Neutral Citation Number: [2021] EWHC 3231 (Fam)

Case No: FD21P00741

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Manchester Civil Justice Centre

1 Bridge Street West

Manchester, M60 9DJ

Date: 26/11/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

NT and RT	**Appl**
- and -	
HT and MT	**First and S** **Respon**
-and-	
AT	**Third Respo**
-and-	**Fourth**
KT, LT and CT	**and** **Respon**

Ms Ruth Kirby QC and Mr Frankie Shama (instructed by **Dawson Cornwell**) for the **Applicants**

Ms Susan Grocott QC and Ms Olivia Edwards (instructed by **HCB Solicitors**) for the **First and Second Respondents**

Mr Carl Gorton (instructed by **Watsons Solicitors**) for the **Third Respondent**

Mr Jamie Niven-Phillips (instructed by **Cafcass Legal**) for the **Fourth, Fifth and Sixth Respondents**

Hearing dates: 24 November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice MacDonald:

INTRODUCTION

1.
In this matter I am concerned with an application pursuant to Children Abduction and Custody Act 1985 for an order for summary return under Art 12 of the 1980 Hague Convention of KT, born in 2010 and now aged 11, LT, born in 2016 and now aged 5 and CT, born in 2017 and now aged 4, to the jurisdiction of the Republic of Ireland. The three subject children hold Irish passports. KT and CT were born in Ireland and LT in England. CT had only lived in Ireland until her removal to England in February of this year.

2.
The application is brought by the maternal grandparents of the children, NT and RT (hereafter the 'maternal grandparents'). The maternal grandparents contend that at the time the children were removed from the jurisdiction of Ireland they had, and were exercising, inchoate custody rights in respect of the children, and that the children were habitually resident in that jurisdiction, for the purposes of Art 3 of the 1980 Convention. The mother of the children is sadly deceased in circumstances that I will come to.

3.
The application is resisted by the paternal grandparents of the children, HT and MT (hereafter the 'paternal grandparents'), with whom the children currently reside in this jurisdiction. The children's two sets of grandparents are related to one another, with their paternal grandmother being a cousin of the maternal grandmother.

4.
In opposing the application, the paternal grandparents assert that the maternal grandparents did not have inchoate rights of custody in respect of the children at the relevant time for the purposes of Art 3 of the 1980 Convention and, accordingly, cannot bring themselves within the terms of the Convention. They further contend that the children were not habitually resident in the Republic of Ireland immediately before they were retained in the jurisdiction of England and, once again, that in those circumstances the maternal grandparents cannot bring themselves within the terms of the Convention. Finally, the paternal grandparents rely on what they say was the consent of the maternal grandparents to the removal of the children from Ireland for the purposes of Art 13a of the Convention, on the assertion that a summary return of the children would result in a grave risk of exposing the children to physical or psychological harm or otherwise placing them in an intolerable situation for the purposes of Art 13b of the Convention and on the assertion that KT objects to returning for the purposes of Art 13 of the Convention. The father, who is presently serving a sentence of imprisonment in this jurisdiction and is due for release on 10 December 2021, supports the case advanced by his parents.

5.
The children have been joined as parties to these proceedings. On behalf of the children, the Children's Guardian submits that on the evidence before the court the maternal grandparents had inchoate rights of custody, and that the children were habitually resident in the Republic of Ireland, immediately prior to their retention in the jurisdiction of England and Wales. The Children's Guardian further invites the court to consider whether KT objects to returning to the jurisdiction of the Republic of Ireland for the purposes of Art 13 of the Hague Convention.

6.

The court also has before it an application by the maternal grandparents for an order for summary return under the inherent jurisdiction of the High Court. For reasons that will become apparent, it has not been necessary to consider that application.

BACKGROUND

7.
The background to this matter is somewhat involved and many of the key aspects of that background are matters of dispute between the parties. For the purpose of this judgment however, the account of the background can properly be limited to the following matters.

8.
The parents were married on 4 August 2009. The relationship was a fractious one and was characterised by a number of separations and reconciliations. The maternal grandparents allege that when the mother was seven months pregnant with KT the father assaulted her and left her on their doorstep. The maternal grandparents further assert that following this incident the mother and KT resided with them in Ireland for five years. In 2011 the father applied in the court in Ireland for custody of KT but was granted contact with KT at the home of the maternal great-grandparents. The maternal grandparents allege that this litigation followed the father abducting KT from the care of the mother.

9.
The father has been the subject of a number of criminal convictions. In 2006 the father was convicted of assault with a weapon and sentenced to four years in prison. The father was again in custody between 2012 and 2015. In June 2015, following his release from custody, the father moved to Manchester. The parents reconciled and the mother moved to Manchester with KT in July 2015 to live with the father. In January 2016, Children’s Services undertook an assessment of the family. It was confirmed that the mother had a diagnosis of severe epilepsy which was poorly controlled, resulting in between one and four epileptic fits per day. There were concerns about the mother not complying with her medication, about an allegation that the paternal grandfather had been involved in a fight using an axe, which allegation he disputes, and about the father’s previous conviction of assault.

10.
On 29 October 2015, KT was taken into police protection following the arrest of the mother and was ultimately placed in the care of his father when the mother received a short custodial sentence for theft in November 2015. On 27 November 2015 the father was charged with rape. A further assessment of the family was carried out by the local authority on 19 June 2016 in light of this charge. The assessment identified difficulties with the parents being evasive and dishonest with professionals, the mother having registered her pregnancy with LT late and with the father refusing to allow KT to be seen alone by the assessing social worker.

11.
On 8 August 2016, care proceedings were issued in respect of KT and LT and those children were made the subject of interim care orders. At the conclusion of the care proceedings in March 2017, KT and LT were made the subject of six month supervision orders and returned to the care of the mother. During the course of proceedings paternal grandparents were the subject of a fostering assessment by the local authority, the outcome of which was negative. In April 2017 the father was found not guilty of rape. The parents, who had undergone a further period of separation, reconciled in November 2017. The maternal grandparents allege that during 2017 they travelled to England because the father was being violent towards the mother and not allowing her and the children to leave. In 2018

the father was convicted of theft, robbery and dangerous driving and sentenced to three years in prison. In February 2018 the mother returned to Ireland with all three children, where they remained until the mother's untimely death.

12.
The father was released from prison on 10 June 2020 but was recalled on 21 September 2020. There is an issue regarding the extent to which he remained in contact with the children in Ireland whilst he was in prison. The father contends that he called the children daily from prison but there is no evidence that this is the case. By contrast, the maternal grandparents assert that the father essentially disappeared from the lives of the mother and the children whilst he was incarcerated in England.

13.
In July 2020, the mother registered as homeless in Ireland. The maternal grandparents submit that in order to secure a permanent home the mother was required to take this formal step and reside in accommodation for the homeless. Within this context, the mother and the children moved to a Salvation Army Hub in July 2020. On 11 November 2020 the mother and the children moved to a 'Family Hub' in Ireland. The correspondence from this organisation suggests that the mother cared well for the children and that the maternal grandparents provided regular support for the mother and the children whilst they were staying at the Family Hub.

