Easter Term
[2014] UKSC 29
On appeal from: [2014] NICA 15

JUDGMENT

In the Matter of K (A child) (Northern Ireland)

before

Lady Hale, Deputy President
Lord Kerr
Lord Clarke
Lord Wilson
Lord Hughes

JUDGMENT GIVEN ON

15 May 2014

Heard on 8 April 2014

Appellants
(Grandparents)
Denise McBride QC
Mary Connolly
(Instructed by Cleaver Fulton Rankin Ltd)

1st Respondent
(Mother)
Henry Toner QC
Jill Lindsay BL
(Instructed by X Solicitors)

2nd Respondent (Child)
Siobhan Keegan QC
Louise Murphy
(Instructed by The Official Solicitor to the Court of Judicature of Northern Ireland)

Intervener (Reunite)
Henry Setright QC
Edward Devereux
Michael Gration
Mehvish Chaudhry
(Instructed by Dawson Cornwell)

LADY HALE (with whom Lord Kerr, Lord Clarke and Lord Hughes agree)

1. The Preamble to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") states that its purpose is "to protect children internationally from the harmful effects of their wrongful removal or retention". But under article 3 the taking or keeping of a child is only "wrongful" if it is in breach of "rights of custody". The same applies under the Brussels II Revised Regulation ("the Regulation"), which complements and takes precedence over the Hague Convention as between all but one of the member states of the European Union. So what is meant by "rights of custody"? It might be thought that the meaning of a concept so central to the operation of both instruments would be well settled by now. But this is not even true within the United Kingdom. The Courts of Appeal in England and Wales and in Northern Ireland have taken different views. It therefore falls to this court to resolve the difference. If nothing else, the position should be the same throughout the United Kingdom.

2. The concept of "rights of custody" would appear to have at least two functions. One is to identify those removals or retentions which are presumptively so harmful to the welfare of a child that the authorities must take swift action to return him to the country from which he has been taken or kept away. Many international removals of children will not be harmful to them at all, for example where their united parents take a well-planned sabbatical in another country or even emigrate permanently. Other international removals may or may not be so harmful. The Convention draws a clear distinction between "rights of custody" and "rights of access". It does not presume that removal or retention in breach of rights of access is so harmful that the child must instantly be returned. Another function of "rights of custody", therefore, is to secure that long term decisions about the child's future are taken in the country where he was habitually resident immediately beforehand and not in the country to which he has been taken.

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? The issue is well illustrated by the facts of the present case.

The facts

4. We are concerned with a little boy whom I shall call Karl. He was born in Lithuania on 13 March 2005 and so is now nine years old. His father and mother separated before he was born and his father has played no part in his life. From the time of his birth until his removal from Lithuania in March 2012 he lived with and was cared for by his maternal grandparents. His mother returned to work in the Lithuanian army shortly after his birth. There is an unresolved dispute of fact as to whether she remained based with the family for about a year after Karl's birth. It is however clear that in May 2006 she moved to live and work in Northern Ireland with her then partner, leaving Karl in the sole care of her parents, and that she has lived there ever since. She and that partner had a child together in July 2010. Some time after that they separated and the mother now has another partner.

5. There is also an unresolved dispute about the level of interest which the mother showed in Karl over the years. Between May 2006 and October 2011, she sent 28 payments to the grandmother totalling some £2,590. She was in contact with her family by telephone and by SKYPE but we do not know how often. The grandmother came to visit her once in Northern Ireland in 2006 but did not bring Karl with her. The mother visited the family once in Lithuania in November 2006 for five days or a week when Karl was 20 months old. Otherwise Karl had not seen her until she returned to Lithuania in February 2012 shortly before his seventh birthday. According to the solicitor working with the Official Solicitor in Northern Ireland, who interviewed Karl a year later, "it was his firm belief that his grandmother was his mother". He was confused as to who the woman he spoke to on the computer (via SKYPE) was. His grandmother's evidence is that he referred to the mother as his "mum from far away".

6. In February 2012 his mother returned to Lithuania in order to take Karl with her to Northern Ireland, where she now had suitable accommodation, employment and a stable relationship. Her own evidence is that she knew that her parents would not agree to Karl moving to live with her. A friend had told her that her mother was taking preliminary steps to obtain legal custody of the child. A lawyer advised her that legal proceedings between her and her mother would be "very protracted and costly". So she decided to take matters into her own hands.

7. On 12 March 2012, as the grandmother was walking Karl home from school, the mother and her partner drew up beside them in a van and there was a tug of war which resulted in Karl being removed from his grandmother and taken away in the van. Again, there is a dispute of fact. The grandmother says that she heard the mother shouting "pull him, pull him", a man jumped out of the van and grabbed the child. When she would not let him go, the van door was shut on her hand, injuring her. The mother says that her partner was driving the van and it was she who had the tug of war to remove Karl from his grandmother's grip. Either way, it was a shocking episode of which any mother should be deeply ashamed. Thereafter they travelled by car and ferry through Slovakia, Germany, France and England, arriving in

Northern Ireland around 17 March 2012. Karl had to leave behind his country, his home, his toys and his clothes, his school and many other activities, and the grandparents with whom he had lived all his life. He was taken to a country he did not know, with a language he did not know, by a mother he scarcely knew, to live with her and a half-sister and step-father whom he had never met.

8. After arriving in Northern Ireland, Karl had some contact with his grandparents by telephone and by SKYPE, but this was terminated by the mother later in 2012 and there has been no contact since then.

9. Shortly after the removal, the grandmother contacted the Children's Rights Division in her home city in Lithuania and a referral was made via Children and Families Across Borders to the local authority in Northern Ireland. A social worker undertook an assessment using the "Understanding the Needs of Children in Northern Ireland" (UNOCINI) framework, which was completed on 24 May 2012. Karl had been enrolled in school in April, after the Easter break. His behaviour during the first week had been very disturbed and the school had requested specialist support for this. Otherwise, the assessment was that the mother appeared to have good insight into the needs of her children, but that Karl had experienced a major change in his life, and would benefit from support in relation to the current language barrier and emotional support which would enable him to process his thoughts and feelings about the move. Nevertheless it was agreed that the case should be closed as the school had involved behaviour support. A letter from the head-teacher in February 2013 reported that his behaviour since returning to school in September 2012 had been exemplary. He had very quickly mastered English and was making excellent academic and social progress.

10. When the solicitor for the Official Solicitor interviewed Karl at his mother's home in April 2013, she found a little boy who presented as very young. He expressed a desire to stay with his mother in Northern Ireland. The solicitor concluded:

> "[Karl] has experienced a situation where he was cared for by a grandmother, whom he believed was his mother, and had irregular contact with a woman with whom his relationship was unclear. He was subsequently abducted from his grandmother in an extremely frightening manner by a person whom he believed at the time was a stranger. He was removed from the country of his upbringing to a country where he struggled initially with the language. Contact with his grandparents, who had been his primary carers and the significant adults in his life, was brought to an abrupt end by his mother and he was informed that his grandparents had lied to him throughout his entire life. In light of the above, despite [Karl's] assertion that he

> wants to remain with his mother, I have concerns about the emotional well-being of this young boy and the impact of the traumatic events on his ability to formulate his wishes and feelings freely and without influence. It is entirely possible that [Karl] has suffered emotional harm and I would consider that it might be in his best interests for an expert assessment to be carried out in order to identify appropriate supports for him."

The legal position in Lithuania

11. These proceedings are unusual in that we have no formal evidence as to the legal position of the grandparents in Lithuanian law. The central authority in Lithuania has not supplied the central authority in Northern Ireland with a certificate or affidavit, such as is contemplated by article 8(f) of the Convention, concerning the relevant Lithuanian law. There has been no contact through liaison judges. The mother's legal advisers did attempt to obtain evidence of Lithuanian law but this could not be obtained within the tight time-table for child abduction cases. No-one suggests that at this late stage it would be appropriate for the court to exercise its power, under article 15 of the Hague Convention, to request that the grandparents obtain from the Lithuanian authorities "a decision or other determination that the removal was wrongful within the meaning of article 3 of the Convention". We shall have to do the best we can with the limited material at our disposal.

