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[27/11/1992; High Court of Ireland; First Instance]
C.K. v. C.K. [1994] 1 IR 260; [1993] ILRM 534; [1994] 1 IR 268; [1993] 2 Fam. L.J. 59

IN THE HIGH COURT

27 November 1992

Denham J.

In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991 and in the matter of P.K. and C.K., Infants, C.K., Plaintiff, v. C.K., Defendant [1992 No. 818 Sp. Ct. 6]

Counsel: Cormac Corrigan for the plaintiff; Dervla Browne for the defendant; Solicitor for the plaintiff: Cora Grainne O'Mahony; Solicitor for the defendant: Sean Cregan.

Denham J.The plaintiff wife in this action seeks an order under Part II of the Child Abduction and Enforcement of Custody Orders Act, 1991, for the return forthwith of the infants P. and C. to the Commonwealth of Australia.

This case raises some very important issues, but also it is an extremely urgent matter of its very nature. Consequently I am giving my decision in that time frame, so that the children who are innocent parties in this action will not be harmed by delays caused by the legal process.

Legal history

The plaintiff, the defendant and the two children in issue are Irish citizens. The plaintiff and defendant were married in March, 1981, in Dublin. The two children are children of the marriage. P. was born in December, 1985, and C. was born in February, 1988. The plaintiff and defendant lived and worked in Ireland. However, they decided to go and live in Australia which they did in February, 1989. They planned to stay in Australia until their eldest child would finish primary school, and then return in Ireland to enable him to attend secondary school in Ireland, in about 1996. In Australia the plaintiff and defendant have residency status and both initially got employment as sales representatives. In January, 1990, they purchased a home at Lawlor Park, Sydney, and the children went to the local pre-school and St. Bernadette's primary school respectively. In 1991 the defendant returned home for three weeks owing to the death of his father. He had not settled well in Australia and the plaintiff felt he might settle back if he had a visit to Ireland.

In mid-1991 the relationship between the plaintiff and the defendant deteriorated. In January, 1992, the plaintiff was promoted. Her career blossomed and she is doing very well taking home $550 Australian dollars per week. Unfortunately the defendant was not so lucky. While he has had two sales representative jobs he was unable to pursue a career of his original choice as a sales representative but has taken up driving a taxi, which became a permanent job early this year. It has meant long hours, 60 to 70 hours work per week, which also have not been very remunerative financially. The plaintiff has travelled in her job to conferences and meetings. Since 1989 she has been on five such conferences of approximately one week each. She also went on a trip to Hong Kong which was a prize she won for her success in her job, the defendant went with her on that holiday. The major financial support of the family has been the plaintiff. She was contributing $550 Australian dollars per week to the home this year. The defendant has not been contributing

to the payment of the mortgage and was contributing $60 to $100 Australian dollars per week to the household.

In February, 1992, the plaintiff told the defendant of her friendship with G.W. In June, 1992, the defendant by agreement left the family home and went to live with his brother and family in Sydney. The plaintiff considered that this was a permanent situation, but she did allow the defendant to believe that it was a trial separation. He was then still hopeful of a reconciliation. The children were left with the plaintiff in the family home. The defendant had access to the children easily and as he wished. In fact because of circumstances he did not take overnight access until the end of September, 1992.

In August, 1992, the defendant applied to the Australian courts for a custody order which was to be heard on the 8 September, 1992. He did this to try and show the plaintiff that he had rights to the children too and to let her imagine what his position was just visiting the children. On the 4 September he told the plaintiff that the application was withdrawn. There are no civil proceedings pending in Australia.

The friendship between the plaintiff and G.W. developed. Over June, July and August, 1992, he visited the plaintiff's home regularly. He stayed overnight on one occasion, and P. saw someone in the bed with his mother and later asked his father if he had been home and in bed with the plaintiff. G.W. is married with three children and I accept the plaintiff's evidence that it is planned that he will divorce his wife, that the plaintiff divorce the defendant, and that then the plaintiff and G.W. will marry.

