, consented to the child residing in Ireland but only temporarily. On the single visit home to England in December (the Court having already found as a fact that the child's habitual residence remained in England) the Applicant arranged overnight access with his son. This is in stark contrast with the facts in *N.J.* There is evidence of a second date of access in January of 2020 but this is disputed. The Applicant makes a positive case that he had such access and the Respondents, pointing to the fact that the Mother was again suffering from addiction issues, dispute it. There is limited support for the Applicant's argument in Exhibit SMcC B, already referred to, an audio message in which

Kathy refers to the Applicant having taken the boy, apparently in early January. The case will not turn on this fact but Court finds it more likely that the Applicant did spend more time with Bill in early January as this position is also bolstered by direct supportive evidence of the Mother. She acknowledges that she was beginning to drink again at that time but states that Bill spent more time with his father after Christmas and in early January.

8.7 The Respondents seek to refute the Mother's affidavit generally, pointing to her financial dependence on the Applicant and to misstatements of the position in relation to her struggles with her mental health. The financial aid to the Mother has continued, however, with or without Bill in her custody. While the Respondents seek to characterise this as payments to finance her drinking, the Court considers that this is more probably linked to the support of the child and the family generally given that the payments date back, even on the Respondent's account, to the birth of the child. The Mother does not appear to need more incentive to support the Applicant's case than the return of her child. All her texts to the Respondents point to this, particularly those from August 2020, and her payments are being made anyway so there is unlikely to be a financial motive, whatever else there may be. To suggest that the Applicant may have made some indication of continuing payment if her affidavit supports him is speculative and the Court cannot act on such a submission without stronger evidence of such motivation. Any references to financial support, all of which are hearsay, are far outweighed by direct evidence and text references to the Mother's wanting her child back.

8.8 The Mother is unreliable when relating certain details, in particular those matters regarding her mental health but I do not, therefore, reject all of the material in her affidavit

just as the misleading statement by the Respondents to the district court as to their knowledge about the Applicant does not lead me to reject their other evidence.

8.9 The Applicant relies on the custody plan dated 25th August 2019 and signed by him and by the Mother. The Respondents aver that they do not believe it is a genuine document due to their not having heard about the Applicant playing any significant part in his child's life, his responses to Kathy's attempts to contact him and the fact that, as they aver, none of their family met him at the Mother's house over the years.

8.10 The Court notes the argument that the document was drafted after August 2019 in order to create a wholly unrealistic picture about the amount of time the father would expect to spend with Bill but there is little, if any, evidence to support this interpretation. The Court must act on evidence. The Mother offers direct evidence of the fact that the Applicant saw his son regularly. The Respondents did not live in the same country as the Applicant and the Mother for any of the child's short life before he moved to Ireland. Their reports of the Applicant and his behaviour came initially from the woman with whom he had broken up, the Mother, and later from a woman with whom he has a very poor relationship, her sister Kathy. More fundamentally, even if the document is unreliable, there is evidence of interaction between the parents and between the Applicant and Bill which undermines the Respondents' statements that the father had not taken any part in the child's life. Given the low bar expected of a parent in order to show that he has exercised his custody rights, this Applicant, by the overnight access alone, would have provided sufficient proof in that regard but has provided somewhat more, in this Court's view.

8.11 The text messages exhibited by the Applicant are contemporaneous proof of exchanges between him and the child's mother regarding when he should collect Bill and

show that he is clearly exercising his access to the child. The texts are disputed in terms of timing, with the Respondents arguing that they could not have been sent at the time indicated on the relevant exhibit as Bill was with his grandparents and not with the Mother but again, this is not necessarily something that is determinative as the Mother has sworn that she was still seeing Bill throughout the period. As a matter of fact, this is likely as it does not appear to me to be likely that she would necessarily abide by a stricture not to see her son and the concoction of such texts in terms of timing is an elaborate plot for which there is no support. The Respondents' view, as they were not there and cannot dispute this averment, must carry less weight than the combined evidence of Applicant and the Mother which evidence, taken together, proves that he was probably exercising access at a time proximate to the child's first removal to Ireland.