12. On 13 April 2005, when Karl was one month old, the mother signed a document authorising the grandmother "to visit all medical institutions and hospitals" with her son. On 20 April 2006, shortly before her move to Northern Ireland, the mother executed a notarised consent for Karl to travel to any foreign country together with the grandmother and/or the grandfather. On the same date, she also executed a notarised power of attorney, to be valid for ten years, authorising the grandmother "to receive the passport of my minor son . . .; to represent me at the Migration Service Passports subdivision and other state, legal and governmental institutions, companies and organisations; to receive and submit all necessary documents; to make applications on my behalf; to sign on my behalf and to perform all other actions in relation to this authorisation". On 10 January 2007, the Director of the City Municipality Administration for the city where the grandparents live made an order, pursuant to various articles of the Lithuanian Civil Code and Law on Child Benefits and in accordance with the Description of Care (Guardianship) Procedure of the City Child Crisis Centre. According to one of the translations we have, this order put Karl under temporary care (custody); appointed the grandmother as his carer (guardian); determined that the place of care (custody) should be the carer's (guardian's) place; and transferred the supervision of this temporary care (custody) to the City Child Crisis Centre. (The Lithuanian original also uses alternative terminology, "globa (rupyba)", and "globeja (rupintoja)"; given the

etymological similarity between "rupyba" and "rupintoja", it may well be that "custodian" would be a closer translation than "guardian", but that is by the way.)

13. There matters stood until the mother returned to Lithuania in February 2012. On 20 February 2012, the Manager of the Children's Rights Division of the City Administration issued a notice to the mother stating that, under an Order of the Social Security and Labour Minister, "it is indicated in the children temporary care provision that temporary care terminates when the parents return from a foreign state and inform Children's Rights Division about it". The mother had that day informed the Division that she had returned and would take her son into her own care. The temporary care was therefore held to be terminated on that date.

14. On 2 March 2012, the mother issued applications to the notary's office to withdraw the two notarised consents which she had given on 20 April 2006. It would appear, therefore, that she was doing whatever she could to withdraw the parental authority which she had delegated to the grandmother in 2006.

15. However, Karl obviously remained living with his grandparents. The grandmother says in her affidavit that a little earlier the child had begun to suffer from anxiety and was afraid of leaving the house. A psychologist had become involved through his school and had recommended that he be educated at home for a while. We do not know whether this was in any way related to the mother's return but it may have been completely unrelated. On 2 March 2012, the Manager of the Children's Rights Division issued a notice to the grandfather, copied to the mother, headed "Re: Request dated 20/02/12", but we do not know what that request was. The notice recounted events subsequent to that request. There was a meeting on 22 February 2012 in relation to the mother's contact with her son. A temporary contact "order" was agreed, for the mother to see Karl on Wednesday of each week between 15.30 and 17.00. A further meeting took place, attended by a psychologist from the family and child's welfare centre, on 27 February 2012. A psychiatrist's certificate was also submitted on that date. The grandmother had said that the doctor forbade the child to have contact with other people except his family members, that he would not attend school for one to one and a half months and that he would be taught at home. The staff of the Children's Rights Division spoke to the doctor on 27 February, who advised that the child should see the medical staff once a week and that he could have contact with his mother. They concluded that the temporary contact agreed on 22 February would not breach the child's interests and therefore recommended keeping it. The mother was required to attend the appointments with the psychologist. On 7 March 2012, the mother wrote to the Manager of the Children's Rights Division informing her that she arrived for her contact visit with her son at the recommended time but that the child was not brought to the office for the visit.

16. Thus it would appear that the Children's Rights Division was still actively managing the dispute between the mother and the grandparents in what they saw as the best interests of the child on the basis that, for the time being at least, he would live with his grandparents. Nevertheless, after his abduction on 12 March, the grandmother was informed by the authorities that she had no rights. Hence the application transmitted on behalf of the grandparents by the central authority of Lithuania to the central authority of Northern Ireland on 19 November 2012 was not for the immediate return of a child who had been wrongfully removed from his country of habitual residence but for arrangements to be made for him to spend 30 days' holiday a year with them at their expense. Unlike an application for return, such an application would not normally be accompanied by a certificate or affidavit concerning the relevant Lithuanian law relating to rights of custody. This may explain why we do not have one.

These proceedings

17. However, the originating summons issued by the grandparents in the High Court in Northern Ireland sought a declaration that Karl was being wrongfully retained in Northern Ireland in breach of their rights of custody and an order that he be returned forthwith. No doubt by that time the grandparents had been advised by their lawyers that there was case law in the Court of Appeal and High Court in England and Wales indicating that those courts would regard them as having rights of custody for purposes of the Hague Convention and that there was (at least) a realistic possibility that the High Court in Northern Ireland would take the same view.

18. As it turned out, Maguire J in the High Court declined to follow the English case law, on the ground that it was inconsistent with two House of Lords decisions on the Convention and with one decision in the Court of Justice of the European Union on the Regulation. The Lord Chief Justice, Higgins and Coghlin LJJ in the Northern Ireland Court of Appeal took the same view: [2014] NICA 15. Therefore, in the interests of consistency within the United Kingdom, if nowhere else, it is necessary for this court to resolve the matter.

The relevant provisions of the Convention and the Regulation

19. The crucial provision of the Convention is article 3:

> "The removal or retention of a child is to be considered wrongful where – (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law

> of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually being exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

20. Rights of custody are further defined in article 5(a), which provides that, for the purposes of the Convention, "'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"; while rights of access are further defined in article 5(b), which provides that " 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence". Rights of custody are respected by the obligation in article 12 to order the return of the child "forthwith" where he has been wrongfully removed or retained in terms of article 3, unless one of the limited exceptions provided for in articles 12 and 13 apply. Rights of access are respected through the arrangements in article 21 for securing their effective exercise.

21. The Convention is supplemented as between the member states of the European Union (apart from Denmark) by the Regulation. Under article 60(e), this takes precedence over the Convention. The obligation to respect rights of custody by returning the child forthwith under article 12 of the Convention remains, subject to the limited exceptions in articles 12 and 13, but with some additional obligations in article 11 of the Regulation. The relevant definitions are contained in article 2 of the Regulation. Article 2(9) provides that:

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

Article 2(11) provides that:

> "the term 'wrongful removal or retention' shall mean the child's removal or retention where: (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child

> was habitually resident immediately before the removal or retention; and (b) provided that, at the time of the removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. . . . "

22. It is most unfortunate that the wording of the Convention and Regulation are not identical. However, despite the difference in wording, the apparent intention of both instruments is that the attribution of "rights of custody" is to be determined according to the law of the country where the child was habitually resident immediately before his removal or retention. Further, article 3 of the Convention contemplates that rights of custody may arise "in particular" in three ways: by operation of law, by administrative or judicial decision, and by an agreement having legal effect. This does not rule out that such rights might arise in other ways (see the Explanatory Report by Professor E Perez-Vera, para 67). By contrast, the list in article 2(11) of the Regulation appears exhaustive. Furthermore, a "judicial or administrative decision" in article 3 is intended in its widest sense (see Perez-Vera, para 69). By contrast, a "judgment" is defined in article 2(4) of the Regulation as a judgment relating to parental responsibility pronounced by a court of a Member State. Given, however, that the whole thrust of the Regulation is to supplement and to strengthen the obligations laid down in the Convention, and that it would appear unlikely that the Regulation intended to cut down the possible sources of custody rights which are indirectly protected by the obligation to return the child, they should be construed consistently with one another wherever possible.