In September, 1992, the plaintiff told the defendant that she was going to divorce him and marry G.W. and that G.W. was going to live with her and the two children in the family home from the end of September. The defendant was upset at this proposed divorce. He was and is concerned at the children living in the house with their mother and G.W. as "a live-in lover". He feels he knows nothing of this man, although they have known each other socially for over a year. He felt he could not offer the children a home in Australia. On the 14 September, 1992, he paid a deposit on tickets back to Ireland for himself and the two children. He planned to take the children overnight on the 30 September, 1992. On that day with no notice to the plaintiff he and the children flew to Ireland. On her return from work on the 1 October, 1992, the plaintiff expected the children to be returned, they were not, she got worried and ultimately discovered from the defendant's brother that the defendant had gone to Dublin, which was confirmed by the police.

She discovered two envelopes in the front of her car, one contained car keys and the other a note. The note said:-

"Dear C.,

I've tore up pages of explanations for what I've done. I think you will be fully aware of my reasons so there is no necessity to bore you with further details. I am sorry our lives have turned out like this. Nothing will convince me that we could not have worked things out but you obviously have had other plans. Whatever you decide to do I wish *you* good luck but I am sorry I can't say the same for you and G.

You will know where to contact me.

Love

C."

The defendant is living with his mother in Dublin with the two children, they are going to school locally. He is unemployed.

The plaintiff has arranged leave from her job to come to Ireland to make this application. Her leave has had to be extended because of the time this case has taken to get on and because of the length of the hearing. She is concerned that if she applies for further leave that it will endanger her job. The plaintiff wishes to return to Australia with the two children, to return them to their previous routine, to the pre-school for C. and to St. Bernadette's primary school for P. She indicates that she will be unable to pay the mortgage but plans to rent a house in the same locality. She plans to return to her job.

The defendant plans to stay in Ireland. If the plaintiff's case succeeds he may return to Australia. He has two brothers in Sydney at present. The defendant did the necessary paperwork on leaving Australia with the two children to ensure that he and the children could re-enter Australia.

In this case I had the benefit of the affidavits of the plaintiff and the defendant and their cross-examinations. In addition, as an exercise of my discretion, I allowed some additional oral evidence from the plaintiff and the defendant given with a view to counsel for the defendant arguing the "welfare of the children" ground of this case. I was impressed with the evidence of the plaintiff. I am satisfied that she has solely the interests of the children at heart. She indicated and I believe that if she were not to succeed in this application she would give up her job in Australia, and return to Ireland, and seek the custody of the children here. ***Law***

The relevant law is to be found in the Child Abduction and Enforcement of Custody Orders Act, 1991. This is an Act *inter alia* to give the force of law to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on the 25 October, 1980, and to provide for matters consequent thereupon. Under s. 6 of the Act "the Hague Convention shall have the force of law in the State". The Convention on the Civil Aspects of International Child Abduction commences:-

"The States signatory to the present Convention

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions-

Article 1

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the 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 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.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 12

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds 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 its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 20

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

Counsel for the plaintiff submits that all the formal requirements set out in the Convention have been met and that the two children should be returned to Australia.

The case for the defendant was threefold. First, counsel for the defence submitted that the children were not "habitually resident" in Australia; but conceded that if the court finds that they were habitually resident in Australia that they were wrongfully removed. Secondly, it was argued for the defendant that to return the children to Australia would be in breach of Article 13 (b) of the Convention. Thirdly, counsel argued that Article 20 enables the court to hold an enquiry into the welfare of the child. She submitted that in this case there should be an investigation into the welfare of the children, and that the court should be satisfied that the welfare of the children would be best served by returning them to Australia before so doing.