8.12 Even if the texts have been misdated however, and the Court acknowledges the possibility although there is no evidence to support it such as would outweigh the averments to the contrary, their content convinces the Court that they are reliable in the sense that they are genuine exchanges about the handover of the child and the purchase of items such as nappies, in one case. The tenor of the exchanges is not friendly, and the Applicant does not appear in a good light in these texts, quibbling about being asked to undertake basic purchases for the child. Had they been concocted to suggest an exercise of custody rights that was not, in fact, taking place, they would have been in very different terms, it seems to this Court.

8.13 The Court has carefully considered the argument that the Applicant made no effort to seek access to the child while he was in Ireland in the context of the submission that this is relevant to his exercise of rights of custody. Unlike the situation in *N.J.*, every party to this arrangement understood that the child was in Ireland temporarily. It appears, on the facts

recited, that the Applicant could have found out where the child was had he been more diligent, but this finding of fact must be seen in context: he expected the child to return to England. Not only has he averred that this was his understanding, the Respondents (apart from disputing it) cannot point to any cogent factor that refutes his averment to that effect and *they themselves understood this to be the position* from the outset of this arrangement. How could the Applicant have reached a contrary conclusion? The Respondents point to his letters in October as support for their argument but the omission of the word "temporary" in a letter seeking the return of his son does not, in the Court's view, outweigh all the evidence which proves, as a matter of fact, that the arrangement was in fact temporary and it is likely that the Applicant knew this.

8.14 This Court finds as a fact that the Mother of the child, the main carer for the child for all of his young life at the point of first removal, made an arrangement with her brother and all parties to that agreement knew that this was a temporary arrangement. One of the first indications that there may have been a reluctance to return the child was in February, but the Mother continued to hope for the return of the child, probably until June of 2020. The child was in fact returned home at Christmas of 2019, when he spent time with the Applicant. It is also agreed that the child's mother was in contact with the Applicant throughout the relevant period from time to time. This evidence establishes that, on the balance of probabilities, the Applicant understood that the residence of the child in Ireland was temporary until at least June of 2020.

8.15 In *N.J.* 15 months passed during which the father applicant did not seek contact with his daughter. Here, initially 3 months and, in 2020, another 6 months passed during which time the Applicant understood his son would be returning home. Having heard that the

Respondents sought to retain the child, the Applicant sought legal advice within a month and then, less than 4 months later, on the 13th of October, he wrote to the maternal grandparents, the first named Respondent's parents, seeking information about the child and requesting his return. This letter received no response, nor did he receive a response to a second letter, written a week later and dated 20th October.

8.16 While the Respondents excuse their failure to respond, saying that the child's mother had been hospitalised only days before, on the 10th of October, the district court application took place on the 13th of October. That court was led to believe that the whereabouts and name of the father were unknown, which impression is confirmed by the public health nurse referring to him as "unknown". This is a serious problem for the Respondents. While there is no doubting the quality of care that they extended to the child, the clear impression from the court documents was that they did not know who, or where, he was. It is not giving the full picture to say that the Applicant did not contact them, it is equally true to say that the Respondents actively sought to ensure that he would not be given their address and ensured, deliberately or otherwise, by using the misleading phrase that his whereabouts had always been unknown, that no questions were asked by that court about the father. Nobody comes out of this well but the issue this Court must consider is whether the lack of contact at a time when a father is now actively asserting his custody rights by seeking legal advice and writing such letters can be said to prove that the Applicant was not exercising his custody rights.

8.17 In November, and still without seeking access to the child, he applied to this Court. It is a significant factor, in this Court's view, that the Applicant understood that the child was only temporarily in Ireland. Further, it is evidence in favour of the Applicant that letters to the child's grandparents were ignored and that the Applicant moved swiftly from that point.

8.18 While there may not be evidence of frequent or even regular exercise of custodial rights, the context is one in which a couple split up, the mother of the child is the primary carer, there is evidence of an agreed parental plan to share custody before her condition requires her to seek temporary help. The Applicant father is the first who is entrusted with the child, but he cannot care for the child at that time. The Mother then obtains assistance from her family although they live in a different jurisdiction. That assistance is understood by all to be temporary. As noted by Ní Raifeartaigh J. in *N.J.* a parent may be precluded from exercising rights of custody. Here, the Applicant did not interfere with a temporary arrangement for the care of his son, nor did he seek access but that is not required in order to prove that he was exercising custody rights in this unusual situation. He intervened only when it became clear that this was no longer a temporary arrangement and that the Respondents had refused to return the child. While he may not have been urgent in his actions, his delay was one of two or three months, at most.