The English cases on "inchoate rights"

23. The line of cases begins with the majority decision of the Court of Appeal in *Re B (A Minor)(Abduction)* [1994] 2 FLR 249. The child's parents were not married to one another and by the law of Western Australia where they lived an unmarried father enjoyed no parental rights by operation of law. Nevertheless he had become the child's primary carer when the mother moved back to Britain, leaving the child in the shared care of the father and her mother. The father agreed to the grandmother bringing the child to Britain for a holiday but only on terms to be embodied in a consent order giving the parents joint guardianship and him sole custody. This was agreed by the mother and eventually approved by the Australian court but only after the mother had begun wardship proceedings in Wales. Waite LJ held that the term "rights of custody" was

> "capable of being applied in a Convention context to describe the 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 concerned" (p 261B).

In this case the father's status was one which

> "any court . . . would be bound to uphold; 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 the mother of her official rights".

Staughton LJ agreed with Waite LJ but he also accepted evidence that under the law of Western Australia parents could make valid agreements as to the custody or guardianship of their children which would be binding without a court order. Peter Gibson LJ dissented on the ground that "rights" must mean more than de facto rights. The agreement between father and mother did not confer rights of custody when the child left Australia and (under the authority of *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, see para 42 below) a young child in the sole lawful custody of his mother had the same habitual residence as she did, which was now in Wales.

24. *Re B* was an incoming case, where England and Wales was the requested state. The concept of "inchoate rights of custody" has been deployed in several later cases, both incoming and outgoing, in the High Court of England and Wales where, of course, the decision in *Re B* is binding. In *Re O (Child Abduction: Custody Rights)* [1997] 2 FLR 702, another incoming case, the facts were not unlike those of the present case. A German mother had left her German daughter in the care of the maternal grandparents in Germany. They had taken sole responsibility for the child for over a year and had started custody proceedings in the German court. But before these could be heard the mother kept the child, who was staying with her for the weekend, and brought her to England. The grandmother obtained a provisional custody order in Germany and orders from the High Court in England, under both the Convention and the inherent jurisdiction of the High Court, for the immediate return of the child. Cazalet J thought the non-exhaustive wording "may arise" in article 3 of the Convention (see para 19 above) was important. He asked himself whether the mother could properly be said to have agreed to the child making her home with the grandmother or whether "some situation arose whereby the grandparents were carrying out duties and enjoying the privileges of a custodial or parental character which the court would be likely to uphold in the interests of the child concerned" (p 709). While he had some doubts about whether there was any such agreement he had no doubt that the grandparents had "joint custodial rights within the provisions of Waite LJ's definition" (p 710). *Re G (Abduction: Rights of Custody)* [2002] 2 FLR 703 was an outgoing High Court case in which Sumner J declared that the paternal grandmother in whose care the child had been left by the mother had rights of custody as defined in *Re B*, so that it was in breach of those rights for the mother to retain the child (and take her to South Africa) during an agreed holiday in this country.

25. In *Re G*, Sumner J also declared that the unmarried father, who had joined the household after the child had been left with the grandmother, had rights of custody. Many of the cases have concerned unmarried fathers who do not have rights of custody by operation of law in the country where the child is habitually resident but who have nevertheless played a role in the child's care. In *Re W; Re B (Child Abduction: Unmarried Father)* [1999] Fam 1, which concerned two different outgoing cases, I suggested that removing a child who is habitually resident here would be wrongful under the Convention if (a) the unmarried father has parental responsibility either by agreement or court order (or, it should now be added, by operation of law); (b) there is a court order in force prohibiting it; (c) there are relevant proceedings pending in a court in England and Wales; or (d), following *Re B*, where the father is currently the primary carer for the child, at least if the mother has delegated such care to him (p 20). The facts of *Re W* fell within (c), but those of this *Re B* fell within none of these categories, as the mother had a residence order with no prohibition on removing the child from the jurisdiction and the father had only a contact order. *Re J (Abduction) (Declaration of Wrongful Removal)* [1999] 2 FLR 653 was another outgoing case which fell within category (c); but I doubted whether the concept of "inchoate rights" could be extended to an unmarried father, who was living with and sharing care of the child with the mother "in the way that mothers and fathers living under the same roof commonly do", because that would be difficult to reconcile with the House of Lords' decision in *Re J* (pp 659-660) (see para 42 below).

26. In *Re C (Child Abduction) (Unmarried Father: Rights of Custody)* [2002] EWHC 2219 (Fam), [2003] 1 FLR 252, where the facts were similar, Munby J agreed with my formulation at (d), "so long as it is understood as also applying to a case of shared primary care with someone other than the mother" (para 41). Like me, he held that there was nothing in the authorities to suggest that an unmarried father (or anyone else) could acquire rights of custody while the mother who had sole legal rights remained the primary carer, whether alone or sharing it with the father (para 37). He pointed out that the common thread running through the *Re B* cases was the mother had left the scene and abandoned the care of the child to someone else (para 36). Baron J also followed this approach in *Re J (Abduction: Acquiring Custody Rights by Caring for the Child)* [2005] 2 FLR 791, holding that the mother had not abandoned the child or delegated sole care to the father during the periods when he had been in the father's care and thus that the father did not have rights of custody within the *Re B* principle.

27. In *Re F (Abduction: Unmarried Father: Sole Carer)* [2002] EWHC 2896 (Fam), [2003] 1 FLR 839, an outgoing case, there was doubt about whether the mother's former partner, and father of her three older children, was in fact the father of her youngest child, who had been left by the mother in his sole care (there were no pending proceedings when the child was abducted because his legal aid application had been lost). Dame Elizabeth Butler-Sloss P held that he had inchoate

rights of custody, whether or not he was in fact the father, there being a reasonable prospect that a court would grant him a residence order.

28. Reunite, to whom this court is most grateful for their erudite and dispassionate intervention, has drawn our attention to the treatment of the concept of "inchoate rights" in other states parties to the Hague Convention. In summary, the concept has received enthusiastic support in New Zealand: in the family court in *Anderson v Paterson* [2002] NZFLR 641; in the High Court on appeal from the family court in *M v H [Custody]* [2006] NZFLR 623; and by Baragwanath J in the Court of Appeal in *Fairfax v Ireton* [2009] 3 NZLR 289. These were all cases of unmarried fathers who did not have guardianship rights under New Zealand law, but were enjoying regular contact with their children by agreement with the mother, so the question of inchoate rights was combined with the question of rights acquired by "an agreement having legal effect".

29. In the Ontario Superior Court of Justice in Canada, in *Courtney v Springfield* [2008] CanL II 35920 (ON SC), unreported, Mackinnon J applied the English concept of "inchoate rights" when deciding whether two children had been wrongfully removed from England and Wales. Both children had been placed with a same sex couple as foster parents and adopted by the abducting party alone because joint adoptions by same sex partners were not then permitted in English law. A shared residence order had been made in relation to one of the children but not the other. Nevertheless the left-behind party had been their primary carer while the couple lived together. Following their separation the children had at first spent roughly equal time with each party, and then two days a week with the left-behind party, who had also continued her parental involvement in the children's activities and schooling. MacKinnon J held that it was not necessary to have been the primary carer in order to have inchoate custody rights within the meaning of *Re B* (para 56). We do not know whether the same approach might be adopted in relation to children habitually resident in Canada, although in *VW v DS* [1996] 2 SCR 108, the Supreme Court held that the concept of custody must be given a large and liberal interpretation as a narrow reading would contradict the very object of the implementing legislation.

