

THE HIGH COURT

FAMILY LAW

[2023] IEHC 516

**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 ALEX AND MOLLY, (MINORS)
(CHILD ABDUCTION: CONSENT AND ACQUIESCENCE,
HABITUAL RESIDENCE, SETTLED STATUS)**

BETWEEN:

L.O.

APPLICANT

AND

M.O.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 4th of September, 2023

1. Introduction

- 1.1 This application is for the immediate return of two children to Australia after a family travelled here, ostensibly for a lengthy holiday. The children are called Alex and Molly for the purposes of the judgment. The Applicant

father maintains that he did not consent to his children remaining in Ireland permanently and the Respondent contends that he did, or, if he did not consent, he acquiesced in their remaining here. Either way, the Respondent submits, the children were habitually resident here at the time of the alleged retention and further, or alternatively, are now settled in Ireland and the Court should refuse the application. Finally, the Respondent argues that there is a grave risk to the children should they be returned to Australia.

1.2 In this case, the parties have argued for positions which are diametrically opposed, each to the other, and the Court has been driven by the evidence to conclusions of fact for which neither side argued. Further, there was a dispute about burdens of proof which has been addressed and resolved in this judgment but which required the Court to select a more likely retention date than those suggested by the parties.

1.3 Both children were habitually resident in Ireland by the time the Applicant father withdrew his consent to their remaining here, and the Applicant has therefore failed to prove that there was any wrongful retention in this case.

2. Objectives of the Hague Convention

2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most recent information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an

effective, summary remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in contracting states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the resettlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and 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 and from daily contact with the other parent.

2.3 The Convention requires an applicant such as this one to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the children were habitually resident in the relevant country at the time of removal or retention. If he succeeds in establishing these matters, the burden then shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return the children, as a result of the defence. Here, the Respondent argues that her children were habitually resident in Ireland, and not Australia, by the time they were retained here, and she raises the defences of grave risk and settlement also.

3. Habitual Residence: the Law and the Burden of Proof

The Law

3.1 To succeed, this Applicant must prove that the children were habitually resident in Australia at the time immediately before his custody rights are said to have been breached, which he submits was in May of 2023. Article 4 of the Convention provides:

“The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights”.

3.2 Therefore, Article 4 requires a determination as to the date of the breach of custody rights, if any, and consideration of where the children were habitually resident at the relevant time. If habitual residence changed from Australia to Ireland, the date of that event and the reasons for the change are crucial as the issue of habitual residence directly affects the questions of lawfulness of retention and whether there was a breach of custody rights.

3.3 One of the most useful guides for the Court, from *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309, is that habitual residence is transferred to the host State when the parent *“has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character”*. Duration of stay is only one factor in such cases and all the circumstances must be considered. The intentions of the parents are obviously important but cannot be determinative as, in many such cases, the parents disagree as to the place of habitual residence.

3.4 *A.K. v U.S.* [2023] IECA 65 concerned 3 children who were brought to live in Ireland for what was intended to be a holiday at the beginning of the coronavirus pandemic and whose continuing residence in Ireland was dependent on the restrictions then in place in England. Their stay was

extended for about 2 years. In August of 2022 the children went to England for a holiday visit, but their father retained them there. The mother took the children during an access visit and removed them to Ireland, after which removal child abduction proceedings issued. This Court determined that the two older children retained habitual residence in England but the youngest child acquired habitual residence in Ireland given the duration of their residence here and taking into account the intention of the mother, the integration and ages of the children and their social and family ties here.