14.
Tragically, on 21 January 2021 the mother passed away. The cause of death was given as sudden death in epilepsy. The mother's death certificate wrongly stated that she was single, when in fact she remained married to the father at the time of her death. The paternal grandparents assert that this is evidence of the maternal grandparents seeking to cut the father and the paternal family out of the lives of the children. Upon the death of the mother all three children were immediately taken into the care of the maternal grandparents in Ireland. This occurred "within minutes" of the mother's death being discovered, according to a letter from the Family Hub. Within this context, the maternal grandparents contend that they applied for Child Benefit in relation to the children. Whilst that application is not before the court, the court does have before it a letter dated 3 November 2021 recording the cessation of the claim for Child Benefit following the retention of the children in England.

15.
The paternal grandparents contend that they travelled to Ireland by ferry on 22 January 2021 to attend the mother's funeral. In their statement in the Hague proceedings, the paternal grandparents stated that there were no discussions about where the children would live at this point. This is confirmed by the maternal grandparents, who assumed therefore that it was agreed that the children would continue to reside with them. The paternal grandparents returned to England shortly after the funeral. The paternal grandmother later told this court in a statement dated 9 September 2021 that the children travelled with her to England on 30 January 2021. This was not true. At a hearing on 11 October 2021, after being made aware that an order would be sought for disclosure of the relevant passenger manifests from Irish Ferries, the paternal grandparents conceded that they in fact travelled with the children to England some two weeks later, on 13 February 2021. The maternal grandmother's statement of 9 September 2021 exhibits to it a letter from the father which states he gave his permission on 22 January 2021 for his parents to bring the children back to England. The paternal grandmother further contended in this context that it was fully understood that she would be returning the children to England.

16.
On 11 February 2021, three weeks after the death of the mother and following there having been no discussions at the time of the mother's funeral about where the children would live, the maternal grandparents attended the Family Court in Ireland to seek advice regarding formal custody and guardianship of the children and proceeded to make an application to the Irish District Court Office to be appointed as Guardians for the children and for an order for custody. In the circumstances, at the time the children were retained in England, the maternal grandparents had pending applications before the court in Ireland.

17.
The paternal grandparents assert that they returned to Ireland around 10 or 11 February 2021, primarily to deal with the question of the mother's headstone. Within this context, and as I have noted, the paternal grandparents now accept that, contrary to the earlier assertion of the paternal grandmother, it was in fact on 13 February 2021 that the children travelled to England. There is a dispute between the parties as to both the circumstances of the children's travel to Manchester and the duration it was intended the children would remain in this jurisdiction. The maternal grandparents contend that they agreed through relatives that the children could spend a week in Manchester with the paternal grandparents, with the children being returned ahead of the first Mass for their mother, and that the paternal grandparents wrongfully retained the children in England after the agreed return date of 20 February 2021. By contrast, the paternal grandparents contend in their statement that on or around 10 or 11 February 2021 the maternal grandparents passed a request through third parties that the paternal grandparents take the children to England. Those third parties have not provided statements to that effect in these proceedings. The paternal grandparents assert that the father also wished the children to be brought to England and provided his consent in respect of this course.

18.
Within the foregoing context, in determining which account is the more reliable, KT's statement to Children's Services is instructive, namely that he had understood that he was coming to Manchester for the holidays, although he was not sure how long for. It is also instructive, in circumstances where the paternal grandparents contend that there was an agreement for the children to reside permanently with them in England, that the children were removed from Ireland without their Irish passports or their birth certificates. As I will come to, when the matter eventually came before me on a without notice basis on 14 June 2021 the paternal grandfather misled the court about the amount of time the children had been in England prior to their arrival in this jurisdiction on 13 February 2021.

19.
On 22 February 2021, following the children not being returned, the maternal grandparents made contact with solicitors in Ireland. The maternal grandmother also reported to the Garda and TUSLA (the Irish Children's Services) the wrongful retention of the children in England. It is of note that when reporting the removal of the children to TUSLA shortly after that occurred the maternal grandparents gave the same explanation that they now advance before this court, namely that it had been agreed that the children would spend a week in Manchester with their paternal grandparents, who had then failed to return them.

20.
Having been adjourned on 4 March 2021 to effect service on the father, on 12 March 2021 the Family Court in Ireland granted an order appointing the maternal grandparents as the temporary joint guardians of the children and an order conferring joint custody of the children on the maternal

grandparents. Within this context the paternal grandparents seek to suggest, by reference to the Notice of Applications filed with the Irish court by the maternal grandparents, that the maternal grandparents did not, in fact, have standing under Irish law for the orders that were granted to them on 12 March 2021. The paternal grandparents have not sought to adduce any expert evidence with respect to Irish law on this point. However, the application made by the maternal grandparents for guardianship was made under the Guardianship of Infants Act 1964, which Act, as revised, provides as follows:

“**Power of court to appoint person other than parent as guardian**

6C. — (1) The court may, on an application to it by a person who, not being a parent of the child, is eligible under subsection (2) to make such application, make an order appointing the person as guardian of a child.

(2) A person is eligible to make an application referred to in subsection (1) where he or she is over the age of 18 years and —

(a) on the date of the application, he or she —

(i) is married to or is in a civil partnership with, or has been for over 3 years a cohabitant of, a parent of the child, and

(ii) has shared with that parent responsibility for the child ’ s day-to-day care for a period of more than 2 years,

or

(b) on the date of the application —

(i) he or she has provided for the child ’ s day-to-day care for a continuous period of more than 12 months, and

(ii) the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.

(3) An application under subsection (1) shall be on notice to each person who is a parent or guardian of the child concerned.

(4) Where a person to whom subsection (2)(b) applies makes an application under subsection (1), the court shall direct that the Child and Family Agency be put on notice of the application, and have regard to the views (if any) of the Agency in deciding whether or not to make an order under subsection (1).

(5) Without prejudice to other provisions of this Act, the appointment under this section of a guardian shall not, unless the court otherwise orders, affect the prior appointment (whether under this or any other enactment) of any other person as guardian of the child.

(6) Subject to subsection (7), an order under subsection (1) shall not be made under this section without the consent of —

(a) each guardian of the child, and

(b) the applicant concerned.

(7) The court may make an order dispensing, for the purposes of this section, with the consent of a guardian of the child, if it is satisfied that the consent is unreasonably withheld and that it is in the best interests of the child to make such an order.

(8) In deciding whether or not to make an order under this section, the court shall —

(a) ensure that the child concerned, to the extent possible given his or her age and understanding, has the opportunity to make his or her views on the matter known, and have regard to those views, and

(b) have regard to the number of persons who are guardians of the child concerned, and the degree to which those persons are involved in the upbringing of the child.

(9) Where the court appoints under this section a person as guardian of a child, and one or both of the parents of that child are still living, the person so appointed shall enjoy the rights and responsibilities of a guardian specified in subsection (11) only —

(a) where the court expressly so orders, and

(b) to the extent specified in the order and in the case of the rights and responsibilities specified in any of paragraphs (a) to (e) of that subsection, subject to such limitations as are specified in the order.

(10) In deciding whether to exercise its power under subsection (9), the court shall have regard to —

(a) the relationship between the child concerned and the person appointed as guardian of the child, and

(b) the best interests of the child.