30. On the other hand, the Supreme Court of Ireland, in *HI v MG* [2000] 1 IR 110, held by a majority of four to one that the Hague Convention did not provide protection for inchoate rights of custody. The mother and father had gone through an Islamic ceremony of marriage in the state of New York which was not valid in US law. An unmarried father had no legal status and no rights of custody under New York law unless conferred by court order. So although the family had been living together for some five and a half years, until shortly before the mother obtained a "temporary order of protection" and removed the child to Ireland, and the father had already begun proceedings for a visitation order, the father did not have rights of custody within the meaning of the Convention. Barron J, dissenting, held that

> "The reality is that the Hague Convention is not concerned with legal rights under the law of habitual residence but with rights which were actually being exercised and . . . which the courts of that state would not totally disregard as having no legal effect within that state" (p 140).

Citing the *Re B* line of authorities with approval, he concluded that

> "when the party entitled to the legal rights enters into an agreement whether by words or conduct whereby the de facto exercise of those rights is passed to another whether solely or jointly with the possessor of the rights such rights so passed arise within the meaning of article 3 of the Hague Convention" (p 146).

31. The *Re B* concept of inchoate rights was applied as a back-up reason by Morgan J in the Family Court of Australia in *State Central Authority v LJK* [2004] FamCA 724. The child had been born before the parents were married and the mother had obtained a consent order in Australia making her solely responsible for the child's care. But then she had returned to the United States with the child and married the father. Morgan J held that the marriage had nullified the Australian order and so the father had rights of custody by operation of law. But if he was wrong about that, he would have held that the father had inchoate rights within the *Re B* principle.

32. In *MW v Director-General of the Department of Community Services* [2008] HCA 12, (2008) 244 ALR 205, the High Court of Australia, by a majority of four to one, overturned an order made in the family court that a child be returned to New Zealand. The unmarried father had not established that he was a joint guardian under New Zealand law and his access order did not give him a right of veto over the child's removal. Hence he had no rights of custody. Kirby J dissented on both points. But despite the length and erudition of the judgments, there is no mention of the concept of inchoate rights or of the New Zealand decisions (para 28 above) which would have recognised such a father as having them.

33. The diligence of Reunite, and indeed the other parties, has not unearthed any helpful United States authority on this issue, or indeed any authority from a non-common law country. The upshot is that England and Wales have embraced the concept of inchoate rights both for incoming (requested) and outgoing (requesting) abduction cases. New Zealand has recognised it for outgoing (requesting) cases. Canada has recognised it for an incoming (requested) case from England and Wales, thus as part of our law but not necessarily theirs. Australia has recognised it for an incoming (requested) case from the USA but failed even to consider it in an

incoming (requested) case from New Zealand. Ireland has expressly refused to recognise it in an incoming (requested) case from the United States.

An agreement having legal effect

34. This third source of rights of custody is explained thus in Professor Perez-Vera's Explanatory Report, para 70:

> "In principle, the agreements in question may be simple private transactions between the parties concerning the custody of their children. The condition that they have 'legal effect' according to the law of the State of habitual residence was inserted during the Fourteenth Session in place of a requirement that it have the 'force of law' as stated in the Preliminary Draft. The change was made in response to a desire that the conditions imposed upon the acceptance of agreements governing matters of custody which one convention seeks to protect should be made as clear and as flexible as possible. As regards the definition of an agreement which has 'legal effect' in terms of a particular law, it seems that there must be included within it *any sort of agreement which is not prohibited by such a law and may provide a basis for presenting a legal claim to the competent authorities*." (emphasis supplied)

35. As already noted, there is also some New Zealand authority on when rights of custody may arise by virtue of "an agreement having legal effect" in New Zealand. Section 18 of the New Zealand Guardianship Act 1968 expressly provided that an agreement between the father and mother of a child as to the custody or upbringing of or access to a child was valid, although not to be enforced if the court was of the opinion that this would not be for the welfare of the child. In *Dellabarca v Christie* [1999] 2 NZLR 548, the Court of Appeal pointed out that this was originally enacted so as to nullify the common law rule that an agreement by a father to part with custody was void as contrary to public policy. While holding that there was no such agreement on the facts of that case, they were inclined to doubt the trial judge's view that it would not have had "legal effect" for the purpose of article 3 of the Convention. This was followed up by the High Court in *M v H* (para 28 above), holding that such agreements did not have to be in writing and if established on the evidence would have legal effect for the purpose of article 3. By the time of *Fairfax v Ireton* (para 28 above), section 18 had been replaced by section 40 of the Care of Children Act 2004, which did not in terms state that such agreements were valid, and did provide that they could not be enforced as such, but that some or all of their terms could be embodied in a court order which could be enforced in the usual way. The Court of Appeal held that such an agreement did have legal effect for the purpose of article 3.

36. Reunite have conducted a comprehensive search of the law reports in England and Wales, revealing 59 cases in the Family Law Reports where the phrase "an agreement having legal effect" appears, but only one in which its meaning was specifically considered. In *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119, there had been an article 15 request to the courts of New Zealand which (unsurprisingly in the light of the above) had replied that a father enjoying regular and frequent contact with the child by informal agreement with the mother did have rights of custody and therefore that the child's removal to England and Wales had been wrongful. Nevertheless, both the English High Court and the Court of Appeal held that it was not: the "English perception of the autonomous law of the Hague Convention" (para 29) was that rights of access could not, without more, amount to rights of custody: citing the then most recent cases of *Re V-B (Abduction: Custody Rights)* [1999] 2 FLR 192 and *Re P (Abduction Consent)* [2004] EWCA Civ 971, [2004] 2 FLR 1057 (paras 23-24). The case is therefore of very little help in determining what is meant by an "agreement having legal effect".

37. It is worth considering the answer which might be given by the English courts were an equivalent request to be made of them. Indeed, in *Re W; Re B* (para 25 above) I was invited on behalf of the father in *B* to hold that the parties had agreed that the mother could not take the child out of the jurisdiction except for short periods. I was unable to spell out any such agreement from the known facts and evidence. Moreover (pp 161-162):

> "Even if I had done so, I would have had difficulty in bringing it even within the wide definition given by Professor Perez-Vera. The common law does not permit parents to surrender their parental responsibilities (and see also the Children Act 1989, section 2(9)) nor does it recognise or enforce private agreements about the upbringing of children. It regards such agreements as contrary to public policy (see *Barnardo v McHugh* [1891] AC 388; see also *A v C* [1985] FLR 445). It cannot be suggested, therefore, that any such agreement could be enforced. But neither does it provide a basis for presenting a legal claim to the competent authorities. The father could at any time have applied for parental responsibility or prohibited steps orders: his basis for doing so would have been his relationship to the child rather than any alleged agreement with the mother. Of course, had they earlier made a parental responsibility agreement under section 4 of the Children Act 1989, that would have been an excellent example of rights of custody arising from an agreement having legal effect in our law."

38. That was a brief and some might think inadequate summary of the position in English law. The common law rule was indeed that a married father could not

surrender his parental rights by agreement, but that was modified by a provision in the Custody of Infants Act 1873 similar to that in section 18 of the New Zealand Guardianship Act. An agreement contained in a separation deed between husband and wife was not invalid by reason only that it provided for the father to give up custody or control of the child to the mother; but no court should enforce such an agreement if it would not be of benefit to the child to do so. In the famous case of *Re Besant* (1879) 11 Ch D 508, it was held not to be for the benefit of a little girl to enforce the agreement in a separation deed between her parents that she should live with her mother for 11 months of the year. Annie Besant had not only published atheistical books but also co-operated with Charles Bradlaugh in publishing a pamphlet on birth control which the court considered obscene. In *Barnardo v McHugh* [1891] AC 388, the common law rule was also applied to an agreement between the mother of an illegitimate child and Dr Barnardo that she would leave the boy in his care for 12 years. To this extent, unmarried mothers were treated as on a par with married fathers.

39. When the Guardianship Act 1973 at last gave married mothers the same rights and authority as married fathers, section 1(2) repeated the rule that any agreement to give up such rights was unenforceable, but again made an exception for agreements between husband and wife which were to operate only while they were separated; but even those agreements were not to be enforced if it would not be for the benefit of the child to give effect to it. Section 85(2) of the Children Act 1975 enacted the common law rule, providing that, subject to section 1(2) of the 1973 Act, "a person cannot surrender or transfer to another any parental right or duty he has as respects a child".