8.19 Seen in that context, despite the relatively low level of contact in this case and a delay of some months, the intention to retain a relationship with his son is established on these facts, in this Court's view. The Applicant has shown evidence of an exercise of his custody rights and the Respondents have failed to displace the burden of proof on them that the Applicant was not exercising custody rights either at the time of first removal, at the time of second removal or at the time when it became clear that they did not intend to return the child. This is because of the temporary nature of the agreement at the outset and again in January and up until June of 2020. The Applicant's refusal to engage with Kathy as to collection of the boy on one occasion, while unpleasant in terms of his approach to her, does not outweigh the evidence that, in general, it appears to this Court that the Applicant wants to sustain a

relationship with his son. The Respondents' agreement with the Mother, to care for the boy in another country, and with no line of communication created for him as the father of the boy, made it more difficult for the Applicant to exercise meaningful custody rights with his son in 2020. The pandemic was a factor, but only in the early part of the year.

8.20 The test in such a case is not what a reasonable parent would have done, let alone what would have been best practice, if one can use such a phrase when describing parenting. The test is whether the Applicant sought a relationship with his child. While it is not merely a financial question, the Court also notes a regular payment to the Mother since the birth of the child. While acknowledging the concerns of the Respondent in this regard, the Court notes that the payments began, insofar as the Respondents are aware, on the birth of the child and the most probable interpretation of this fact is that they were, as the Applicant submits, for the support of his son. It is not in the interests of the Applicant that the Mother remains addicted to alcohol or any substance. The motivation for his payments is more likely to be maintenance for her and for his son. More significantly, as set out above, on the one occasion when he was home, the father ensured that there was overnight access, there is evidence of his son being comfortable and happy in his dad's company and, once he understood that the child was not returning, the Applicant began to act. Not perhaps with the speed and urgency one might expect, but within the liberal interpretation required by the Convention, he acted to assert his rights and has made this application well within the period required for this Court to consider it namely, within one year of being notified that his son was to remain in Ireland indefinitely.

## 9. Wrongful Removal or Retention?

9.1 The Applicant bears the burden of establishing that there has been a wrongful removal or retention. To do so, he must show that the child was habitually resident in England, that he was removed to, or retained in, Ireland without the consent of one or both of his parents where, as here, they both have custody rights and are exercising them.

9.2 In this case, it is clear on the facts set out above that the Mother consented to Bill being brought to Ireland, albeit temporarily. She and this Applicant were the only people who were, at that time, entitled to decide where the child lived. The Applicant did not object, nor did he make any apparent effort to contact the child. However, when Bill returned for Christmas, he had overnight access with him and returned him to the Mother's care, she being in her parents' house at that time. Thereafter, the child returned to Ireland again. The exchange with Kathy is set out above and is also commented on in the following section. The Applicant did not take a very active part in his son's life but there is no evidence that he knew his son was returning to Ireland in January. The Court has already accepted the evidence that the Applicant received a call about this in or around the 10th of January and was shocked by it and has found that there is no evidence to support the proposition that the Applicant knew that the child was to leave England again. Having learned of his removal, he did little or nothing to intervene but, again, the Court is satisfied that he understood, as did the child's mother, that this was a temporary situation. The child having returned once before in December, he had no reason to suspect that the boy would not come home again.

9.3 After a period of months, considering their averments and the text messages exhibited, the Respondents became concerned about the condition of the Mother and it appears that the Respondents then decided to keep the child indefinitely, or at least to regulate when the