The first issue to determine is the "habitual residence" of the children. The term "habitual residence" is not defined in the Act of 1991. In *Leckinger v. Cuttriss* (Unreported, High Court, 9 July 1992, Blayney J.), at issue was a similar application under this Act. The court there approved of the judgment of the President of the Family Court Division of the English High Court in *V v. B (A Minor) (Abduction)* [1991] 1 F.L.R. 226, which equates "habitual residence" with "ordinary residence". However, even if the test is not similar to "ordinary residence" it appears to me on the facts that the children here were ordinarily and habitually resident in Australia. They had been there by agreement since 1989. It was originally planned to stay until 1996. They were settled in primary school, in a home which the parties had purchased. I have no doubt that they were habitually resident in New South Wales, Australia. Thus this ground of the defendant's case fails. It was conceded that if the children were "habitually resident" in New South Wales then they were wrongfully removed.

The second ground of the defendant's case is that the children should not be returned to Australia on the grounds of Article 13 (b) of the Convention. On the evidence I am satisfied that the reason the defendant abducted the children and returned to Ireland was because G.W. was living in the family home with the plaintiff and the two children. The defendant was jealous, he had not yet come to terms with the break-up of the marriage, and he objected to the children living in such a situation. For the purpose of this case the kernel fact is the presence of G.W. in the home with the two children. G.W. was known to the children, there is no evidence that he will cause them harm, there is no evidence that it causes them distress. The question then is whether it will be morally and/or psychologically bad for the children to have present in their home G.W., who is not at present their stepfather although he may become so in the future. This court has not had the benefit of evidence from G.W., nor of a psychological assessment of the children as a court would have if it were a custody hearing. Thus this court does not know of the relationship of G.W. with his wife and family and does not know if the relationship between G.W. and the plaintiff has the potential to succeed or is unstable and insecure. The court has been told that G.W. is not a Catholic which is the religion of the plaintiff, the defendant and the two children.

The test for this court to apply under Article 13 (b) is whether there is "a grave risk" that the return of the children to the plaintiff to their home in Australia "would expose the children to physical or psychological harm or otherwise place the children in an intolerable situation." The test must be read as a whole. Thus the question is whether the presence of G.W. in the children's home would put them in an intolerable position by exposing them to physical or psychological harm. There is no evidence that they will be subjected to physical harm, thus the sole question is one of psychological harm. There is no case law in this jurisdiction on the meaning of the words in Article 13 (b) which states:-

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that- . . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

In *Re A (A Minor) (Abduction)* [1988] 1 F.L.R. 365 the Court of Appeal in England considered these words. Nourse L.J. said at p. 372:-

"I agree with Mr. Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the *eiusdem generis* rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view."

This is a reasonable test, and I adopt it. There is no evidence before this court that the children will suffer psychological harm if returned to Australia, although it is argued that the presence of G.W. in the home will be morally and psychologically damaging to the children. Whereas there is the moral question to be considered I do not consider that such a ground in the circumstances of this case would alone, on the facts before this court, invoke Article 13 (b). As to whether G.W.'s presence will expose the children to psychological harm there is no clear evidence that that is the case. I find as a fact that the children know G.W., that they have known him at least since February, 1992, that he was a regular caller to their home in June, July and August, 1992, that he stayed overnight on one occasion and this court has no basis upon which to determine that G.W. would expose the children to psychological harm.

However, the court has not had the opportunity of hearing evidence from G.W. This hearing is not a full hearing, as is a custody hearing, with the circumstances of the children's daily life. This is a summary procedure. The plaintiff has sworn in evidence that she would give an undertaking to this court that G.W. would not live with her and the two children in the family home, or wherever they might live, prior to custody proceedings in New South Wales. Whereas I have some concern about taking an undertaking which cannot be policed by this court I consider it in keeping with the policy of this Act that there can be communication between the courts of countries applying this Convention, between the returning court and the court which will decide the custody issue; further, that there can, and should, be communication between the Central Authorities. On the facts of this case, if G.W. were not to be in the children's home in New South Wales with the plaintiff pending the custody proceedings in New South Wales, then there would be no reason to consider Article 13 (b), let alone invoke it. There is no evidence before this court that G.W. will be a threat of any sort to the children, although the presence of him in their home is an issue for the court which will determine custody. There are no other facts on which Article 13 could be even raised as a reasonable challenge to the return of the children to their "habitual residence".