(11) The rights and responsibilities referred to in subsection (9) are the rights and responsibilities of a guardian:

(a) to decide on the child ’ s place of residence;

(b) to make decisions regarding the child ’ s religious, spiritual, cultural and linguistic upbringing;

(c) to decide with whom the child is to live;

(d) to consent to medical, dental and other health related treatment for the child, in respect of which a guardian ’ s consent is required;

(e) under an enactment specified in subsection (12);

(f) to place the child for adoption, and consent to the adoption of the child, under the Adoption Act 2010.

…/”

21.
With respect to the application by the maternal grandparents for joint custody, the Guardianship of Infants Act 1964 as revised provides further as follows in respect of custody orders:

“ **Relatives and certain persons may apply for custody of child**

11E. — (1) The court may, on application by —

(a) a person who is a relative of a child, or

(b) a person to whom subsection (2) applies,

make an order giving that person custody of the child.

(2) This subsection applies to a person with whom the child concerned resides where the person —

(a)

(i) is or was married to or in a civil partnership with, or has been, for a period of over 3 years, the cohabitant of the parent of the child, and

(ii) has, for a period of more than 2 years, shared with that parent responsibility for the child ’ s day-to-day care,

or

(b)

(i) is an adult who has, for a continuous period of more than 12 months, provided for the child ’ s day-to-day care, and

(ii) the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.

(3) Subject to subsection (4), the court shall not make an order under subsection (1) without the consent of each guardian of the child.

(4) The court may make an order dispensing with the consent of a guardian if satisfied it is in the best interests of the child to do so.

(5) The court, in making an order in respect of a person to whom subsection (2) applies, may grant custody of a child to the child ’ s parent and such person jointly and, in doing so, shall —

(a) where these are not agreed as between the person and the parent of the child, specify the residential arrangements that are to apply in respect of the child, and

(b) where the residential arrangements that are to apply in respect of the child provide that, for any period, the child will not reside with one of his or her parents, specify the contact (if any) that is to take place between the child and that parent during that period.”

22.
Whilst the court must be extremely cautious about interpreting foreign law without the benefit of expert evidence, it would appear tolerably clear from the Irish Statute that the discretion of the Irish court to grant a guardianship order and a custody order is a wide one, including in circumstances where the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child. At the time the orders were granted by the Irish court on 12 March 2021, the mother was deceased and the father was imprisoned in England. Enquires made by the Children’s Guardian in these proceedings indicate that TUSLA have raised no concerns regarding the maternal grandparents but did raise concerns regarding incidents of domestic violence perpetrated by the father against the mother.

23.
In April 2021 the maternal grandparents travelled to England and reported the wrongful retention of the children to the English police and to the local authority. The English police declined to assist. On

11 May 2021 Children's Services undertook an assessment of the children and concluded that they were well cared for in the care of the paternal grandparents. However, it is of note that in the assessment the paternal grandfather is recorded as acknowledging that the children had been due to be returned to the maternal grandparents in the Republic of Ireland, as the maternal grandparents allege had been agreed, but that this had not occurred because the father had stated that he wished his children to be nearer to him.

24.
On 14 June 2021, the paternal grandfather issued an application in the Manchester Family Court for a prohibited steps order and a child arrangements order. On 21 June 2021 I granted a prohibited steps order. It is important to note that at that hearing, and as I have alluded to, in response to questions from this court designed to ascertain whether the children were habitually resident in this jurisdiction, the paternal grandfather stated to the court that each of the children had resided in the jurisdiction of England and Wales for the duration of their respective minorities, subject to periods of holiday in the jurisdiction of the Republic of Ireland. This has now been revealed to be patently untrue. By the time the case returned to this court on 22 July 2021 it had become apparent that, contrary to the information given to the Court in June 2021 by the paternal grandfather, prior to the untimely death of the mother in January 2021 the children had lived since February 2018 with their mother in Ireland and that KT had spent a period of some five years living in Ireland at an earlier point. In light of that information, this court made clear that the orders it made to maintain the status quo were henceforth being made pursuant to its protective jurisdiction under Article 11 of the Hague Convention 1996.

25.
On 9 July 2021, an attendance note from Irish counsel indicates that Judge Flann Brennan refused to strike out the Irish proceedings at the request of the paternal grandparents on the basis of the proceedings commenced by the paternal grandparents in England. However, on 23 July 2021 the Irish proceedings returned to the Family Court in Ireland. In circumstances that are not entirely clear, the proceedings were struck out by Judge Colm Roberts on that day. Neither the order or the learned Judge's reasons have been available to this court, albeit that Judge Roberts ordered on 23 July 2021 the disclosure of a transcript of the hearing to this court. However, again from an attendance note provided by Irish counsel acting on behalf of the maternal grandparents, it would appear that the proceedings were struck out on the technical ground that the proceedings had not been properly served on the father and on the jurisdictional ground the proceedings should properly be before the English court. The attendance note records that Judge Roberts nonetheless expressed the view as to the merits that the children's habitual residence was in Ireland and that they may well have been removed from Ireland unlawfully, but that these were now matters for the English court to decide.

26.
On 5 October 2021 the maternal grandparents made their application under the Child Abduction and Custody Act 1985 for a return order pursuant to the 1980 Hague Convention. The Children's Guardian had attempted to facilitate contact between the children and the maternal grandparents by telephone on 24 September 2021 but the paternal grandmother contended that the timing was not suitable for the children. On 11 October 2021 I made an order under s.5 of the 1985 Act for telephone contact between the children and the maternal grandparents four times per week by telephone and listed the Hague application for hearing on 24 to 26 November 2021, some eight weeks after that application had been made. As I have noted, prior to the hearing the maternal grandparents also issued an application for a summary return order under the inherent jurisdiction of the High Court.

27.
The children continue to reside with the paternal grandparents. They are registered with a GP and dentist. KT, who was not able to read or write when he arrived in England, is now enrolled in school and has made friends. KT's school in Ireland confirmed on 9 November 2021 that KT has not attended school for two years and that when he was in school his attendance was very poor and therefore it was difficult to put in place any plans. CT and LT are likewise enrolled in school and have settled into their schooling well. The children have had regular contact with the father in prison. The paternal grandmother has eight convictions for sixteen offences between 1989 and 2020, the most recent being 6 counts of shoplifting between 2017 and 2020 but has no criminal matters pending.

28.
With respect to the views of the children, the court has the benefit of a report from the Children's Guardian. In that report the Guardian relates the following relevant matters:

i)
KT spoke positively of his paternal grandparents. KT also spoke positively about his maternal grandparents, stating that he has a nanny in Ireland who is 'nice and good' and also a grandad who is 'nice'. KT said that he used to live in Ireland, which he described as 'fine'. KT stated that he did not want to return to Ireland but could not articulate why this was. He stated that he is going to stay in England forever and felt good about this.

ii)
LT stated she likes her paternal grandparents and that she gave a big smile when asked about her maternal grandparents. She gave no sense of a particular fear or trepidation of her life in Ireland or generally.

iii)
CT was able to recall her maternal grandparents and stated that her paternal grandparents were nice. She did not appear to recall much about living in Ireland.