Mother could see her child, if at all. In all of the circumstances, it appears to the Court that the evidence, as set out above, establishes that the child was removed with the consent of his mother and that his father acquiesced in that removal. This refers to both October 2019 and January 2020. At some point in 2020, probably in June, the Respondents refused to return the child and the Mother objected to this. Once the Applicant was informed of this new situation, from that point on, the Respondents wrongfully retained the child as they had no legal right to decide where the child lived, only the Applicant and the Mother had that right. While they may have considered themselves to be acting as parents and clearly were acting very responsibly in terms of the day to day care of the child, the rule of law requires that only those with legal rights of custody can decide to move a child, permanently, to another jurisdiction. Retention of a child originally there consensually may not be the Respondents' understanding of the word "abduction", but it is one legal meaning of the word. Once one considers any alternative rule governing conduct, it becomes clear why this must be so: how can anyone, no matter how well intentioned, decide that he is in a better position to care for a child than that child's own parents and, having made that decision, simply retain the child in his care? This cannot be a decision for an individual and goes to the very heart of the intentions of the signatories to the Hague Convention. In matters of child custody, we must respect the child support and welfare systems in operation in other countries. In this case, while the Respondents might, even with good reason, consider themselves more appropriate guardians than this boy's parents at this time, they cannot take that legal responsibility to themselves in the teeth of parental objections unless they can show acquiescence in the new situation.

**10. Consent or Acquiescence?**

10.1 The Respondents bear the burden of proving that the Applicant either consented or acquiesced in the retention of the child. His position is similar that of the Mother; he avers that the child's stay in Ireland is temporary. Looking at his conduct, at most, he consented to the continuing temporary situation. Lord Browne-Wilkinson in the House of Lords judgment in *Re H (Abduction: Acquiescence)* [1998] AC 72 summarised the law on acquiescence (at p.90):

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

10.2 The assumption in this quotation is that the parties are parents. This assumption highlights, once more, the tenuous nature of the Respondents' position in this case. They had

no rights of custody in respect of this child and seek to persuade the Court that the Applicant's conduct has led them to believe that he would not seek such rights. Clearly, the Applicant's subjective view must be proven by the Respondents. He has exhibited his letter to chambers in London in July 2020. This evidence that he was not acquiescent is difficult, if not impossible, to refute in terms of his state of mind on 6th July 2020 and the Court is satisfied that there was no acquiescence from that point.

10.3 On the issue of contact, given that the burden of proof is on the Respondent, it is not necessary to ascribe blame as to who should have contacted whom but to ask if they have established facts which show acquiescence on his part. The facts are that contact details were withheld by the Respondents but could have been ascertained. The Applicant's contact details were not known but they too could have been ascertained. Either way, there was insufficient effort on the part of the Applicant to find that he was other than acquiescent until mid-2020. The difficulty for the Respondents is that they can only show that he was acquiescent in a temporary arrangement. If he acquiesced in this, and the evidence shows that he did, it does not follow that he acquiesced in the permanent removal of his son to Ireland. He did not.

## 11. Grave Risk or Intolerable Situation

11.1 In *CA v CA* [2010] 2 IR 162, [2009] IEHC 460, Finlay-Geoghegan J. described the Article 13(b) defence as a "*rare exception*" to the requirement to return which "*should be strictly applied in the narrow context in which it arises*." The kind of situation which may constitute a grave risk to a child was considered in *RK v JK (Child Abduction: Acquiescence)*

[2000] 2 IR 416, where Barron J. cited with approval the formulation from the United States Sixth Circuit of Appeals in *Friedrich v Friedrich* 983 F.2d 1396 (6th Cir. 1993) (at p.451):

> *… a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.*

11.2 Finlay-Geoghegan J. set out the legal test for grave risk in *CA v CA* at para. 21:

> "[*T]he evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence*".

11.3 In *R v R* [2015] IECA 265 Finlay-Geoghegan J. noted in particular the trust to be put in the courts of the home state to protect the child and in *S.H. v J.C.* [2020] IEHC 686, this Court rejected the argument that the risk of children being placed in foster care in the requesting state constituted a grave risk within the meaning of the Convention. At para. 6.11 of that judgment the following conclusion is expressed:

> *"It is clear that the courts in England are both willing and competent to vindicate the rights of these children and safeguard their welfare. It cannot be argued, tenably, that returning the children to a situation where Interim Care Orders are now in place, made by a court of*

*competent jurisdiction with the sole aim of protecting the children, amounts to placing them in a situation of grave risk or puts them in an intolerable situation within the legal meaning of those terms, in the context of the Convention*."