In accordance with Article 13, counsel for the defendant urged this court to hear P., arguing that he is a bright mature child. The case was made that he did not want to go back to Australia. I spoke to P. in my chambers. He is a very intelligent, articulate and sensitive boy who will be eight next week. It was clear to me from my interview with him that while he would be happy to live in Ireland with his father he would be equally happy to live in Australia with his mother.

The third ground of the defendant's case was the "welfare" argument. Ms. Browne for the defendant submitted that Article 20 of the Convention allows this court to apply Irish fundamental principles; that it is a fundamental principle of Irish law that a child has a right to have its welfare vindicated and protected by this court; that it is also a fundamental principle that the defendant

has a constitutional right to litigate the issue of custody before this court.

She argued that the Act of 1991 must be interpreted as being that Article 20 adds to this Act for this court the test that the welfare of the child is of paramount importance as that test is the fundamental law of the Constitution, the Guardianship of Infants Act, 1964, and case law in this jurisdiction. She cited extensive case law in custody and adoption cases which set out that the fundamental law for the court is the fact that the welfare of the child is paramount. She argued that the mere fact that the Act is mandatory does not remove the welfare test from the legislation; that on the welfare test the court should be concerned because:-

(a) G.W. will be in the house residing with the two children. This may be a moral threat. It also raises the question of a psychological threat to the children.

(b) The parents of the children will be on two different continents with consequences for the children.

(c) The religious welfare of the children; the religion of G.W. is not known.

(d) The absence of knowledge about G.W. could be a physical threat to the children. It was pointed out that there is no knowledge of his relationship to his family.

(e) The social welfare of the children is called into question because they will be living in an unstable and insecure household.

(f) If the children are removed they will be deprived of secondary education and residence in the country of their birth.

(g) If the children are removed they will be deprived of the benefits available to them by residing in this country.

It was argued that whereas in the normal case under the Act of 1991, the Act would require the children to be returned to the place of their habitual residence, however where the issue of welfare of the children is raised then the court must consider the children's welfare; and must hold a full plenary inquiry as to the children's welfare, which would in this case include a psychological assessment.

I did not consider the Dail Reports in this case in interpreting the Act. In *Bourke v. Attorney General* [1972] IR 36, the *travaux preperatoires* to the European Convention on Extradition were cited. The words in issue here are those of the Hague Convention. The *travaux preperatoires* of this Convention were not offered. The words were not drafted in or for the Dail, but for the Convention. In considering this legislation I have applied the usual rules as to construction of Acts.

In considering this legislation and the arguments thereon I have arrived at a number of conclusions:-

1. The Act of 1991 does not specify that the welfare of the children is the first and paramount consideration as is set out in the Guardianship of Infants Act, 1964.

2. Most of the cases to which counsel for the defendant referred me were cases under the Guardianship of Infants Act, 1964, and the Adoption Acts, 1952 to 1988, where the welfare of the child is the first and paramount consideration under the relevant statutes.

3. Section 13 of the Act of 1991 sets out that certain proceedings must be stayed if proceedings under the same Act are in being or pending. This sets out the clear policy of the Act that proceedings under that Act have precedence over the stayed proceedings. The specific proceedings mentioned are custody or access order under the Guardianship of Infants Act, 1964; an order

under Part II or Part IV of the Children Act, 1908, relating to the care of the child; and recognition or enforcement of a decision relating to custody under Part III of this Act. Not specifically mentioned are proceedings relating to guardianship or the upbringing of an infant under s. 3 of the Guardianship of Infants Act, 1964. I am satisfied that the clear intention of the system established under the Act and Convention is that issues of custody and access be stayed pending an application relating to the abduction of a child under this Act and thus implying that custody and access are not for the court in this application or proceeding. Consequently this court does not consider the issues of access or custody.