29.
Within the foregoing context, in respect of KT the Children's Guardian concludes that he is significantly behind the typical chronological maturity for a child of his age as a result of learning needs and gaps in his education. Within this context, the Children's Guardian considers that KT expressed a preference to remain in England with his paternal grandparents and father when he is released from prison and stated that he did not want to return to Ireland. KT did not however, recount any negative experiences from Ireland, and that it was difficult to gain a sense from KT whether his resistance to being returned that jurisdiction stems only from having become settled and familiar in his current environment. The Children's Guardian properly considers that it is a matter for the court as to whether KT's views amount to an objection for the purposes of the 1980 Convention.

30.
With respect to CT and LT's wishes and feelings, the Children's Guardian concludes that CT and LT are children who, by virtue of their young ages, have not yet attained the requisite maturity to enable them to play a role in these proceedings within the remit of the Hague Convention. Their wishes and feelings appear to indicate a preference to stay in Manchester, but they are too young to comprehend the consequences and wider considerations to enable them to express a view which is balanced and informed.

31.

With respect to the exercise of discretion that arises were the court to be satisfied that the children were wrongfully removed from Ireland but that one of the exceptions under the 1980 Convention is made out, the Children's Guardian concludes as follows:

"Welfare issues play only a limited role in the court's consideration of summary return under the Hague Convention, though the points above are likely to be relevant in the event that the court is able to exercise a discretion in whether or not to order a return. Welfare issues are of more relevance in the event that the court is required to consider an application for summary return under the court's inherent jurisdiction. As the children's guardian and acknowledging that any exercise of discretion within the Hague Convention application is entirely a matter for the court but noting that the court's inherent jurisdiction may also be relied upon by the maternal grandparents in the alternative, I am not able to recommend a summary return of the children to Ireland as a step which promotes their welfare."

THE LAW

Rights of Custody

32.
Now that the paternal grandparents have the benefit of representation by leading and junior counsel, it is clear that they rest their case primarily, although not exclusively, on the assertion that at the time of the children's removal from the Republic of Ireland the maternal grandparents did not have inchoate rights of custody in respect of the children and hence, that this is not a case that falls within the 1980 Hague Convention. In answer to this, the maternal grandparents, who now also benefit from representation by leading and junior counsel, rely on the directly contrary assertion that, on the facts before the court, the maternal grandparents did benefit from inchoate rights of custody under the 1980 Convention. The primary question for this court is, accordingly, whether the maternal grandparents in the Republic of Ireland benefited from inchoate rights of custody at the time of the children's removal.

33.
In order for the removal of a child to be wrongful under the 1980 Convention pursuant to Art 3 of the Convention there must be attributed, to the person asserting that the removal was, wrongful rights of custody and that person must be exercising those rights of custody.

34.
Art 5 of the 1980 Hague Convention provides as follows with respect to the meaning of the term rights of custody:

"**Article 5**

For the purposes of this Convention –

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

35.
Beyond the provisions of Art 5 of the Convention, the meaning of the term 'rights of custody' is established by the autonomous law of the 1980 Hague Convention. Within this context, the domestic courts have made clear that a dispute concerning the existence of rights of custody should not be determined by the English court unless it is unavoidable (see A v B (Abduction: Declaration)[2009] 1

FLR 1253). Where the existence of rights of custody is disputed, the question of whether the position created by the law of the state in which the child was habitually resident immediately before the removal or retention equated to ‘rights of custody’ for the person in question having regard to the meaning of the term ‘rights of custody’ as established by the autonomous law of the 1980 Hague Convention should, ordinarily, be adjudicated upon by the court of the requesting State at the highest level, but for expediency may be dealt with by a court at a lower level, following a referral pursuant to Art 15 (see Re T (Abduction: Rights of Custody) [2008] 2 FLR 1794 and Re D (Abduction: Rights of Custody)[2007] 1 FLR 961). The court will then normally be bound by the decision of the court of the Requesting State delivered pursuant to the request under Art 15 as to the applicant's rights and the legality of the child's removal from that state (see Re D (Abduction: Rights of Custody).

36.
That is not to say however, that there are not examples of the English court determining the question of the existence of rights of custody. In Re F (Abduction: Rights of Custody) [2008] 2 FLR 1239 Sir Mark Potter P held that:

“[13] The first of these is that she does not concede that the father had rights of custody in respect of the children pursuant to Polish law at the time of their removal to England by the mother in December 2006. She asserts that the existing court orders gave her the legal right to determine where the children's residence should be. In directions ordered by Ryder J on 10 December 2007, as well as providing for the service of evidence and a Cafcass officer's report in respect of the children also advanced (see below), it was ordered that there be joint instruction of a Polish expert regarding the question of whether the father had rights of custody on which to base the proceedings, such report to be filed and served by 21 January 2008. That report has not in fact been obtained, owing apparently to difficulties in obtaining the services of a Polish lawyer. However, the parties are anxious that the matter should be disposed of promptly, as indeed is the duty of the court, and they proposed that I proceed with the hearing.

[14] That gives rise to an inherently unsatisfactory position. I am mindful of the observations of the editors of the Family Court Practice 2007 at p 509 that where there is an issue whether the foreign law gives the applicant custody rights or not, the court should resist the temptation to make its own findings as to the foreign laws applicable and should be reluctant to allow rights of access to a child to metamorphose into rights of custody. In my view, evidence is particularly desirable, in a situation where, without it, the court is obliged to form its own conclusion upon the basis of a series of orders translated into English without the assistance of expert evidence as to the nuances of the wording, or guidance as to the nature or extent of the rights of the parties under the relevant law. That said, however, in the light of the parties' readiness to proceed and in particular the willingness of the father, as the party upon whom the burden of the issue lies, I propose to accept the parties' invitation because, in the event, the position seems to me to be susceptible of decision with reasonable confidence.”

37.
In Re K (Rights of Custody: Spain)[2010] 1 FLR 57, Sir Mark Potter P endorsed the decision that an Art 15 referral seeking a decision of the Spanish Court on rights of custody would not be practicable in light of the delay it would introduce in the context of the six week time constraint on deciding cases of child abduction and proceeded to determine the question of rights of custody, albeit in that case the President had the benefit of expert reports on the effect of Spanish law. That decision was the subject of an appeal to the Court of Appeal. In Kennedy v Kennedy[2010] 1 FLR 782 the Court of Appeal declined to criticise the approach taken by the then President of the Family Division.

38.
In this case what is in dispute is whether there existed in favour of the maternal grandparents inchoate rights of custody. In Re B (A Minor) (Abduction) [1994] 2 FLR 249 the Court of Appeal was satisfied that the rights within Art 3 may extend to inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child, at least to the point of refusing to allow it to be disturbed, abruptly or without due opportunity of a consideration of the claims of the child's welfare, merely at the dictate of a sudden reassertion by another of their official rights. In this regard, I note that in Re B (A Minor) (Abduction) at 260-261 Waite LJ had observed as follows:

"The objective [of the 1980 Hague Convention] is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible."

39.
It is possible to gain inchoate rights of custody relatively quickly. In Re G (Abduction: Rights of Custody)[2002] 2 FLR 703 an unmarried father was recognised as having inchoate rights when he lived with his daughter at his mother's home for four months.