3.5 The Court of Appeal upheld the finding regarding the youngest child but concluded that the older children had also become habitually resident in Ireland at the relevant time. In his judgment, Murray J. relied primarily on the principles and factors set out by Whelan J. in *Hampshire County Council v. CE and NE* [2020] IECA 100. These factors included proximity, duration, integration, stability, nationality, reasons for the move, location of possessions, durable ties and parental intention. Whelan J. noted that *“in relation to a pre-school child the circumstances to be considered will include the geographic and family origins of the parent or parents who effected the move and their degree of integration in the relevant jurisdiction. For older children, if all the central members of the child’s life in the original state have moved with him or her, the faster habitual residence will have been achieved there. Conversely where any of the central family members have remained behind, the slower his or her achievement of habitual residence will likely be.”* These passages conclude: *“a child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for him. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused and fact based.”*

3.6 While not determinative, therefore, the intentions of the parties in this case must be examined along with any evidence of integration and stability. The issue of consent usually arises a defence. The usual scenario involves an

applicant establishing that there has been a retention that is ostensibly wrongful, but the respondent is able to show unequivocal consent, before the move of jurisdiction, thus proving that the retention was not wrongful.

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

The Burden of Proof

- 3.8 Each side argued that the other was required to prove the date of retention. No authority was cited in respect of this issue. In *K. v. J.* [2012] IEHC 234 the High Court reviewed the circumstances in which the habitual residence of a child could change. In paragraph 32 of that judgment, Finlay-Geoghegan J. confirmed that the onus in that case was on the respondent who sought, as does this Respondent, to show that there had been a change in habitual residence. The evidential burden must be on the Respondent as it is she who seeks to prove that the family's habitual residence changed, from the country in which they lived all their lives until 2021, to Ireland.

- 3.9 The onus of proof placed on the Applicant is to show that he has custody rights and was exercising them until the date of removal or retention, and that the application for return was made within one year of that date. He must also prove that the children were habitually resident in the requesting country as a matter of fact, which fact is inextricably bound up with the question of whether or not the removal or retention was wrongful.
- 3.10 If the Respondent argues for a defence of grave risk, she bears that onus of proof. Similarly, if she argues that the children had changed habitual residence, as a matter of first principles she bears the evidential burden of proof. The party seeking to argue for a change of habitual residence is invariably the respondent who has the means to so prove. Apart from evidential rules, on a practical note, it would be virtually impossible for the 'left-behind parent' to prove that a child had not changed habitual residence as he does not usually have access to most of the evidence in respect of the new residence. Ultimately, of course, as Donnelly J noted in *M v. M* [2023] IECA 126, citing *A: Reference for a preliminary ruling Case C523/07* [2010] 2 WLR 527, the habitual residence of the child is "*for the national court to establish... taking account of all the circumstances specific to each individual case*".
- 3.11 In our adversarial system, it is an important feature of such cases that the parties take on burdens rather than leaving that onus on the courts and my views on the burden of proof are shared by Declan McGrath in his authoritative text on Evidence, 3rd Edition, where he concludes, at paragraphs 2-136 – 2-137:

"The general principle applied in civil cases is that he who asserts must prove... Thus, whichever party contends for the existence of a particular fact will bear the burden of proving its existence..."

3.12 In order to consider the issues raised under the heading of habitual residence, and to make a decision that is child-centred and fact-based, the evidence in the case must be considered in detail and conclusions of fact drawn in respect of numerous matters, which bear on the question of habitual residence and on what might constitute wrongful retention.

4. The Affidavit and Exhibit Evidence and Conclusions of Fact

4.1 The parties and their children lived in Australia for years although they have significant ties to Ireland. They travelled to Ireland in late 2021. The Respondent managed the travel and financial details and booked return flights. The Applicant took a few months' leave from his permanent employment. His job was the sole source of income for the family.

4.2 The parties are married, the family home is in Australia, both children are Australian citizens, and both are under the age of seven years. In 2021, the eldest had been enrolled in school in Australia. The family have medical records in Australia and their bank is in Australia. The children here are very young, but are no longer infants. Their primary carer is their mother. While their early history was spent in Australia, they have now spent a large portion of their young lives here in Ireland.

4.3 The Respondent appears to have filled out a statutory declaration to confirm that she understood that there would be re-entry restrictions relating to the coronavirus pandemic on her return to Australia. The contents of this form, exhibit 6 in the Applicant's first affidavit, support the view that the trip was a temporary one as the Respondent confirms that they have sufficient funds to sustain themselves while they are away. The copy exhibited is unsigned.