11.4 It is argued here that the Applicant, by his conduct, has shown that he cannot care for his child and that this, in combination with alleged statements by social workers in England, mean that it is likely that the child will be put into foster care. In support of the submission, the Respondents describe Bill's condition on arrival in Ireland and say that Bill's lack of verbal ability and his apparently traumatised or disturbed behaviour suggest that the Applicant (and the Mother also, as she had been his primary carer until then) are unable to take care of this child appropriately. This section focuses on the Applicant as it is his intention to take sole custody of the child, insofar as this Court is concerned. Naturally, if the child is returned, these issues will all be a matter for the courts in the country of habitual residence, as is envisaged by the Hague Convention, namely, the English family courts.

11.5 The Respondents point to the Applicant's history of criminal convictions, arguing that they are entitled to know exactly what kind of convictions make up his prior history and pointing to his failure to make disclosure in this regard. They say that to return the child to this Applicant would be to put him in a situation where Bill will be at grave risk of serious harm, in particular, that he is likely to be neglected and that his future development will suffer as a result. There is no specific risk identified as a result of the criminal convictions of the Applicant, other than to speculate that he, meaning the child, may end up in prison.

11.6 As to the condition of the child on arrival in Ireland, the English social services, which had already had some interaction with the child in late 2019, made no such finding. The exhibit relied upon in this regard is SMcC 5. This exhibit does not bear out the submission

that the child was neglected: it is a report dated February 2020 in which the conclusion is that Bill is doing well. The report does not support the proposition that he was disabled on arrival.

11.7 There was also a dispute about whether or not the child had received the appropriate medical attention while in England. Taking the Respondents' allegation of grave risk at its height, however, and supposing that the child had not received sufficient medical attention, had not been immunised, had been disturbed and developmentally delayed on arrival in Ireland the Court makes the following observations: No matter what the conduct of Bill when he first arrived in Ireland, it is impossible to say at this stage and without any expert view having been sought at the time, whether having taken the child from his primary carer was a causal factor in destabilising him, traumatising him or even in affecting his verbal ability. Further, it is common case that there is a history of verbal deficiency in the Respondents' family and that other children have required special assistance in this regard. Failure to immunise a child is not grounds to find that the child is at grave risk.

11.8 The Court notes that the social services had had some, albeit limited, interaction with Bill and had not noted any difficulty. His own GP did not note deficiencies and Kathy, who had spent a couple of days each week with the Mother when Bill was living with her, noted only his speech difficulties. This is clear from Exhibit F in which Kathy is asked to recall Bill's condition when he was with the Mother. Given the concession in respect of verbal delay and the trauma it would cause to any child to be removed from his mother, it is difficult to point to clear evidence that the Applicant or the Mother is responsible for any delay in the child's development as regards his speech nor is there evidence that his parents caused a serious deficiency for Bill such as would require him to be removed from their care. The Court cannot

find clear and compelling evidence of a condition or deficiency such as would comprise evidence that the Court is putting the child at grave risk if he is returned to his father's care.

11. 9 The local social services had a file on this child which was closed when Bill came to Ireland. The social services will be ready to re-engage, if required, upon the return of the child. The Respondents argue that Bill has had developmental supports in this State which they allege were not utilised when the child resided in England. Even if this is so, and if they could establish such a state of affairs as a matter of proven fact, a failure to use all services available to a child is insufficient to meet the test for grave risk. There is no suggestion that any relevant services are unavailable in England; the allegation is that Bill's parents did not avail of them.

11.10 It is also important in this respect to note that one of the guiding principles of the Convention is that the country of habitual residence must be trusted to safeguard the best interests of children in that jurisdiction. Finally, in this regard and as a matter of logic, the Respondents aver that they intended for the first few months at least of his residence with them that Bill would be returned to his mother. If this was the case, it is difficult for them to now assert, as they did strongly at the close of the case, that he cannot safely be returned to a situation in which she may have more access to him and that the child is at grave risk, in part, due to her early parenting of the child. The Mother's own averments about the medical condition of the child in his first six months comprise compelling evidence in support of her having arranged medical appointments to some extent and having ensured that his basic health was good. More fundamentally, the Respondents' initial trust in the Mother provides support for her evidence in defence to these allegations of neglect on her part.