40.
The leading domestic authority on inchoate rights of custody is now Re K (Abduction: Inchoate Rights) [2014] 2 FLR 629, in which the court identified the limited category of persons who may acquire inchoate custody rights. In Re K at [3], Baroness Hale set out the competing interpretative options with respect to the concept of rights of custody when considering whether it could encompass inchoate rights:

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

41.
In Re K, a mother had signed documents in Lithuania authorising the maternal grandmother to visit all medical institutions and hospitals with the child and permitting the child to travel to other countries with the maternal grandparents, as well as a power of attorney to apply for a passport for him. The mother then departed to work in Northern Ireland. Temporary custody was granted to the grandmother and the Children's Rights Division in Lithuania issued a notice stating that the temporary care provision would terminate upon the mother's return once she had informed them. Later, the mother abducted the child from Lithuania and took her to Northern Ireland. Whilst the grandmother had benefited from the temporary care order whilst caring for the child in Lithuania, that order was terminated upon the mother resuming care pursuant to the notice issued by the Children's Rights Division. In determining whether the grandmother benefited from rights of custody for the purposes of Art 3 the Supreme Court articulated the following principles (Lord Wilson dissenting):

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

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

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

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

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

c)
the person or persons must have either abandoned the child or delegated his primary care to them (I pause to note that a parent of a child who is serving a sentence retains “custody rights” and that such rights are not suspended but are merely curtailed (see Re A (Abduction: Rights of Custody: Imprisonment)[2004] 1 FLR 1 FD and Re L (A Child)[2006] 1 FLR 843));

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

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

42.
On the face of it, the approach taken by the Supreme Court in Re K is to a degree inconsistent with aspects of the case law that I set out ahead of examining Re K in respect of the process of establishing the existence of rights of custody. In particular, that the question of whether the position created by the law of the state in which the child was habitually resident immediately before the removal or retention equated to ‘rights of custody’ for the person in question, having regard to the meaning of

the term ‘rights of custody’ as established by the autonomous law of the 1980 Hague Convention, should ordinarily be adjudicated upon by the court of the requesting State following a referral pursuant to Art 15. Within the foregoing context, in Re K Baroness Hale recognised that, in support of the fundamental purposes of the Hague Convention, the courts of England and Wales have pushed at the boundaries in interpreting rights of custody and had so far upheld inchoate rights of custody, there being little enthusiasm for such an expansive view among a number of other State parties to the Hague Convention.

43.
However, in Re K, Baroness Hale having recognised that the proceedings in that case were unusual in that the Supreme Court had before it no formal evidence as to the legal position of the grandparents in Lithuanian law, the central authority in Lithuania had not supplied the central authority in Northern Ireland with a certificate or affidavit concerning the relevant Lithuanian law, there had been no contact through liaison judges and an attempt by the mother’s legal advisers to obtain evidence of Lithuanian law had not been successful within the tight timetable for child abduction cases, the Supreme Court nonetheless proceeded to determine the question of whether the grandparents benefited from inchoate rights of custody. In such circumstances, and in the context of no party making an adjournment application to enable the court to exercise its power under Art 15 of the Convention to request a decision or other determination that the removal was wrongful within the meaning of art 3 of the Convention, on the question of inchoate custody rights the Supreme Court determined to “do the best we can with the limited material at our disposal”.

44.
In the circumstances, the decision of the Supreme Court in Re K appears, notwithstanding earlier authorities that make clear that the question of whether a person in the Requesting State benefits from rights of custody is ordinarily a matter to be determined by the Requesting State, to permit the domestic court itself to determine whether the left behind person benefited from inchoate rights of custody in the requesting State, where necessary without the benefit of expert evidence on the law of the Requesting State or recourse to a request pursuant to Art 15 of the 1980 Convention.

Habitual Residence

45.
It follows from the criteria set out in Re K, and in any event from the terms of Art 3 when considering an application for a return order under the 1980 Convention, that it is necessary also to establish whether the children were habitually resident in the Republic of Ireland at the time of their removal. Further, the paternal grandparents continue to assert that the children were not habitually resident in the Republic of Ireland at the time of their retention in England on 20 February 2021. Within this context, the following legal principles fall to be applied.

46.
For habitual residence to be established the residence of the child must reflect some degree of integration in a social and family environment (Area of Freedom, Security and Justice) (C-532/01) [2009] 2 FLR 1 and Re A (Jurisdiction: Return of Child)[2014] 1 AC 1). Whether there is some degree of integration by the child in a social and family environment is a question of fact to be determined by the national court, taking into account all the circumstances specific to the individual case. Habitual residence must be established on the basis of all the circumstances specific to the individual case (Case C-523/07[2010] Fam 42). With respect to those circumstances, in Re A (Area of Freedom, Security and Justice) and Mercredi v Chaffe[2011] 2 FLR 515, the Court of Justice of the European

Union identified the following, non-exhaustive, list of circumstances that might be relevant in a given case:

i)
Duration, regularity and conditions for the stay in the country in question.

ii)
Reasons for the parents move to and the stay in the jurisdiction in question.

iii)
The child’s nationality.

iv)
The place and conditions of attendance at school.

v)
The child’s linguistic knowledge.

vi)
The family and social relationships the child has.

vii)
Whether possessions were brought, whether there is a right of abode and whether there are durable ties with the country of residence or intended residence.

47.
In a series of decisions, namely Re KL (A Child)[2014] 1 FLR 772, Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2014] 1 FLR 772, Re LC (Children) (Reunite International Child Abduction Centre intervening)[2014] 1 FLR 1486, Re R (Children) (Reunite International Child Abduction Centre and others intervening)[2015] 2 FLR 503 and Re B (A child) (Habitual Residence: Inherent Jurisdiction)[2016] 1 FLR 561 the Supreme Court has articulated the following principles of general application with respect to the question of habitual residence:

i)
It is the child's habitual residence which is in question and hence the child's level of integration in a social and family environment which is under consideration by the court determining the question of habitual residence.

ii)
In common with the other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity. Proximity in this context means the practical connection between the child and the country concerned.

iii)
In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must also weigh up the degree of connection which the child had with the state in which he resided before the move.

iv)
The relevant question is whether a child has achieved some degree of integration in social and family environment. It is not necessary for a child to be fully integrated before becoming habitually resident.

v)
It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there.

vi)
In circumstances where the social and family environment of an infant or young child is shared with those on whom she is dependent, it is necessary to assess the integration of that person or persons (usually the parent or parents) in the social and family environment of the country concerned.

vii)
In respect of a pre-school child, the circumstances to be considered will include the geographic and family origins of the parents who effected the move.

viii)
The requisite degree of integration can, in certain circumstances, develop quite quickly. It is possible to acquire a new habitual residence in a single day. There is no requirement that the child should have been resident in the country in question for a particular period of time. The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, were any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence.

ix)
A child will usually, but not necessarily, have the same habitual residence as the parent(s) who care for her. The younger the child the more likely that proposition but this is not to eclipse the fact that the investigation is child focused.

x)
Parental intention is relevant to the assessment, but not determinative. There is no requirement that there be an intention on the part of one or both parents to reside in the country in question permanently or indefinitely. Parental intent is only one factor, along with all other relevant factors, that must be taken into account when determining the issue of habitual residence.

48.
In considering the question of habitual residence, it is not necessary for the court to make a searching and microscopic enquiry (Re B (Minors)(Abduction)(No 1)[1993] 1 FLR 988).