- 4.4 The family travelled here in late 2021 and contemporaneous texts between them and to friends make it clear that the two parties had considered moving permanently to Ireland at that time but had made no concrete plans in that regard. The Respondent had not seen her family here since before the Covid pandemic and this was one of the reasons for the trip.
- 4.5 The Applicant has another child in Australia who is older than the children of this marriage and with whom the Applicant has a close relationship. This sibling is mentioned by Alex in the assessor's report prepared for this case.
- 4.6 In December of 2021, the Respondent started in employment in a local retail business. The Applicant did not get a job here though there were some contemporaneous messages exhibited about possible options in that regard. The Respondent did not remain in employment and avers that this was because she was concerned about the Applicant and his care of the children. There is very little to sustain this statement; a single instance of leaving a child with another adult is not sufficiently reckless, to use her term, to lead to such a breakdown in trust. The Respondent got another job in January but only one pay slip is shown and, by the following month, she had applied for social welfare payments here.
- 4.7 In January, the Applicant applied to register with a local doctor in Ireland and obtained a PPS number for this purpose. The PPS number issued on what was expressed to be a contingency basis. It is likely that this was done for vaccination purposes and is not a sign of his intention to remain here.
- 4.8 The family's return home was delayed by numerous factors: first, one family member became infected with coronavirus and then another had to undergo surgery and a hospital review after the date of the postponed return flights. There were contemporaneous emails and messages about the first two return dates and no dispute about these medical details.

- 4.9 In March, the Applicant flew home a month later than planned, to resume employment in Australia. He had obtained leave from work and exhibited his exchanges with his employer in respect of this extra month. Meanwhile, the Respondent postponed flights for herself and the children until May.
- 4.10 Later, the Respondent avers that she decided to stay for a birthday and explained to the Applicant that she had looked at flights in June or July but that they were very expensive. In May of 2022, the Respondent confirmed a proposed return date of 10th September, saying she had booked their return flights on this date. In June of 2022, the Respondent cancelled the Australian school registration for that year for the older child.
- 4.11 In early 2022, as noted, the Respondent applied for social welfare benefits in Ireland. She obtained this benefit, using an email ostensibly from the Applicant, which email confirmed that the parties had separated. This, leaving aside the question of which of the parties sent the email, was probably untrue as there is no support for the proposition that they had separated in any contemporaneous emails or texts.
- 4.12 There is a dispute about who sent that message, but it appears clear from an exchange on 17th and 18th September that both knew that the Respondent was receiving social welfare benefits. It is more likely than not, based on the Australian IP address, that the Applicant sent the email to support the application. What is more significant is that its contents were probably not true and that both parties knew in September that the Respondent was receiving welfare payments on a basis that both, probably, knew to be false.
- 4.13 Shortly after this application for social welfare benefits, the younger child, Molly, was enrolled in school in a neighbouring county. She had been due to start school in Australia in 2022 and texts between the parties suggest that this is a stop gap as Molly was keen to go and the place was available. The

Respondent's texts state that Molly is in Ireland until at least the end of May (the latest tickets having been booked for 27th May) hence her decision to send the youngest child to this school, the logical implication being that this was only for a few weeks before their probable return.

- 4.14 In mid-2022, the Applicant stopped paying his salary into the account from which the Respondent had continued to receive maintenance until then.
- 4.15 In June and July, the parties exchanged messages about buying a new house in Australia and a real estate agent emailed them, suggesting properties. In August, the agent emailed asking when the Respondent expected to be home. At that time, messages suggest that the Respondent appeared to want to buy in Australia but also to invest in property in Ireland. The Applicant texted to say he did not want to do this as the family finances would be too stretched (these messages are in exhibit 10 in the Applicant's first affidavit). On the 7th of June 2022, there is an exchange in which both parties discuss jobs and houses. At this point, there is no question of the family living separately and my impression was that they were deciding where they would settle and what kind of house they could afford in each country.
- 4.16 On the 9th of August, the Respondent applied for a solicitor in Ireland. In her affidavit she says that this was to enquire about divorce proceedings, but she did not go ahead with the application in this jurisdiction.
- 4.17 In September and October there was an exchange of emails and messages, none of which appear in the Applicant's affidavit and they are described in more detail later in this section but they contain no conclusion in respect of whether the couple would reunite or where they would live.
- 4.18 On the 25th of October of 2022, the Respondent and Applicant exchanged messages in which it was made clear that the Respondent did not want to return to Australia. The Applicant initially replied that he would not ask