40. Both provisions were repealed by the Children Act 1989, section 2(9) of which provides that "A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf". Section 2(10) provides that "the person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned". Thus any explicit recognition of agreements between parents has gone, no doubt because the court could always decline to enforce them if they were not for the child's benefit, but (again as in New Zealand) the whole thrust of the Act was to encourage parents to make their own arrangements for their children's future without seeking the intervention of the courts unless it was needed (see, for example, section 1(5)). Whether section 2(9) and (10) amount to giving such arrangements "legal effect" for the purpose of article 3 of the Hague Convention must await a fuller argument and more careful consideration than it was given in *Re W; Re B*. But one obvious problem is that there would appear to be nothing to prevent the parent from unilaterally rescinding the delegation before the abduction.

41. The only other relevant case found by Reunite is the US decision in *Shalit v Coppe* 182 F 3d 1124 (9th Circuit 1999). The question was whether an agreement between the parents that the child would live in Israel for three years had "legal effect" in Israeli law such as to give the father rights of custody and make the mother's removal of the child to Alaska wrongful in Convention terms. The US Court held that it did not, because Israeli law specifically provided that agreements between parents were subject to the approval of the court.

42. Thus it is difficult to reconcile the English cases on inchoate rights with the concept of "an agreement having legal effect", unless that concept is given an extremely wide meaning. Although they all had a basis in the voluntary delegation or abandonment of the child to the care of the people from whom the child had been taken, it could not be said that such delegation had the effect of a legally binding agreement which could not be revoked without the approval of a court. The abduction, and the steps leading up to it, were the clearest possible evidence that the delegation had been revoked.

Can "inchoate rights" be reconciled with Re J and other cases?

43. As will already be apparent, the courts in England and Wales have tried hard to reconcile the concept of inchoate rights recognised in *Re B*, *Re O*, *Re G* and *Re F* (paras 23, 24-25, 27, above) with the decision of the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, as well as with the careful distinction drawn in the Convention between rights of custody and rights of access. Like *Re B*, *Re J* concerned a little boy born in Western Australia to unmarried parents. Their relationship "had its ups and downs, its separations and its reconciliations" (Lord Donaldson of Lymington MR, p 566), but they were living together in their jointly owned home when the mother brought the child to live permanently in England without telling the father of her plans. Under the law in Western Australia, an unmarried father had no right to the custody or guardianship of the child unless and until a court made an order in his favour. The Family Court of Western Australia made a sole custody order in his favour after the mother had left and followed this with a declaration that removing the child was wrongful. The House of Lords held that this was not correct. Although there was "no doubt that, while the mother and father were living together with J in their jointly owned home in Western Australia, the de facto custody of J was exercised by them jointly", the legal rights of custody, including the right to decide where the child should live, belonged to the mother alone (Lord Brandon of Oakwood, p 577). Further, retaining the child in England after the court order in the father's favour was not wrongful because by that time the child had become habitually resident in England and Wales.

44. In *Re B*, Peter Gibson LJ was unable to distinguish the de facto rights exercised by the father in that case from the de facto rights exercised by the father

in *Re J*. Waite LJ, on the other hand, distinguished it on the basis that the mother had delegated the primary care of the child to the father and the grandmother, and any court would be bound to uphold his status at least in the short term. All the cases in which inchoate rights have been recognised in this country, *Re B* itself, *Re O*, *Re G and Re F*, are cases in which the person with legal rights of custody had abandoned the child or delegated his primary care to others. The cases in which inchoate rights have not been recognised are cases in which the person with legal rights of custody continues to have the primary care of the child, either alone, as in *Re W; Re B*, *Re C*, and *Re J* [2005] (paras 25 and 26 above) or jointly with the other parent, as in *Re J* [1990].

45. However, the courts in Northern Ireland found themselves unable to reconcile inchoate rights with *Re J* and also with an observation of mine in the House of Lords in *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619. On their divorce in Romania, the mother had been granted a custody order and the father an access order. Following a request under article 15, the courts in Romania had held that the father's rights did not include a right to veto the mother's bringing the child to England, did not amount to rights of custody and that the removal was not wrongful. In reaching the same conclusion, I observed (para 38):

> "I would not, however, go so far as to say that a parent's potential right of veto could amount to 'rights of custody'. In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to 'rights of custody'. To hold otherwise would be to remove the distinction between 'rights' of custody and rights of access altogether. It would also be inconsistent with the decision of this House in *Re J* [1990] 2 AC 562. There an unmarried father had no parental rights or responsibility unless and until a court gave him some; but he did, of course, have the right to go to court to seek an order".

46. *Re D* was not a case where mother and father were sharing the primary care of the child. Still less was it a case in which the mother had delegated the primary care of the child to the father. It was a clear case of the distinction between rights of access and rights of custody. The cases on "inchoate rights" were not cited to the House, no doubt because none of the experienced counsel appearing in the case considered them relevant. But they can readily be reconciled.

47. The final case relied upon in the courts of Northern Ireland was the decision of the Court of Justice of the European Union in *McB v E* (Case C-400/10ppn) [2011] All ER (EC) 379. This concerned an unmarried couple who had three children together and lived in Ireland. The mother left the family home with her

children and fled to a refuge. The father prepared an application to the Irish court in order to obtain rights of custody but the mother took the children to England before this could be served upon her. The father brought proceedings in England under the Convention and the Regulation for the return of the children to Ireland. The English court requested that he obtain a determination from the Irish court under article 15. The High Court held that he had no rights of custody at the time of the children's removal. On his appeal, the Supreme Court of Ireland referred this question to the CJEU:

> "Does [the Regulation], whether interpreted pursuant to article 7 [of the Charter of Fundamental Rights] or otherwise, preclude a member state from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having 'custody rights' which render the removal of that child from its country of habitual residence wrongful for the purpose of article 2(11) of that Regulation?"

48. The CJEU answered that question in the negative (para 44). While article 2(9) gave an autonomous meaning to the "rights of custody", it followed from article 2(11) (see para 21 above) that the Regulation does not determine who has such rights of custody as may render the removal wrongful within the meaning of article 2(11), but refers that question to the law of the member state where the child was habitually resident immediately before the removal. It was the law of that member state which determines the conditions under which the natural father acquires rights of custody within the meaning of article 2(9). That law may provide that his acquisition of such rights is dependent upon his obtaining a judgment from the national court (para 43). This was not affected by article 7 of the Charter (which is the equivalent of article 8 of the European Convention on Human Rights) because it was sufficient for that purpose that the father had the right to go to court to seek rights of custody (paras 55 and 57, applying *Guichard v France*, (Application No 56838/00), 2 September 2003, unreported and *B v United Kingdom* [2000] 1 FLR 1, in the European Court of Human Rights).

49. It is not surprising, therefore, that the courts of Northern Ireland took the view that, if the Regulation throws the attribution of rights of custody entirely onto the law of the member state where the child was habitually resident, there is no room for the concept of "inchoate rights". The father had made the rather different argument that the Charter gave inchoate rights to those who could make an application to the court, but the CJEU rejected that (see para 47). Given that this too is a case between member states of the European Union, however, *McB v E* does present a difficulty for the grandparents. The answer may depend upon precisely what question is left entirely to the law of that member state.