11.11 As regards the argument that the Applicant has previous convictions which he has not disclosed, again the burden remains on the Respondents. Here, the Applicant avers that the

most recent conviction was over a decade ago and that he is now a respectable and successful business man. The Court made it clear during oral argument and reiterates here that the fact of a parent having previous criminal convictions, alone, is not sufficient to successfully raise an article 13 defence of grave risk. There are many convicted criminals who are excellent parents. Even where, as here, the Respondents seek to rely on hearsay evidence from social workers of unspecified reservations as to the Applicant's suitability to be the primary carer of his son, the evidence is far short of a grave risk of harm being done to this child if he is returned to England, whether in the care of his father or in the care of social services. Such reservations are belied by the relevant social services having initially placed the child with this Applicant in September of 2019 and confirm to this Court that whatever the nature of the previous convictions, they are not sufficient to prevent the Applicant from caring, safely, for his child.

11.12 The Respondents aver also that the Applicant has been violent to the Mother of the child. Again, there is no supporting evidence of this general allegation, in a case where the mother has sworn an affidavit and specifically refutes this the Court must find that the Respondents have been unable to prove that there is a grave risk to the child in this respect. The Applicant has admitted one such incident but even if there were more, the couple no longer live together and there is no suggestion that the child has ever been at risk. The Court has considered the possible motives of the Mother, of the Applicant and of the Respondents themselves in coming to this conclusion. The Respondents ascribe financial motives to the Mother or the hope that if the Applicant gets custody of Bill that she will see him more often. Her clear desire to be reunited with her son has not, as a matter of probability, led to her lying to hide extensive violence on the part of the Applicant, in my view. The evidence here does not sustain a finding that he is violent to the extent that he poses a grave risk to his son.

Speculation as to the effects on a child of a parent's criminal history, here pre-dating the birth of the child, is not a sufficient basis for a finding of grave risk to that child.

11.13 Finally, it is also suggested that if, as they anticipate, the Mother remains incapacitated and the Applicant fails to persuade the English social services that the child can be safely left in his care, the only other option will be that the child must go into foster care. This is speculative, given the Court's findings in respect of the Applicant's previous convictions. It is also contradicted by the Mother, who confirms that no court orders were sought or even discussed with her by her local social services. The Applicant has sworn that he will arrange his affairs so as to provide for the child and there is no reason to doubt this. Further, while the Court understands the scepticism of the Respondents in relation to his son given what they have experienced from him, through the accounts of the Mother and Kathy, his actions in seeking to vindicate his rights of custody in these proceedings and indeed in exercising those rights during the one period when his child was home in 2019, are evidence of a genuine intention to have a sustainable relationship with the boy. Nothing else explains the lengths to which he has now gone to secure the child's return. He gains nothing from this action save the company of his son.

11.14 No matter what the Respondents think of him, the boy needs the regular company of his father if his father is willing to provide a home for him and he has averred to the Court that he is now prepared to do so. The Court has considered, very carefully, the damaging evidence against the father that he returned his son to the boy's maternal grandparents after only a couple of days, the manner in which that appears to have been done, the submission that his general level of contact with his son was very low and the absence of contact during the boy's stay in Ireland. Despite this, the Court accepts that the Applicant has shown

evidence of his willingness to be a full-time father. More pertinently, for the purposes of this case, the Respondents have not shown that he is a person who presents a grave risk to his son.

11.15 There is insufficient evidence to prove that there is a grave risk to his son or that the Applicant will not actively seek assistance when he needs it. Even if there is a risk in that regard, given that the social services are alert to this child and his needs, there is no basis to apprehend that Bill will not get those services if he is returned to England. Again, taking the argument at its height, even if the social services are likely to become involved, as set out in *S.H. -v- J.C.* [2020] IEHC 686, this is not proof of grave risk.

11.16 The Court is very conscious of the happy family situation in which the child now finds himself and knows that it will be difficult for all involved for him to be removed from a house in which he has found a home at a time of need in his life. In particular, he will of course miss his young cousins. Such a removal, in order to reunite him with his parents, cannot be characterised as putting him in an intolerable situation, however, no matter how close he is to his extended family. This is by no means an easy decision for any court to make but it is dictated by the law and by the overriding requirements of the Convention which prioritise the relationship of a child with both his parents in considering his best interests. Such relationships are crucial for his mental health into adulthood.