her to move home or to bring the children back. The exchange ends with him saying his place is not in Ireland and that he hopes the children will want to “*catch up*” one day and that later in life “*we can also be best of friends*”. Two days later, he changed his mind and said he had been confused and was seeking advice.

4.19 The Applicant had already sent the Respondent details (in August) about the Hague Convention. After the exchange on the 25th of October, he then alternated between suggesting that he would use the Convention procedure and asking her to reconsider. None of these messages are exhibited by the Applicant but all appear in the Respondent’s affidavit.

4.20 On the 26th of October, a firm of lawyers wrote to the Applicant about the sale of the family home in Australia but without reference to the purchase of another joint family home. There is a reference to “*diving marital assets*” which presumably means dividing, and the Applicant is invited to engage a solicitor. This letter clearly envisages a separation and makes sense when seen in the context of the text and email exchanges of the parties on the 25th of October which the Applicant has not exhibited. In his affidavit, this solicitor’s letter appears to come out of the blue but in fact it was heralded by an exchange between the two about separating. The Applicant also states categorically that he never consented to the children remaining in Ireland, when he clearly did so, albeit withdrawing this consent after two days.

4.21 There are further exchanges in November but no agreement in respect of return of the children and, on the 12th of December, the Applicant filled in a form for the relevant public authority in Australia, consenting to his details being used for the purposes of an application under the Hague Convention (exhibit 14 in his first affidavit). The application was signed on the 12th of January 2023. This application is exhibited, along with all of the exhibits in

that original application, many of which are duplicated in the affidavit prepared specifically for the Convention proceedings. That original application will be referred to as the January Application.

- 4.22 The exhibits to this January Application include more exchanges between the parties than those exhibited in these proceedings but even in this Application the Applicant has not adverted to, or exhibited, the exchange in October in which he agrees to the children remaining in Ireland.
- 4.23 The first concrete indication of difficulty in the marriage in the papers before the Court is at exhibit 22 of the January Application, at page 88 of the Applicant's first affidavit and contained within exhibit 4 of that affidavit.
- 4.24 At exhibit 21 of the January Application is an undated message from the Applicant to the Respondent saying that the months without her and the children have been extremely difficult, and that September is too far away, asking when they can return. The next exhibit, 22, is an unrelated text which appears to have been sent in the first week of July, 2022. The Respondent states in this message that she no longer has a husband because he does not reply and has cut off her income. She accuses him of lying and says that she will not respond to him until he gets his head together. In the text are the words: *"until last week we were planning our future"*. Every indication is that this future was, at that point, in Australia. The text appears to be a reply to exhibit 21. There is no indication that the family is not coming home.
- 4.25 This message at exhibit 22 appears before a message dated 15th July, which is the next exhibit. On that date, the Respondent did not reply to a query from an estate agent: *"when are you coming home?"* The same question was asked and not answered in August.
- 4.26 On the 21st of July, exhibit 23 in the January Application, there are a number of messages about the proposed return date in the context of a request from

the Respondent about the Applicant's shares, which she needs for the Irish social welfare authorities. Despite a specific request for the return date, there is no response to this request, nor is there an indication that they are not returning, however. On the 27th of July, there is an exchange in which the Respondent asks the applicant to visit them in Ireland.