Discussion

50. The dilemma presented by this case is summed up neatly in the Perez-Vera Report, para 9:

> "The Convention reflects on the whole a compromise between two concepts, different in part concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relations which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand *it is equally clear that the characterisation of the removal or retention of a child as wrongful is made conditional on the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent*." (emphasis supplied)

51. Thus it is not enough that this was, as the Official Solicitor forcefully argues on behalf of Karl, a classic example of the sort of conduct which the Convention was designed to prevent and to remedy. Looked at from his point of view, he was wrested away from the person he regarded as his mother, who had looked after him for the whole of his life, by one person whom he scarcely knew, if he recognised her at all, and another whom he did not know at all; he was taken away from his familiar home, his clothes and his toys, his school and his country; he was taken over land and sea to a place which he did not know, where they speak a language which he did not know, to live with people whom he did not know, and to go to a new school. Small wonder that his behaviour in the first few weeks there was deeply disturbed. These were indeed the "harmful effects" referred to in the preamble to the Convention.

52. But that is not enough. We are looking for "the existence of a right of custody which gives legal content" to the situation which was modified by the abduction. The second question, therefore, is where are we looking for this right? Some terms and provisions in an international treaty have an autonomous meaning, a meaning independent of that which they would be given in the domestic laws of any of the states parties. Those terms are meant to be interpreted and applied consistently among all the states parties. Where, as with the Convention, there is no supra-national body responsible for its interpretation, the task falls to the national court. But, as Lord Steyn explained in *R v Secretary of State for the Home Department, Ex p Adan* [2001] 2 AC 477, 517, "in doing so, it must search, untrammelled by notions

of its national legal culture, for the true, autonomous and international meaning of the treaty. And there can be only one true meaning".

53. There can now be no doubt that the *content* of the "rights of custody" protected by the Convention has its own autonomous meaning. The second conclusion of the Second Special Commission to Review the Operation of the Convention (held 18 - 21 January 1993) was that

> "The key concepts which determine the scope of the Convention are not dependent for their meaning upon any single legal system. Thus the expression 'rights of custody', for example, does not coincide with any particular concept of custody in a domestic law, but draws its meaning from the definitions, structure and purposes of the Convention."

This conclusion was more recently reaffirmed by the Sixth Meeting of the Special Commission (held 1 – 10 June 2011).

54. It was for this reason that England and Wales was able to conclude, from an early stage, that a right to veto the child's relocation abroad (what the Americans call a *ne exeat* right) was a right of custody for the purpose of the Convention, even if its purpose was to support rights of access rather than to protect rights of custody, a view which is now widely shared among member states: see *C v C (Abduction: Rights of Custody)* [1989] 1 WLR 654; *Re D (Abduction: Rights of Custody)* [2007] 1 AC 619, especially the discussion by Lord Hope at paras 8 to 19; and, now, *Abbott v Abbott* 560 US 000 (2010) in the United States.

55. It was also for that reason that Dyson LJ, in *Hunter v Murrow* (above, para 36) divided the question of whether the father had rights of custody into two. The first, which he called "the domestic law question", was what rights the father had in national law. The second, which he called "the Convention question", was whether those rights were to be characterised as rights of custody for the purposes of the Convention.

56. To which question are the "inchoate rights" recognised in *Re B* the answer? There is a suggestion, in the written submissions from Reunite, that the Hague Conference, in its INCADAT database, may see them as falling within the first, the domestic law question. It is, of course, the case that their existence has been recognised in outgoing as well as incoming cases in England and Wales; and that MacKinnon J was persuaded that they were part of our national law in *Courtney v Springfield* (para 29 above). But in my view there can be no doubt that the concept

was developed as an answer to the second question: in *Re B*, the Court was asking itself whether the position of the father amounted to "rights of custody" for the purposes of the Convention, not whether the national law of Western Australia would so regard it. Again, in outgoing cases such as *Re W; Re B* (para 25 above), the court was not suggesting that these were rights recognised for domestic law purposes, but whether they were rights which in English law were recognised for Convention purposes.

57. If it is indeed a Convention question, then the answer should be the same in all member states. Yet we face the very real difficulty that there is very little support for such an expansive view of rights of custody among the other states parties to the Convention. Once again, the courts of England and Wales, in their enthusiasm to support the object and purposes of the Convention, have pushed at the boundaries. However they have done so for many years now, albeit in a very narrow category of cases, without apparent objection from the rest of the Hague community. One reason may be that it is apparent from the Perez-Vera report that, although there must be some legal content to the factual situation disrupted by the abduction, the listed sources of that legal content were not intended to be exhaustive, thus "favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration" (para 67). Another reason may be that the English approach is entirely consistent with the two fundamental purposes of the Convention, to protect children from the harmful effects of international abduction and to secure that disputes about their future are determined in the state where they were habitually resident before the abduction.

58. Does the decision of the CJEU in *McB v E* (paras 46 - 47 above) constitute an insuperable obstacle to our continuing to take that approach? After anxious consideration I have reached the view that it does not. The CJEU stressed that, in the Regulation as in the Convention, the concept of rights of custody is an autonomous one (para 41). It must follow that its *content* is not to be determined by reference to the laws of individual member states, even if the question of who enjoys such rights is left to them. The CJEU were asked whether the Regulation *precluded* a member state from providing in its own law that the acquisition of rights of custody by a child's father depended upon his obtaining a judgment from a national court. They were *not* asked whether the Regulation precluded a requesting state from regarding whatever legal situation the father might be in as being within the autonomous concept of rights of custody for the purpose of the Regulation. If a strictly limited category of so-called "inchoate rights" fall within that concept for the purpose of the Convention, there is no reason why they should not do so for the purpose of the Regulation, which is intended to strengthen rather than weaken the implementation of the Convention. As it happens, the father in *McB v E* would not have fallen within the *Re B* concept, as at the very highest he was sharing care with the mother.

59. How then may the people who possess that strictly limited category of rights be defined, consistently with the principles and purposes of the Convention and the Regulation? In my view the "continuum" as described in *Re B* is imprecise. It risks disrupting the important distinctions drawn in the Convention between rights of custody and rights of access and between those who do and those who do not have something which can plausibly be termed a right. I would define such people thus. (a) They must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child. Thus, for example, our law recognises the obvious truth that people who are actually looking after a child, even if they do not have parental responsibility, may "do what is reasonable in all the circumstances of the case for the purpose of safeguarding and promoting the child's welfare" (Children Act 1989, s 3(5)). (b) They must not be 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. They would not then have the rights normally associated with looking after the child. (c) That person or persons must have either abandoned the child or delegated his primary care to them. (d) There must be some form of legal or official recognition of their position in the country of habitual residence. This is to distinguish those whose care of the child is lawful from those whose care is not lawful. Examples might be 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.

60. Those requirements are consistent with the twin purposes of the Convention. First, they protect the child from the harmful effects of international child abduction by recognising that he should not be peremptorily removed from their care. Second, they enable the courts of the child's habitual residence to determine where his long term future should lie. It is possible to analyse them in terms of "an agreement having legal effect", but only if the unilateral (and usually clandestine) decision of the abducting parent is not seen as effective to revoke that agreement.

Applying the principle to the facts

61. How then does such a concept apply in this case? The grandparents had for many years undertaken the responsibilities entailed in the primary care of the child. They had exercised all the decision-making rights and powers associated with that. Until days before the abduction they had done so with the benefit of some specific authorisations granted by the mother. The mother had undoubtedly delegated the care of her son to them. For most of that period the grandmother's status had been officially recognised. Had it not been for what appears to have been the automatic cancellation of that status on the mother's notification of her return, there would have been no problem at all in ascribing rights of custody to the grandmother. There

would have been no need to involve any concept of inchoate rights. But it seems to me that her position did still have some legal content after that order was revoked. The Children's Rights Division, which appears to have been the competent authority for this purpose, was monitoring and controlling the situation of the child. An order was agreed on 22 February and confirmed on 27 February that the mother should have weekly contact with the child. Obviously this was on the basis that it was in the best interests of the child to remain living with his grandparents for the time being. The question for the authorities was whether, given the child's fragile psychological condition, it was in his best interests to be reintroduced to his mother. It can also be concluded from the legal advice which the mother was given that had either she or the grandmother taken legal proceedings the status quo would have been preserved while these were resolved.