Consent

49.
Whilst not in the end pressed with any great fervour in circumstances where Ms Grocott and Ms Edwards concede that the evidential picture is at best "confused", the paternal grandparents also rely on the consent exception in Art 13 of the 1980 Hague Convention. In Re P-J (Abduction: Habitual Residence: Consent)[2009] 2 FLR 1051, [2009] EWCA Civ 588 the Court of Appeal made clear that consent to the removal of the child must be given in clear and unequivocal terms. Further, consent

can be given to the remove at some future of unspecified time, or upon the happening of some future event, but such advance consent must still be operative and in force at the time of the actual removal. Further, in respect of the latter, the happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party.

50.
Within this context, the Court of Appeal made clear in Re P-J that consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of nor governed by the law of contract. Within this context, consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed. The burden of proving the consent rests on him or her who asserts it and, in this respect, the inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case. The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal? Within this context, at [57] Lord Wilson held that:

“[57] It seems to me that the most obvious (albeit not always decisive) indication of whether in reality an advance consent subsisted at the time of removal is whether the removal was clandestine. I accept that a consent to the removal of children within Art 13 does not have to include a consent to their removal on the particular day, or by the particular means or more generally in the particular circumstances, on, by or in which the other parent elects to remove them. Nevertheless a clandestine removal will usually be indicative of the absence in reality of subsistence of the consent; see, for example, the judgment of my Lord in this court in P v P (Abduction: Acquiescence) [1998] 2 FLR 835 at 836H–837A.”

51.
In so far as it might be suggested in this case that the father consented to the removal of the children from the jurisdiction of Ireland, it is important to note that the consent required is, pursuant to Art 13a, the consent of “the person, institution or other body having the care of the person of the child…” that is relevant.

Harm

52.
Again, whilst not pressed heavily, the paternal grandparents further rely on the harm exception set out in Art 13b of the 1980 Convention. The law in respect of the defence of harm or intolerability under Art 13(b) was examined and clarified by the Supreme Court in Re E (Children)(Abduction: Custody Appeal) [2011] UKSC 27, [2012] 1 AC 144. The applicable principles may be summarised as follows:

i)
There is no need for Art 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art 13 are quite plain and need no further elaboration or gloss.

ii)
The burden lies on the person (or institution or other body) opposing return. It is for them to produce evidence to substantiate one of the exceptions. The standard of proof is the ordinary balance of

probabilities but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the Convention process.

iii)
The risk to the child must be ‘grave’. It is not enough for the risk to be ‘real’. It must have reached such a level of seriousness that it can be characterised as ‘grave’. Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two.

iv)
The words ‘physical or psychological harm’ are not qualified but do gain colour from the alternative ‘or otherwise’ placed ‘in an intolerable situation’. ‘Intolerable’ is a strong word, but when applied to a child must mean ‘a situation which this particular child in these particular circumstances should not be expected to tolerate’.

v)
Art 13(b) looks to the future: the situation as it would be if the child were returned forthwith to his or her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough the court will be concerned not only with the child’s immediate future because the need for protection may persist.

vi)
Where the defence under Art 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which are not based upon objective risk to her but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child’s situation would become intolerable, in principle, such anxieties can found the defence under Art 13(b).

53.
In Re E, theSupreme Court made clear that in examining whether the exception in Art 13(b) has been made out, the court is required to evaluate the evidence against the civil standard of proof, namely the ordinary balance of probabilities whilst being mindful of the limitations involved in the summary nature of the Convention process. Within the context of this tension between the need to evaluate the evidence against the civil standard of proof and the summary nature of the proceedings, the Supreme Court further made clear that the approach to be adopted in respect of the harm defence is not one that demands the court engage in a fact-finding exercise to determine the veracity of the matters alleged as grounding the defence under Art 13(b). Rather, the court should assume the risk of harm at its highest and then, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified.

54.
The methodology articulated in Re E forms part of the court’s general process of reasoning in its appraisal of the exception under Art 13(b) (see Re S (A Child)(Abduction: Rights of Custody) [2012] 2 WLR 721), which process will include evaluation of the evidence before the court in a manner commensurate with the summary nature of the proceedings. Within this context, the assumptions made with respect to the maximum level of risk must be reasoned and reasonable assumptions based on an evaluation that includes consideration of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention.

55.
In determining whether protective measures, including those available in the requesting State beyond the protective measures proposed by one or both parties, can meet the level of risk reasonably assumed to exist on the evidence, the following principles can be drawn from the recent Court of Appeal decisions concerning protective measures in Re P (A Child) (Abduction: Consideration of Evidence)[2018] 4 WLR 16, Re C (Children) (Abduction: Article 13(b))[2019] 1 FLR 1045 and Re S (A Child) (Hague Convention 1980: Return to Third State)[2019] 2 FLR 194:

i)
The court must examine in concrete terms the situation that would face a child on a return being ordered. If the court considers that it has insufficient information to answer these questions, it should adjourn the hearing to enable more detailed evidence to be obtained.

ii)
In deciding what weight can be placed on undertakings as a protective measure, the court has to take into account the extent to which they are likely to be effective both in terms of compliance and in terms of the consequences, including remedies, in the absence of compliance.

iii)
The issue is the effectiveness of the undertaking in question as a protective measure, which issue is not confined solely to the enforceability of the undertaking.

iv)
There is a need for caution when relying on undertakings as a protective measure and there should not be a too ready acceptance of undertakings which are not enforceable in the courts of the requesting State.

v)
There is a distinction to be drawn between the practical arrangements for the child's return and measures designed or relied on to protect the children from an Art 13(b) risk. The efficacy of the latter will need to be addressed with care.

vi)
The more weight placed by the court on the protective nature of the measures in question when determining the application, the greater the scrutiny required in respect of their efficacy.

56.
With respect to undertakings, what is therefore required is not simply an indication of what undertakings are offered by the left behind parent as protective measures, but sufficient evidence as to extent to which those undertakings will be effective in providing the protection they are offered up to provide.

Child's Objections

57.
Finally, as I have noted above, the Children's Guardian invites the court to consider whether KT objects to being returned to the jurisdiction of the Republic of Ireland. Within this context, the following legal principles fall to be applied.

58.

The law on the 'child's objection' exception under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal) [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in Re F (Child's Objections)[2015] EWCA Civ 1022). In summary, the position is as follows:

i)
The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

ii)
Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

iii)
The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

iv)
There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

v)
At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

59.
Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention.

DISCUSSION

60.
I am, on balance, satisfied that the children were wrongfully retained in England by the paternal grandparents on 20 February 2021. I am likewise satisfied that the children were on that date habitually resident in the jurisdiction of the Republic of Ireland. Within this context, on the evidence before the court I am further satisfied that none of the exceptions to the court’s duty in the foregoing circumstances to order the summary return of the children to the jurisdiction of Ireland are made out. In the circumstances, the discretion does not arise and the court must make an order pursuant to Art 12 of the 1980 Hague Convention for the return of the children forthwith. My reasons for so deciding are as follows.

61.
As in Re K, it is somewhat unsatisfactory that this court is required to determine the question of the existence of inchoate rights of custody without the benefit of formal evidence as to the legal position

of the grandparents under Irish law, a certificate or affidavit concerning the relevant Irish law or any attempt by the paternal grandparents' legal advisers to obtain evidence of Irish law. However, Re K indicates that, where the circumstances demand, it is permissible to proceed to determine the question of inchoate rights absent such evidence and on the information available to the court, which was the approach taken by the Supreme Court in that case. I am satisfied that this should also be the approach in this case.