- 4.27 On the 2nd of August is a message containing the first reference to the Hague Convention in which the Applicant states that "*the main priority*" is to get his children home. On the 15th of August, the Respondent wrote to the Applicant by email that he chose to go home in March and alleging that he left them and treated the family badly.
- 4.28 On the 17th and 18th of September, this couple had a lengthy exchange about various things, including allegations which were denied, a request for money and allegations of financial blackmail which appear to refer to the Applicant's having stopped payments to the Respondent from his salary.
- 4.29 Even in September there is no contemporaneous support for the proposition that the Respondent and the children have now settled in Ireland. Her responses in this document do not suggest that her mind is made up or that she and the children are staying in Ireland: she asks the Applicant to visit and accuses him of having put her in this situation by leaving. She tells him the children do not need an *en suite* bathroom, referring to his refurbishment of their home in Australia. At no point does she mention residing permanently in Ireland. The copy of this exchange is exhibit 30 in the January Application, it is not individually exhibited, but is part of exhibit 4.
- 4.30 In the same exchange, the Respondent refers to the Applicant being advised to contact a lawyer as "*a dog's act which ruined their marriage*". The Applicant appears, in this exchange, to be asking the Respondent to come home and

the Respondent is not happy with his responses but there is little or no support for the proposition that she has decided that she is staying here.

4.31 The Applicant's exhibits then skip to late October, with a letter from a lawyer about their property, advising that he obtain a lawyer. In the interim are several key messages only available in the Respondent's affidavit.

4.32 From the Respondent's affidavit, one learns that the parties had considered moving to Ireland. None of this is exhibited by the Applicant. However, for the purposes of these proceedings, the key word in that conclusion is 'considered'. The evidence establishes that this was something that had been discussed, and was on the cards, but it did not materialise. The Applicant did not get a suitable job and, as the primary breadwinner, this was a real obstacle to the proposition of settling here more permanently.

4.33 While I accept that he has a good relationship with his other, older child, it also appears from his messages in 2021 and early 2022 that the Applicant had considered this option and I do not accept the submission that family commitments made it impossible for him to move here.

4.34 Exhibit 2 of the Respondent's affidavit, a copy of the relevant Irish visa, shows that the Applicant received a long stay visa for those who wish to stay for longer than 3 months or to reside permanently in Ireland. Given that the initial plans were stated to employers, friends and even to each other to be for about 3 months, I do not consider the type of visa determinative of the intentions of the parties. More significant are the contemporaneous exchanges which indicate that this was an option for the family, not a decision that had been made before the trip was undertaken. "*Still no real plans*", is one of the messages from the Respondent to her friends in a group chat in October 2021. This indecision is mirrored in exchanges as late as September of 2022.

- 4.35 As a matter of fact, it appears to me likely that this is the true position: the couple considered moving here, looked for jobs, the Applicant did not find anything to his liking and he left, partly (if not entirely) in order to keep his job in Australia, from which he only had temporary leave. At that time, the Respondent had not committed to staying in Ireland, though this was probably her preference. Likewise, the Applicant had not necessarily ruled out coming back here though he clearly wanted to stay in Australia.
- 4.36 The case is unusual in that there is a huge amount of evidence about the intentions of the parties but very little about the daily lives of their children. What is available is evidence of happy, school-going children who appear to be happy in Ireland but had no difficulties in Australia either. When assessed by an expert child psychologist for the purposes of the case, the only child old enough to give an account of her views regarding her living situation was Alex. The overwhelming impression given by Alex is one of a happy child who is, nonetheless, missing the Applicant.
- 4.37 The relevant matters from the psychologist's report include Alex's references to Irish locations, Irish relatives and the impression of a very happy, well-adjusted child who has settled in this country now, in mid-2023, having been here since 2021. Alex is no longer aware of Australia as a place. These matters do not assist in terms of when the child's habitual residence changed, however.
- 4.38 I do not consider the allegations in respect of vaccination scepticism to be of assistance to the decision this Court must make. Insofar as misleading averments assist the Court in assessing reliability, unfortunately there is evidence that both parties misled the Court, although much can be explained by the human tendency to remember what we want to remember rather than the actual facts. Contemporaneous messages, as always, are

more reliable than the fallible and understandably biased human recollections set out in affidavits. The issue is whether or not the children must be returned to Australia, however, not the reliability of the deponents.