62. I conclude, therefore, that the grandmother's status did constitute "rights of custody" in relation to Karl on the day when he was removed for the purpose of the Convention and the Regulation. Her status had legal content derived from the decisions taken by the competent authorities in the light of the mother's previous delegation of primary care to her. It had not been deprived of all content by the mother's notice to the authorities (which may or may not have been communicated to the grandmother). Thus to take him out of the country without her consent was in breach of those rights and wrongful in terms both of the Convention and the Regulation.

Conclusion

63. It follows that the appeal must be allowed. It also follows that this court is obliged, pursuant to article 12 of the Convention and article 11 of the Regulation, to order that the child be returned to Lithuania forthwith. The mother has not yet sought to raise any of the exceptions to that obligation contained in article 13 of the Convention; nor does the possible exception in article 12 for children who have become settled in the country to which they have been abducted apply, as these proceedings were begun less than a year after the abduction.

64. This is not, however, the result for which the Official Solicitor contends on behalf of the child. While strongly arguing that this was indeed a wrongful removal, which should be recognised as such by this court, she submits that there should be a reconsideration of the child's position and the effect of another move upon him after two years of living with his mother and her family. This submission, with all respect to her, is trying to have it both ways and ignores the binding effect of article 12 of the Convention and article 11 of the Regulation. This court cannot allow the inevitable effect of the passage of time involved in the appellate process (however expedited) to affect its decision.

65. However, although they have given instructions to pursue this appeal, it may be that this is also what the grandparents would prefer. In her second affidavit, the grandmother states that if the court in Northern Ireland is satisfied that it is in Karl's best interests to remain in Northern Ireland with the mother, then they would be willing to consider allowing this, but only on condition that proper contact arrangements are put in place and incorporated in a court order which could be enforced against the mother. Despite all that has passed, she may still be prepared to consider an agreed solution along those lines and the mother, of course, now has every incentive to do so. The mother has indeed brought this situation upon herself, and more importantly upon her son, not only by her cruel and high-handed actions in taking the law into her own hands, but also by her insensitive handling of the relationship between her son and the people whom he had regarded as his parents for so long. She has cut off all contact between them and appears to have poisoned his mind against them by suggesting that they lied to him. She should now be doing her best to put that right.

66. Otherwise, the only conceivable way of getting this case back before the High Court in Northern Ireland would be if the mother were to seek permission, even at this late stage, to raise one of the exceptions in article 13 to the court's obligation to order the return of the child. We have not heard argument upon whether this is even possible, given the stage which the proceedings have reached. But were the mother to make such an application, and were the High Court to grant her such permission, it would be necessary to stay this court's order until the case could be heard. All these matters would be better dealt with by the High Court in Northern Ireland. Accordingly, I would direct that if within 21 days the mother applies to the High Court for permission to apply for the child not to be returned, pursuant to article 13 of the Convention, the order of this court is to be stayed until the matter is mentioned, on the first available date, before the Family Division Judge in the High Court in Northern Ireland. Should he permit the mother to make her application, and I am very far from suggesting that he should, he should also have power to stay the order of this court until the matter is determined. It goes without saying that the time-table for hearing and determining the whole matter should be very tight.

67. There is one final comment. Cases like this are mercifully rare and ought to be rarer still. This is because the High Court retains its inherent jurisdiction to order the immediate return of a child who has been removed from his country of habitual residence. That jurisdiction is governed by the best interests of the child. But it has long been recognised that there are situations in which those interests are best served by a swift return to his home country for his future to be decided there. Indeed, in cases within the European Union, jurisdiction to determine matters of parental responsibility remains with the country of habitual residence unless and until the child acquires a new habitual residence. There are therefore cases, and this is one, in which it is appropriate to allow an application under the inherent jurisdiction to proceed hand in hand with an application under the Hague Convention (as in fact

happened in *Re O*, para 24 above, where Cazalet J made return orders under both). The Family Division in Northern Ireland may therefore wish to reconsider its practice of automatically postponing such applications until the Hague case has been determined.

LORD WILSON

68. I consider that the court should have dismissed the appeal.

69. The grandparents need to establish that on 12 March 2012 they had rights of custody in relation to Karl. But in my view they face an insuperable difficulty. For on 20 February 2012 the Children's Rights Division of the Social Security Department of Klaipeda City Municipal Administration in Lithuania revisited the order dated 10 January 2007 by which it had invested temporary care of Karl in them or, to be more accurate, in the grandmother. Its order dated 20 February was as follows:

> "RE: TERMINATION OF TEMPORARY CARE
>
> Under the Order … 28.05.2007 of the Social Security … Minister… it is indicated in the children temporary care provision that temporary care terminates when the parents return from a foreign state and inform Children's Rights Division about it. [The mother] informed Children's Rights Division on 20.02.2012 that she came back from abroad and she will take her son… into her own care. Referring to the Order stated above and considering that [the mother] did inform about the return, [Karl's] temporary care is held to be terminated from 20.2.2012."

70. There are grounds for suspecting that, in the translation of the order into English, that last date has been wrongly typed as 20 February and should have read 28 February 2012. But whether it took effect immediately or eight days later, the order dated 20 February terminated the legal entitlement of the grandparents to care for Karl even on a "temporary" basis. Why? Because the mother "will take her son… into her own care".

71. I cannot accept that the grandparents had rights of custody in relation to Karl after the order for temporary care of him was terminated. I am convinced that the effect of the order dated 20 February 2012 was that they no longer had rights of custody. Lady Hale's ingenious conclusion otherwise seems to me to be strained.

She relies in particular, at para 59, on the agreed order for the mother's contact with Karl dated 22 February 2012. The court's limited understanding of the order for contact largely derives from the notice to the grandfather dated 2 March 2012. This refers to a meeting on 22 February between the mother and the grandmother in the presence of the child psychologist and to the arrangement of a contact visit on Monday 27 (or possibly Wednesday 29) February; and it makes a recommendation, as of 2 March, that temporary contact on Wednesdays should be maintained. In one of her affidavits the grandmother casts light on these arrangements: she says that on 22 February the psychologist "recommended that [the mother] take her time to get to know her son". I infer that the "temporary contact order" reflected the mother's acceptance at that time of the advice that she should get to know Karl again through some contact visits prior to taking him into her care. I cannot infer that its effect was to invest the grandparents with the rights of which the termination order, made almost simultaneously, clearly deprived them.

72. Lady Hale suggests at para 59 above that the corollary of the temporary contact order agreed on 22 February 2012 was the mother's acceptance that Karl should continue to reside temporarily with the grandparents. She also suggests that, had any dispute about his future been presented to it, a Lithuanian court would have directed that he should continue to reside with them pending its resolution. I agree with both of Lady Hale's suggestions but I do not accept the significance which she attaches to them. The search is for rights of custody in the grandparents. The mother's apparent concession that, presumably only for a few weeks, she should delay her removal of Karl from the home of the grandparents says nothing about rights of custody other than her own. And a court's usual concern to maintain a child in his existing environment pending its resolution of a dispute about his future reflects its usual inability to resolve a dispute immediately and a resultant concern that a child's initial move might later fall to be reversed. Take a father without parental responsibility who, following a period of contact, refuses to return an adolescent child to the mother on the basis that the child refuses to return to her. A court in the UK is likely to order the mother not to seek to remove the child from the father's home pending its urgent inquiry but it does not thereby invest the father with anything which in Convention terms could be described as rights of custody.

73. Lady Hale has conducted a valuable *tour d'horizon* of the doctrine of inchoate rights and concludes that it is by reference to the doctrine that the grandparents establish that on 12 March 2012 they had the requisite rights. I will explain why I agree with much, but not all, of Lady Hale's analysis of the doctrine. But it will be essential to bear in mind that, as Lady Hale accepts at para 24, the inchoate rights must be rights *of custody*. Can the inchoate rights of a child's carer to prevent, for a few weeks, his removal by a person who on any view had rights of custody amount to inchoate rights of custody? In my view the closest scrutiny falls to be given to any deconstruction of the doctrine which yields an affirmative answer.