62.
To adjourn this matter for a further period would cause unacceptable delay for the children in the resolution of these proceedings (significant delay already having been caused by the paternal grandfather misrepresenting to this court the position of the children's habitual residence and, thus, that the court only had jurisdiction to make protective rather than substantive orders in June this year) and would take the matter even further outside the strict timescales applicable to proceedings under the 1980 Hague Convention. Further, and importantly, during the hearing no party, including the party who resists the existence of inchoate rights of custody, has pursued an application to adduce expert evidence with respect to the legal position in the Republic of Ireland, nor to suggest that the case should be adjourned to permit a referral to be made to the Irish court pursuant to Art 15 of the Convention. Within this context, at the hearing both sets of grandparents proceeded on the basis that the court will decide the central issue of inchoate rights of custody on the evidence currently available to it, applying the test set out in the Supreme Court in Re K. Within the foregoing context, I shall proceed to do so.

63.
The test for whether inchoate rights exist is clearly set out in Re K and I turn first to the question of whether the maternal grandparents were undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child. It is not disputed that immediately upon the tragic death of the mother, the maternal grandparents assumed the care of each of the children in Ireland. Within this context, the maternal grandparents assumed complete responsibility for the primary care of the children on 21 January 2021 in circumstances where there was no other person with legal responsibility for the children available to care for them. Until the retention of the children in England, in what I am satisfied was a blatant case of child abduction, the maternal grandparents continued to have sole responsibility for the primary care of each child.

64.
Further, prior to the children being retained in England, the maternal grandparents took concrete steps to formalise the concomitant rights and powers entailed in the primary care of the children by issuing applications for guardianship and for custody under the Guardianship of Infants Act 1964 in the Irish court (I pause to note that, in these circumstances, it is at least arguable that the Irish court had rights of custody at the time the children were retained in England. However, I heard no submissions on this point and accordingly make no determination in respect of it). The application of the maternal grandparents was advanced in the context of both the maternal grandparents and the paternal grandparents accepting that there was no discussion at the time of the mother's funeral regarding the care of the children and the maternal grandparents therefore proceeded on the basis of no arrangement subsisting other than the children remaining in their care. Within this context, the maternal grandparents also secured and retained the official documents in respect of the children, including their Irish passports and birth certificates.

65.

I am further satisfied that, immediately prior to the retention of the children in England, the maternal grandparents were not sharing the responsibilities entailed in the primary care of the child with the father of the children. It would appear to be correct that, notwithstanding his incarceration, under Irish law the father continued to have a legally recognised right to determine where the children should live and how they should be brought up and, as I have noted, that the father's "custody rights" were not suspended by the fact of his prison sentence but merely curtailed. However, and within that context, it is equally plain, as a matter of fact, that by reason of his continued imprisonment in England he was not sharing, because he could not share, in the responsibilities entailed in the primary care of the children.

66.
The question of whether the father had abandoned the children or delegated his primary care to them is a more difficult one in this case. On one interpretation, the father had not deliberately abandoned the children but rather was simply prevented from assuming his responsibilities by virtue of his custodial sentence. However, on balance I am prepared to accept the argument advanced by the maternal grandparents and the Children's Guardian that the father has, by engaging in criminal activity leading to an extended period of incarceration, abandoned the children for the purposes of the test set out in Re K. The father's involvement in criminal activity was not, on the evidence before the court, in any sense involuntary, and within that context the fact that he was absent from the lives of the children as a result of being convicted for that criminal activity falls properly within the concept of abandonment for the purposes of the test in Re K.

67.
With respect to the question of whether in this case there is some form of legal or official recognition of the position of the maternal grandparents in the country of habitual residence that distinguishes those whose care of the child is lawful from those whose care is not lawful, I am satisfied that there is.

68.
For reasons I will come to, I am satisfied that it is plainly the case on the evidence before the court that each of the children was habitually resident in the Republic of Ireland at the time they were retained in England by the paternal grandparents. Within this context, with respect to legal or official recognition the evidence before the court indicates that the 'Family Hub' which was accommodating the mother and the children before the mother's untimely death were satisfied that it was appropriate for the children to be placed in the care of the maternal grandparents. More importantly, through a document notifying the maternal grandparents that their claim for child benefits was being terminated, there is evidence of State recognition of the position of the maternal grandparents, the payment of State child-related benefits being one of the examples expressly contemplated by the Supreme Court in Re K. Within this context, I accept the submission of the maternal grandparents and the Children's Guardian that that correspondence is sufficient to evidence a degree of official recognition for the purposes of the test in Re K.

69.
In addition, I am satisfied that the position of the maternal grandparents was also officially recognised in law by the fact that they had locus standi to issue an application for guardianship and custody of the children in the Irish court. That application was accepted by the court as validly issued and was listed for hearing, orders ultimately being made in favour of the maternal grandparents both in respect of guardianship and custody. Whilst, as I will come to, the proceedings were ultimately struck out, this does not appear to have been for reasons to do with locus standi. Within this context, I am not able to accept the submission of the paternal grandparents that the maternal grandparents did

not in fact have standing to apply for the orders they did. That submission is based on the Notice of Application but is more properly considered by reference to the Irish statute that governs the application. Adopting the latter approach, and whilst the court must be extremely cautious about making findings in respect of Irish law, as I have set out above it is tolerably clear on the face of the Irish statute, and more importantly from the ultimate outcome of the maternal grandparents' application, that the maternal grandparents had locus standi to apply for the orders they did on the basis that, from the Irish Statute, the discretion of the Irish court to grant a guardianship order and a custody order is a wide one, including in circumstances where the child has no parent or guardian who is willing or able to exercise the rights and responsibilities of guardianship in respect of the child.

70.
Finally, I am satisfied that it can be said in this case that there is every reason to believe that, had the application of the maternal grandparents for guardianship and custody orders been heard by the Irish court prior to or at the time of the retention of the children in England, the Irish courts would at that time have preserved the status quo for the time being, so that the long-term future of the child could be determined in those courts in accordance with his best interests, and not by the pre-emptive strike of abduction.

71.
First, the court has conclusive evidence that this is the step that was in fact taken by the Irish court in making orders on 12 March 2021, albeit after the children had been retained in England. It must be assumed by this court that the Irish court granted those orders on a principled basis. Second, in circumstances where the children were Irish nationals who had resided in the Republic of Ireland for a period of over three years, who were plainly habitually resident in that jurisdiction and who had been placed in the care of maternal grandparents who had been heavily involved with the children prior to the sudden death of the mother, there is in any event every reason to believe that such orders would have been granted if the case had come before the Irish court prior to the retention of the children in England. Third, for the reasons set out in the foregoing paragraph, I am not able to accept the submission of the paternal grandparents that the maternal grandparents did not in fact have standing to apply for the orders they did.