4.39 The significant discrepancies in this regard are the Respondent's submission that the marriage had ended in March, which is undermined by numerous exchanges between the parties, and her representation to the Irish authorities in February that she had separated from the Applicant, probably made to obtain social welfare payments at a time when she was still receiving money from him. In respect of the Applicant, the highly relevant exchange in which he consented to his children remaining in Ireland was completely omitted from his application to the Australian authorities and from the affidavits supporting this case. This exchange is quoted above, at paragraph 4.18. Both parties failed to be open about their initial plans in travelling here. This lack of transparency on both sides makes the affidavits difficult to accept as reliable sources of fact without contemporaneous supporting evidence.

4.40 The parties present diametrically opposed views on the evidence regarding habitual residence, neither of which is supported by the evidence in their affidavits, when considered as a whole. The Applicant invites the Court to accept that the purpose of the family trip to Ireland was a holiday. This ignores his own messages about looking for work and about their possible plans to relocate here. The Respondent, he submits, never booked alternative return flights and orchestrated a situation in which he would appear to have acquiesced in her remaining in Ireland when she never intended to return. There is no exhibit in respect of the flights apparently booked by the Respondent but her own averments and contemporaneous texts suggest that she probably did book more than one flight. Not only this, but the Applicant appears to have accepted this in messages as late as

September and it seems likely that even the last flight mentioned was, in fact, booked, this being on the 23rd of December 2022.

4.41 On the other hand, the Respondent submits that the purpose of the trip was always to settle in Ireland, that she quickly got a job and that the Applicant looked for work too. She submits that he abandoned them in March of 2022 and cut off their finances.

4.42 The Respondent's narrative ignores the fact that the Applicant had to return to work. It also ignores the plain facts: she sent contemporaneous messages about the contingent nature of their trip, telling friends that nothing had been decided, she made a declaration confirming to Australian authorities that she had means to remain in Ireland for over 3 months, the inference being that she would then return, the Applicant did not quit his job, they did not sell their house and they enrolled Alex in a school in Australia. The Applicant's submissions ignore the joint plans to settle here if things worked out.

5. Conclusions on the Issue of Habitual Residence

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

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

- 5.3 Both children are now in school in Ireland, they live with a close family member who is referred to as often as the child's dad in Alex's assessment report. While Alex misses the Applicant very much, the child's centre of interests was in Ireland by the time of the assessment. The issue is when that change occurred, and if it pre-dates the retention of the children here.
- 5.4 The Respondent's visit to a lawyer in August, her exchanges with the Applicant in August and September, in particular about the Hague Convention, did not indicate a settled intention to stay in Ireland. It is, at all times, possible that this family will return on the 10th of September as planned. When they do not, there is still evidence on her part of the Respondent blaming the Applicant for this and seeking to resolve the issues between the parties, including inviting him to visit them.
- 5.5 The Respondent has not rented or bought any property here, nor is there evidence of her having full time employment here in the past year. In these circumstances, which involved an ongoing discussion between the parties but in respect of their marriage as much as where they would live, only factors such as this would indicate a change of habitual residence unless the intentions of the parties were clear from some other source. While the Respondent did withdraw Alex, in June, from the Australian school originally selected, this is not necessarily sufficient, in all the circumstances, to indicate a settled intention to stay here, as opposed to another delay in their return, now expected on the 10th of September. There was no evidence, for instance, of the children being enrolled in Irish schools for 2023.
- 5.6 The evidence does not support the proposition that there was a change of habitual residence by July, nor would the evidence support a finding that the Respondent had formed a settled intention to move to Ireland at that stage. The correspondence does not suggest that the marriage is over

though it is clearly in trouble. She continues to reassure the Applicant that she is returning, with the children, in September.