4. Counsel for the defendant conceded that the question of custody was not for this court but argued that the concept of welfare of the child was; and that if this court so found that there would then have to be an inquiry into that issue. This would also involve an assessment of the children and an inquiry into facts to see if *prima facie* there was disclosed a risk of psychological harm which would require psychiatric assessment. If Ms. Browne is right in her submission it means that this court in exercising its jurisdiction under the Act should in certain circumstances also hold an additional inquiry. If this is the true construction then it sets at nought the procedures of the Act of 1991 in such cases as in fact what would happen would be that in addition to the procedures set out in this Act there would be a hearing identical to a custody hearing.

5. What factors would require the court to demand such an inquiry into the welfare of the child? The Act does not state. Counsel argues that it is only in appropriate cases that this matter arises, such as this case, and she raises matters which alert the court to the necessity for this inquiry as:-

(i) if the children are removed it will deprive them of their grandparents and their family here;

(ii) if the children are removed it will deprive them of secondary education in this jurisdiction;

(iii) to return them to a home with G.W. therein would be a moral threat to the children;

(iv) to return the children to Australia will result in the parents being on separate continents;

(v) to return the children to Australia will impinge on their religious welfare as G.W. is not of their religion;

(vi) to return the children may be a breach of the physical welfare of the children;

(vii) to return the children to a home with their mother and G.W. would be to return them to an unstable and insecure household.

I am satisfied that the Act of 1991 does not require an inquiry to be launched in addition to the procedures under that Act on foot of the above seven matters; this is so especially in light of the plaintiff's undertakings in relation to G.W. Primarily I am satisfied that the Act does not require such an inquiry. The Act protects the children in Article 13 and in Article 20. If these Articles come into play then the children must not be returned. Thus in *Greene v. Greene* (Unreported, High Court, 12 November, 1992) Costello J. refused to make an order returning the children to England on the grounds of Article 13 (b). Flood J. also refused to return children in *A. (M.) v. R. (P.)* on the 23 July, 1992.

In this case there is no factor established which indicates that there is a grave risk or that the children's return would expose the children to physical or psychological harm or otherwise place the children in an intolerable position.

6. Do Article 20 and our Constitution require that there be such an additional inquiry if the issue of the welfare of the children is raised in such cases? Article 20 specifically states in the Act that the return of the children may be refused if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental

freedoms. This states the *de facto* and *de jure* situation in this jurisdiction. The Act of 1991 could not, and does not, deprive the children of any constitutional right. The Act is presumed to be constitutional, and should be read to encompass existing constitutional rights.

The question then to determine is whether the Constitution would require that this court hold an inquiry into the welfare of the children. Ms. Browne cited *G. v. An Bord Uchtala* [1980] IR 32 and *In re J.H., an Infant* [1985] IR 375 in support of her argument that the children have a constitutional right to such an inquiry, that they have a constitutional right to have the concept of their welfare as the first and paramount consideration in this case. Both such cases relate to the Guardianship of Infants Act, 1964, and the Adoption Acts where the welfare is in issue specifically. However the court did enumerate the personal right of a child. In *G. v. An Bord Uchtala* [1980] IR 32 Finlay P. in the High Court stated at page 44:-

"[the child] . . . has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to her religious, moral, intellectual, physical and social welfare. The State, having regard to the provisions of Article 40, s. 3, sub-s. 1, of the Constitution, must by its laws defend and vindicate these rights as far as practicable."

In the Supreme Court O'Higgins C.J. stated at pp. 55 and 56:-

"The child also has natural rights. Normally, these would be safe under the care and protection of its mother. Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State."

Walsh J. at p. 69 also cited the rights of the child:-

"The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such. I wish here to repeat what I said in *McGee's* case [1974] IR 284 at p. 312 of the report:- . . . any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question.' In these respects the child born out of lawful wedlock is in precisely the same position as the child born in lawful wedlock."

In *In re J.H., an Infant* [1985] IR 375, the Supreme Court was again construing the Adoption Acts and the Guardianship of Infants Act. Both cases were interpreting the Adoption Acts and the Guardianship of Infants Act and stating constitutional principles. None of this is undermined by the operation of the summary procedure in this Act. The defendant has not indicated that any constitutional right of the children will be breached if they are returned to Australia. He has not shown that Australian law would not hold an adequate inquiry into the custody of the children.