74. Article 3 of the Convention provides that rights of custody " may arise in particular" in any of three ways, namely by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of the state of the child's habitual residence: see para 19 above. Article 2.11 of the Regulation provides that rights of custody are acquired in any of the same three ways, albeit described in slightly different terms, but it omits the words "may arise in particular": see para 21 above. My view is that the omission was deliberate. I infer that it reflects a study of Convention jurisprudence which gave no support for the view that rights of custody could arise otherwise than in one of the three ways and therefore a conclusion that the words were redundant and productive only of confusion. At all events my view is that the doctrine of inchoate rights, first articulated in the courts of England and Wales, reflects a legitimate application of the third of the prescribed ways in which rights of custody may arise, namely by "an agreement having legal effect…". Usually the agreement will be express and if, as Professor Perez-Vera explains in the passage of her report quoted at para 34 above, it provides a basis for presenting a legal claim to the competent authorities, it will have the requisite legal effect. Even in the absence of an express agreement, however, it may, in certain unusual circumstances, be proper to infer from the conduct of a person with rights of custody that she (or he) has agreed that another person should not just help to care for the child nor even care single-handedly for him but should have rights of custody over him. If in those circumstances there is a likelihood that, had it been asked to do so, a court in the state of habitual residence would have given legal effect to the inferred agreement by investing that other person with rights of custody, one can properly conclude that that other person had rights of custody – even though they were inchoate. The words of the Regulation seem to me to allow no wider principle.

75. The crux of Lady Hale's judgment lies in para 59 above, where she identifies five requirements which must be satisfied before persons can be held to have had inchoate rights of custody. She says:

(a) that they must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child;

(b) that they must not be sharing these responsibilities with the person having a legally recognised right to determine where the child shall live and how he shall be brought up;

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

(d) that there must be some form of legal or official recognition of their position in the country of habitual residence; and

(e) that 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.

76. Respectfully, I agree with (a), (b) and (c) above; discern no logical need for (d); and disagree with (e). In my view (e) sets the bar too low. For it fails to reflect the fact that the search is for rights of custody (defined in article 2.9 of the Regulation as including in particular the right to determine the child's place of residence) rather than a right to continue to care for a child in a specified place on an interim basis pending the resolution of proceedings. So my formulation of the requirement at (e), which I would re-label as the requirement at (d), would be that there is a likelihood that, had it been asked to do so, a court in the state of habitual residence would have inferred from the facts in (a), (b) and (c) an agreement that the carers should have rights of custody and would by virtue of the agreement have proceeded to invest them with such rights.

77. It is also important to remember, as Reunite points out, that the inquiry is not into whether the carers had at some earlier stage had rights of custody but whether they had them at the time of the child's removal. In my view it follows that the facts required at (a), (b) and (c) must have existed immediately prior to the removal and that the hypothesis at (d) is of an application to the court at that same point. No doubt the unilateral removal of the child amounts to revocation of the requisite agreement but the inquiry is of course into its subsistence immediately prior thereto.

78. It will be easy to understand the basis of my conclusion that the grandparents in the present case had no inchoate rights of custody on 12 March 2012 nor at any time after 20 February 2012. In respect of the period from that date onwards it cannot be said, for the purposes of the fact required at (c), that the mother abandoned Karl; and I doubt that it can be said that she was continuing to delegate his primary care to the grandparents. On any view, however, no court at any time after 20 February could have inferred an agreement on her part that the grandparents should have rights of custody or, by virtue of any agreement, could have invested them with such rights. I am clear that the Lithuanian authorities were correct to advise the grandmother immediately after Karl's removal that she had no rights in respect of him.

79. There is no need for this court to shoe-horn into the Convention a case, like the present, which (so I consider) does not naturally fit into it. The risk is that it thereby distorts the domestic jurisprudence relating to the Convention; sets it at odds with the international jurisprudence; and compromises the need for a swift and straightforward inquiry into the existence of rights of custody. I would develop Lady Hale's "final comment" in para 64 above. The grandparents' case was tailor-made for a prompt application for an order for Karl's immediate return to their care pursuant to the inherent jurisdiction of the High Court recently reaffirmed by this court in *In re L (A Child) (Custody: Habitual Residence)*, [2013] UKSC 75, [2013] 3 WLR 1597, at para 28 (Lady Hale). The court's inquiry would then have been into the best interests of Karl but – who knows? – its early conclusion might well have been that they were served by his immediate return to Lithuania on the basis that, irrespective of whether they retained jurisdiction under the Regulation, its courts were better placed to conduct the full inquiry.

80. The unsuitability of the present proceedings is further exemplified by the unusual order which Lady Hale proposes, namely that the mother should be afforded a limited opportunity (a) to seek to raise a defence under article 13 of the Convention to the grandparents' application for an order for Karl's return to Lithuania and (b) therefore also to apply to the High Court for a stay of the order for return which, so Lady Hale concludes, this court should make.

81. This court would, I respectfully suggest, turn elementary procedural rules on their head if it were to indorse the possibility that a defence to an application might be raised notwithstanding that an order granting it had already been made. Were the possible defence apt, I would have expected this court to decline to make the substantive order for Karl's return and to remit the grandparents' application for re-determination in the light of this court's rulings. But would such a defence be apt?

82. The basis of it is the following submission of the Official Solicitor:

> "It …did take almost one year before the grandparents made the application under the Convention and now another year has passed. If this Court decides the case by recognising [that] a "wrongful removal" has taken place, there should be a reconsideration of the child's position and the effect of another move upon him after two years of living with his mother and family, including a half sibling. Expert evidence may be necessary and further enquiries can be made on behalf of the child about re-establishing relationships with his home country, his grandparents and how he feels now."

In other words the Official Solicitor unsurprisingly calls for a welfare inquiry prior to any return of Karl to Lithuania. The court's proposed response is that the only possible vehicle for inquiry would be a contention on the part of the mother pursuant to article 13 of the Convention that there is a grave risk that Karl's return would expose him to psychological harm or otherwise place him in an intolerable situation and, conceivably also, that he objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views.

83. I consider, however, that the identified vehicle is not fit for its purpose. Article 11.3 of the Regulation requires a member state to determine an application under the Convention expeditiously and, save in exceptional circumstances, within six weeks of its issue. The grandparents' application has already been on foot for more than a year. In my view it would be contrary to principle for the mother to be allowed at this stage to raise a defence which would apparently be based to a substantial extent on the consequences for Karl of the existing delay in determination of the application and which would be productive of significant further delay. The determination of an application under the Convention remains an exercise only in choosing the forum for the welfare inquiry in accordance with its rules and a defence under article 13 impacts only on that choice. Irrespective of whether the mother could now establish the facts specified in article 13, the ultimate determination of the grandparents' application, if reopened, can only be either that Karl should be returned to Lithuania (where it would surely now be increasingly difficult to conduct the welfare inquiry) or that he need not be returned to Lithuania (being an order which would entirely fail to address what at first sight is the most glaring shortcoming in the current arrangements for Karl, namely the absence of contact between him and the grandparents).

84. On my analysis of inchoate rights of custody, the way forward would, by contrast, have been clear. If, as I consider to be the case, the grandparents lacked rights of custody on 12 March 2012, their application would correctly have been dismissed. Under article 16 of the Convention the dismissal would have opened the door to an entitlement in the High Court in Northern Ireland to conduct a welfare inquiry in respect of Karl. The grandparents would therefore have proceeded to seek leave to apply for an order for contact, or if so advised for an order for residence, in respect of Karl under article 10 (2)(b) of the Children (Northern Ireland) Order 1995, 1995 No.755 (N.I.2).