- 5.7 As in the *A.K. v U.S.* case, to which this case bears some resemblance, the parents were in dispute as to where they would live, meanwhile, the children were putting down roots here. The text of the 25th of October changes everything. At that point, there is an unequivocal consent, in writing, from the Applicant, that his wife may stay here with their children.
- 5.8 The Applicant withdrew that consent two days later, rendering the consent equivocal but by then the habitual residence of the children, a question of fact, had changed. By the 25th of October, with his consent, the Respondent had decided to stay in Ireland and, given their ties with their community and their integration here, it seems reasonable to conclude that the two children were, from the 25th of October, habitually resident here. Their mother's intention was then clear, their father agreed, and all circumstances aligned over a period of days to confirm where they would be living for the foreseeable future. His changing his mind could not and did not transfer the country of habitual residence back to Australia.
- 5.9 This exchange on 25th October clarifies the Respondent mother's intention and adds the Applicant father's consent, which is the final piece of the jigsaw. Already the children have school, medical and family factors tying them to Ireland, but they are sufficiently young that their parents' intentions are crucial, particularly those of the primary carer. While the Respondent has submitted that the marriage was over in March of 2023, if that was so in her mind, the evidence does not support this conclusion. There was room for reconciliation and even a move back to Australia in some messages. By October, it is clear that she will stay here and on the 25th of October, their father agrees that the children may stay with her.

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

6. Earlier Dates of Retention?

6.1 As a matter of fact, I am satisfied that this couple made no decision as to where they would live until at least the 25th of October, 2022. The prevarication on both sides is clear from the exchanges of messages throughout July and September in particular.

6.2 The Applicant nominates the 27th day of May as the date on which the children were unlawfully retained. The Respondent maintains that there was no unlawful retention in light of the consent or acquiescence of the Applicant. The Respondent maintains, further, that as the Applicant bears the burden of proof, he must nominate and prove the date of retention.

6.3 The date of 27th of May cannot be the date of wrongful retention, given the factual findings that this couple had yet to decide where they would live at that time. Until the exchanges in September and October, there was no retention and no change of habitual residence. Had the relationship problems been ironed out, it appeared just as likely that the family would reunite in Australia as in Ireland. This was ruled out on the 25th of October with the exchange in which the Applicant said that he would stay in Australia knowing this meant he would not see his children for some time.

6.4 From that date, the children were retained in Ireland, but this was not a wrongful retention as the children were habitually resident here by that time. In an exchange on the 27th of October, the Applicant emailed that he wanted the children back, but at that point, the retention could only be one which was unlawful if, at that stage, the children were still habitually resident in Australia. As that had changed on the 25th of October, by the time the Applicant had changed his mind on the 27th of October, the retention was not wrongful.

7. Consent and Acquiescence

7.1 Article 3 of the Hague Convention provides that the retention of a child is wrongful where it is in breach of rights of custody attributed to a person under the law of the State in which the child was habitually resident immediately before the retention. Article 13(a) adds that return of a child is not mandatory where the person exercising those rights had consented to or subsequently acquiesced in the removal or retention.

7.2 Given the conclusions of the Court, that the effect of the short-lived consent in this case was to change the habitual residence of the children before their mother decided to remain here, neither defence arises.

8. Settled Status and Grave Risk

8.1 Article 12 of the Hague Convention provides that if a period of more than one year has elapsed since the child was removed or retained, the Court must nonetheless return the child unless it has been demonstrated that the

child is now settled in its new environment, to use the words of the Article. This does not arise as the date of retention was the 25th of October of 2022 and the Court has determined that the children were habitually resident in Ireland at that date.

- 8.2 The defence of grave risk does not arise on the facts. In the event that the children had been wrongfully retained, there is no evidence to support such a finding in this case.

9. Conclusions

- 9.1 There is no issue in this case in respect of rights of custody and whether the Applicant was exercising them. The Respondent and her children became habitually resident in Ireland in October of 2022, in circumstances where she and the Applicant agreed that they would stay here while he remained in Australia.
- 9.2 This is a conclusion that the Respondent did not specifically argue for as part of her case, but which emerged from exhibits in her affidavits which the Applicant did not include in his. The conclusions are strongly supported by the Applicant's application to Australian authorities and the contemporaneous messages revealed therein, which messages were not independently exhibited in any affidavit he filed for these proceedings.
- 9.3 In those circumstances, there was no wrongful retention and, therefore, issues of the children becoming settled post-wrongful retention, and defences of consent, acquiescence, and grave risk do not arise.