11.17 The Court proposes to make no findings on the issue of contact between the child and the Applicant's wider family as it is unnecessary for the purposes of this decision.

11.18 There having been insufficient evidence to establish a grave risk to Bill in this case, should he be returned, or to conclude that he will be in an intolerable situation, the Court is not required to consider the exercise of its discretion in this regard.

## 12. Is the Child Well Settled?

12.1 This concept was considered by Bracewell J in the High Court of England and Wales in *Re N (Minors)(Abduction)* [1991] 1 FLR 413 where he held (at pages 417/418):

> *"The second question which has arisen is: what is the degree of settlement which has to be demonstrated? … children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas LJ in Re S did advert to art. 12 at p. 35 of the judgment and he said:*
>
> > *'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.'*
>
> *He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance in Re S. The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving*

*attachment. That can only be relevant insofar as it impinges on the new surroundings."* (emphasis added)

12.2 Reading that passage the question must be posed: how well settled could this child be when he is in a house and in a country where neither one of his parents lives and which has been, until his parents objected, expressed to be a temporary arrangement? Given the way in which the child came to be in the Respondents' home, it is not appropriate to allow the defence of the child being well settled to defeat the application for the return of the child. The defence cannot be established in circumstances where consent was express, and acquiescence has been shown, to a situation expected to be only a temporary one. The Court notes also that the assumption in this test is that the child will be in the care of one of his parents, not of his extended family, so the lack of regular contact with both parents is a significant factor here.

12.3 The argument was also made that this case had elements of subterfuge, albeit not such as to compare it to the facts in *Z.D. v K.D.* [2008] IEHC 176, [2008] 4 IR 751 in which MacMenamin J. endorsed the view that it would be difficult for a parent who had hidden a child away to assert that the child was now well settled, saying: "*A broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay*".

12.4 This observation is relevant here and I adopt it. The Respondents were loathe to identify the Applicant to the district court and, while they did not hide the child, they did not seek out the Applicant nor did they make it easy for him to find them. In all of the circumstances, no matter how happy the child is with them, they have not established that he is well settled, within the meaning of the Convention and the relevant case law, in the

circumstances of this case. Bill's stay with them was to be temporary, not permanent, and they have made it difficult for his father to find him. Nearly a year of Bill's time with them has been taken up with their opposition to both parents' requests that they return Bill.

12.5 Further, and as discussed below, the position of the Mother should be considered in this context also. She has sought to take Bill home since the middle of 2020 and yet, in May of 2021, he remains in their care. This delay is one of the reasons why Bill has adjusted to his surroundings. It is perfectly plain that his parents are partly to blame for the initial arrangement, for the very fact that an alternative was needed, but that does not mean that the Respondents must therefore be given custody of the boy. To make such an order would not only set a dangerous precedent in terms of those with temporary care of children, the Court would also have to ignore the Convention and the relevant law based, as it is, on the paramount importance of the child's best interests. In particular, the vital importance to the child of regular contact with both parents and the essential trust in the institutions of signatory states to vindicate the child's rights and protect his interests – both fundamental animating principles of the Convention, to borrow the phrase used by Collins J. and quoted above.

## 13. <u>The Views of the Mother</u>

13.1 In considering the grave risk argument, the Court has considered the position of the mother and her support of the Applicant's request that Bill be returned to England. The Respondents argue that her position, if it is truly to support the application, must be seen in the context of his financial support to her.

13.2 The Respondents also rely on a letter purporting to transfer custody from the Mother to them. The Applicant responds that the Respondents have not disputed her averment that a letter provided to the Court by the Respondent purporting to be a transfer of custody from her to the Respondents was not signed by her. But what this Court finds more significant in this regard is that the Respondents seek to rely on this intention of hers to transfer custody. When asked, their response to the argument that she is now objecting to the child remaining in Ireland, was that she was not a party to this action and that the issue was confined to that raised by these parties. But this is a Hague Convention case involving an allegation of child abduction. Further, it is a case in which the child is now residing with relations who have no custody rights. In those circumstances, and even if she is not a party to these proceedings, it is inappropriate to ignore the wider situation and the wishes of the child's mother. If only because the best interests of the child must remain the paramount concern of the Court, the primary carer for the child and her attitude to changing events cannot be left out of the case in that way.