72.
Finally in relation to the final part of the test in Re K, I am satisfied that the fact that the proceedings were subsequently struck out by Judge Colm Roberts on 23 July 2021 does not act to alter the conclusion that there is every reason to believe that, had the application of the maternal grandparents for guardianship and custody orders been heard by the Irish court prior to or at the time of the retention of the children in England, the Irish courts would at that time have preserved the status quo for the time being. Whilst it has not been possible to obtain a copy of the Irish order of 23 July 2021 or a transcript of that hearing, it is clear from the attendance note provided by the maternal grandparents' Irish counsel that the basis of the proceedings being struck out was not the merits of the application, but rather technical considerations of service and the question of jurisdiction in circumstances where the paternal grandparents had commenced proceedings in England. Within this context, it is again of note that Judge Colm Roberts appears to have observed at the hearing on 23 July 2021 that the children were likely habitually resident in Ireland and that the retention by the paternal grandparents was likely unlawful.

73.
For the reasons I have set out above, I am on balance satisfied that at the time the children were retained in England by the paternal grandparents on 20 February 2021 the maternal grandparents

had inchoate rights of custody in respect of the children and were exercising those rights. Within the context of the need to give the term “rights of custody” in Art 3 of the 1980 Hague Convention an autonomous interpretation, I am satisfied that the foregoing conclusion also is consistent with the twin purposes of the Hague Convention, protecting the child from the harmful effects of international child abduction by recognising that he should not be peremptorily removed from their care and enabling the courts of the child’s habitual residence to determine where his long-term future should lie.

74.
As I have already referred to, I am further satisfied that there can be no principled basis for contending that the children were not habitually resident in the Republic of Ireland immediately prior to the retention of the children in England on 20 February 2021. As at that date, each of these Irish national children had been resident in Ireland for 3 years, CT having never lived anywhere other than that jurisdiction. They were well integrated into their maternal family and in the wider community. Within this context, it is plain on the face of the evidence before the court that each of the children had achieved some degree of integration in a social and family environment immediately prior to the paternal grandparents retaining them in England. The fact that the mother and children had moved into the ‘Family Hub’ as the necessary precursor to securing independent accommodation does not act to change that conclusion. During that period the children remained in their community in Ireland, in the care of the mother and with regular and extensive contact with the maternal grandparents.

75.
Within the foregoing context, I am satisfied that the retention of the children by the paternal grandparents in England on 20 February 2021 was wrongful for the purposes of Art 3 of the 1980 Hague Convention.

76.
With respect to the application of the exceptions under the 1980 Convention to the duty on the court that therefore arises under Art 12 of the Convention to return the children to the jurisdiction of the Republic of Ireland forthwith, beyond the question of rights of custody the paternal grandparents did not press the other exceptions with any great force. In my judgment, they were wise to take this course.

77.
With respect to the question of consent, and as sensibly conceded by Ms Grocott and Ms Edwards, it simply cannot be said on the evidence before the court, taken at its highest, that the maternal grandparents gave clear and unequivocal consent to the retention of the children in England by the paternal grandparents. Whilst the question of consent must be viewed in the context of the realities of the disintegration of family life, the answer to the ultimate question of whether the maternal grandparents consented to the retention of the children must be ‘no’. With respect to the consent purported to be given by the father, having regard to the terms of Art 13 of the Hague Convention, the father was not, at the time the children were retained in England by the paternal grandparents, “the person having care of the person of the child” and therefore I am satisfied having regard to the terms of the Convention that his consent was not operative for the purposes of Art 13a, nor has the father sought to argue that it was.

78.
I am likewise satisfied that the paternal grandparents cannot make out the exception under Art 13b of the Convention, namely that there is a grave risk that the return of each child to the Republic of

Ireland would expose that child to physical or psychological harm or otherwise place them in an intolerable situation. The allegations made by the paternal grandparents to make good this contention are limited to an assertion that the maternal grandparents were irresponsible in allowing the mother to care for the children on her own in light of her epilepsy, that KT had not accessed education whilst in the care of the mother and, perhaps ironically, that the maternal grandfather is “involved in criminal activity”.

79.
The exception under Art 13b looks to the future. The court is required to consider the situation as it would be if the child were returned forthwith to his or her home country, the answer to which question will be informed by what protective measures can be put in place to ensure that the child is not exposed to physical or psychological harm or otherwise placed in an intolerable situation. Within this context, required as I am to make a reasoned and reasonable assumption of the risk of harm at its highest and, if that risk meets the test in Art 13(b), go on to consider whether protective measures sufficient to mitigate harm can be identified, I am not satisfied that the matters advanced by the maternal grandparents even reach the threshold of Art 13b. Further, the evidence before the court indicates that there were no concerns in Ireland with the involvement of the maternal grandparents in the lives of the mother and the children, or with the care of the children by the maternal grandparents following the death of the mother. The children did not report any concerns about their life in Ireland to the Children’s Guardian. With respect to the disruption of the children caused by a return order being made, in the context of an already disrupted and difficult period in their lives, does not amount to a situation that meets the imperatives of Art 13b of the Convention. As made clear in Re E (Children)(Abduction: Custody Appeal) at [34]) it is important to remember that every child has to put up with a degree of discomfort and distress and that there will be a degree of psychological harm inherent in a return order being made. Within this context, the children will be returning to carers who provided them with immediate care and support following the death of their mother, supported by other agencies in doing so, which care and support was only interrupted by the wrongful retention perpetrated by the paternal grandparents. For these reasons, I am satisfied that the exception provided by Art 13b is not made out.

80.
Finally, I am satisfied on a fine balance that it cannot be said that KT objects to returning to the jurisdiction of the Republic of Ireland for the purposes of Art 13a of the 1980 Convention. In considering whether KT objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views I of course acknowledge that he said to the Children’s Guardian that he did not want to return to Ireland. Against this however, KT was unable to articulate why this was the case. Further, KT’s age and degree of maturity must be evaluated in the context of the impact on this question of KT’s learning issues and the gaps in his education.

81.
Within this context, I am not on balance satisfied that KT’s views amount to an objection rather than a preference or wish or that, in the context of his degree of maturity, that he has attained an age and degree of maturity at which it is appropriate to take account of his or her views. In this regard, I again note the view of the Children’s Guardian that KT expressed a preference to remain in England with his paternal grandparents and father when he is released from prison and stated that he did not want to return to Ireland. KT did not however, recount any negative experiences from Ireland, and that it was difficult to gain a sense from KT whether his resistance to being returned that jurisdiction stems only from having become settled and familiar in his current environment. Having regard to these

matters, I am on a fine balance, not satisfied that KT's views amount to an objection for the purposes of Art 13 of the 1980 Convention.

CONCLUSION

82.
In circumstances where, for the reasons I have given, I am satisfied that the retention of the children in England on 20 February 2021 was wrongful for the purposes of Art 3 of the 1980 Hague Convention, and where I am satisfied that none of the exceptions to the duty of the court in these circumstances to order the immediate return of the children to the jurisdiction of the Republic of Ireland applies, I am required by Art 12 of the 1980 Hague Convention to make an order requiring the return of the children to Ireland forthwith and I do so. In the foregoing circumstances, the question of discretion does not arise.

83.
Upon the return of the children to the jurisdiction of Ireland it will be for the court of the children's habitual residence to determine the children's long term welfare. Such competing applications as the maternal grandparents, the paternal grandparents and the father seek to pursue in respect of the children will fall to be issued before, and determined by the Irish courts, being the courts of the children's habitual residence.

84.
That is my judgment.