The legislature has determined that this Convention as between Ireland and Australia have the force of law in the State. A policy decision was also taken by the executive arm of government. This legislation was enacted by the legislature. There has been no fact before this court which establishes that such summary procedure would breach a constitutional right of the children. Article 20 specifically enables such a case to be made by the defendant. He has not done that. He has not made the case that the procedures in Australia would not be adequate. He has argued that

there must be an inquiry here as to the children's welfare. The only implication one can draw from this argument is that the Australian court would not adequately inquire into the welfare principle. The defendant has not made this case overtly and it is not for this court to accept such a case by implication.

The Act of 1991 introduced a new procedure. The cases on the Guardianship of Infants Act and the Adoption Acts are of limited relevance to the new procedure. The Act of 1991 is presumed constitutional. There is no evidence in this case which establishes a breach of a constitutional right of the children. Article 13 and Article 20 enable such matters to be raised in the procedure under the Act. The defendant thus has the opportunity to raise them. If, on their being raised, there is evidence of a breach of a fundamental or constitutional principle then the children would not and could not be returned to Australia. The court has not had evidence of a human right or a fundamental freedom or a constitutional right of the children which would be breached by the return of the children to New South Wales in Australia. The court has no evidence that custody proceedings in New South Wales would breach a constitutional right of the children.

The preamble to the Convention clearly states that the interests of the children are of paramount importance in matters relating to their custody. This is a clear statement of a fundamental principle. The preamble then sets out a policy decision by the executive which was made in ratifying the Convention that in effect to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence as well as to secure protection for rights of access, the provisions set out therein were agreed.

Any excessive delay or inquiry into this process by which the children are returned to their habitual residence only serves to defeat the objectives of this Act. The Act is to protect children from being wrongfully removed from the place of their habitual residence. The corollary is that custody should be determined by the courts of that country. This is done with the welfare of the children in mind. This concept of welfare is the foundation of the Act of 1991. There is no evidence that it is in conflict with any rights of the children herein under the Constitution.

Consequently I am satisfied that Article 20 of the Convention does not require, nor does the Constitution, or the facts of this case, that there should be an additional inquiry into the welfare of the children. Article 13 (b) protects the children's basic rights, as does Article 20. On the evidence herein there is no evidence that either have been breached. If there was evidence before this court of a breach of the children's constitutional rights (being the Irish law setting out the fundamental principles relating to the protection of human rights and fundamental freedoms) then the children may not be returned to Australia. The Constitution does not require that an additional inquiry specifically relating to the welfare of the children as defined in the Guardianship of Infants Act, 1964, be held in this case in addition to the jurisdiction set out in the Act of 1991.

Conclusion on this case

(1) The plaintiff has met the formal proofs of the Act of 1991.

(2) The children are "habitually resident" in New South Wales, Australia, and were wrongfully removed from there.

(3) There is not a grave risk that the return of the children would expose the children to physical or psychological harm or otherwise place them in an intolerable position. As regards the eldest child, P., I am satisfied on interview that a return to New South Wales would not upset him unduly.

(4) There is no evidence that a return of the two children to New South Wales would be in breach of their constitutional rights.

(5) The plaintiff therefore succeeds in her application and I make an order under Part II of the Act of 1991 for the return forthwith of the two children to the Commonwealth of Australia; the said order to recite the undertaking of the plaintiff that, pending custody proceedings in New South Wales, G.W. will not live in the home of the plaintiff and the two children. This order is to be brought to the attention of the relevant court in Australia and for that purpose a copy of this order is to be furnished to the Central Authority here for the purpose of being sent to the Central Authority in New South Wales, Australia, and in addition a copy of this order is to be sent to Mrs. Paula Marie McNamara, 164, Liverpool Road, Ashfield, New South Wales, Australia, who is employed by the Department of Community Services which is the Central Authority for New South Wales, and who knows of this application.

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