13.3 For this reason, it seems appropriate to this Court to find, as part of the factual matrix of the case and on the balance of probabilities: that the Mother had consented (in October and again in January) to Bill's staying with his uncle and aunt on a temporary basis; that the Mother confirmed, by text message, that she was not characterising the Respondents' conduct as an abduction of her child; that when the Respondents sought guardianship rights, she consented; that when it became apparent that the Respondents were refusing to return the child, the Mother objected. These findings are borne out by contemporaneous texts, particularly when one considers that the ordinary meaning of the word abduction is not one that is necessarily the same as the legal definition but imports a sense of a child being

physically taken from a guardian. The word does not contemplate any consent on the part of the guardian. To retain a child who is staying with his extended family temporarily is not usually, other than in legal circles, referred to as an abduction. But if a child is retained without parental consent or acquiescence, even with the best motives, it amounts to an abduction. Further, the Mother's conduct throughout is consistent with an intention to continue to care for the child, as soon as she is in a position to do so. If her position is ignored in these proceedings, the Court cannot consider the best interests of the child in a holistic and meaningful way.

13.4 This Court has considered the consistent approach of the Mother to the care of her child, her failures in that regard and her awareness of her own weaknesses, the attitude of the Respondents as set out in their affidavits and the contents of the exhibits in the case. On the basis of all these factors, it appears that the Respondents have been reluctant to entrust the child to his mother and have shown a capacity to exclude the Applicant from meaningful contact with his son. While they seek to link the former reluctance to the Mother's condition and it is understandable that they seek to avoid the child having to be placed in foster care, this initial reluctance has transformed in later stages of these proceedings to more settled position which opposes a return to the Mother. The argument is made, to the Mother herself, that her addiction issues are so difficult to overcome that the child is no longer safe in her care. The impression they seek to create is that they are the most appropriate guardians, in the circumstances.

13.5 The difficulty with this view of the facts, while borne out by their excellent care of the child and by his evident happiness with his cousins, is that it ignores the longer-term interests of the child and the vital importance of his retaining a meaningful and regular relationship

with both parents. While the parents too are responsible for their part in creating that relationship, the law does not permit a court to remove a child from his parents because they have been less than perfect, or even if they have been downright bad parents. It is not lawful to remove a child from his home because parents have been neglectful or are inadequate to the task. What is done in such a case is to ensure that the social services are involved so as to support the parents as best they can and only where the children are at risk are they removed from the family home. This system, before even commenting on the Hague Convention, is to ensure that children remain at home and with their parents wherever possible.

13.6 Once one considers the position of a child who has not only been taken out of his home but moved to another country, out of the jurisdiction where both his parents remain, it must be clear to any independent observer that no matter how good their care, these Respondents cannot retain the child without the consent of his parents. The effect of a ruling in their favour may be to effectively ensure that the child will grow up estranged from both parents, who live in a different country and this is not in the best interests of any child.

13.7 This is an unusual case as the parties who seek to retain the child are making that case in the teeth of the objections of both parents. As set out above, this Court cannot ignore the position of the mother in this case, nor can the Court effectively assign custody in Ireland to people who have no rights, in law, to decide where this child lives when the only two people who do have such rights both object to the child living here.

13.8 The Court will order the return of the child and will hear the parties on the most effective orders to achieve this in a way that will be least disruptive to the child.

13.9 It is important to emphasise that once Bill returns to UK, the UK Courts will have jurisdiction in relation to all matters of custody and access concerning Bill. However, this Court is recommending that contact between Bill and his extended family be facilitated. In making this recommendation the Court does not wish to particularise or make any directions as to matters that are, more correctly, matters for the courts in England, to paraphrase Denham J. in *P. v. B (No.2) (Child Abduction: Delay)* [1999] 4 I.R. 185. This Court is of the view that it is in the best interests of the child that an ongoing relationship be maintained with his uncle, aunt and cousins with whom he has lived for over a year now and that it is very much in Bill's interests that the adults in his life strive to achieve some measure of contact with his extended family in Ireland, for his sake.