**Judgment Title:** Nottinghamshire County Council v B.

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**Composition of Court:** Denham C.J., Murray J., Fennelly J., Macken J., O'Donnell J.

**Judgment by:** O'Donnell J.

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**THE SUPREME COURT**

**[Appeal No: 026/2010]**

**Denham C.J.**
**Murray J.**
**Fennelly J.**
**Macken J.**
**O'Donnell J.**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991**

**AND IN THE MATTER OF THE HAGUE CONVENTION**

**AND IN THE MATTER OF COUNCIL REGULATION 2201/2003**

**AND IN THE MATTER OF A.B. AND S.B. (CHILDREN)**

**BETWEEN**

**NOTTINGHAMSHIRE COUNTY COUNCIL**

**APPLICANT/RESPONDENT**

**AND**

**K. B. AND K. B.**

**RESPONDENTS/APPELLANTS**

**AND**

**HEALTH SERVICE EXECUTIVE**

**NOTICE PARTY**

**Judgment of O'Donnell J. delivered the 15th December 2011**

1. The Appellants are a married couple and are mother and father of the two children the subject matter of these proceedings. Until early November 2008, the family had lived in England and, it appears, had no prior connection of any kind to Ireland. The local authority, Nottinghamshire County Council ("the Council") had become concerned about the treatment being afforded to the children. Proceedings were commenced by the Council on the 5th November 2008 and served upon the Appellants. On the evening of the 6th November 2008, the Appellants removed the children from England to Ireland. The children are now in the care of the HSE. The Council brought an application pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (The Hague Convention 1980) ("the Convention") and Article 11 of Council Regulation 2201/2003 ("the Regulation") for the return of the children to the jurisdiction of the Courts of England and Wales. Until this Appeal, the parents had always represented themselves. On this Appeal they were represented by a solicitor, and senior and junior counsel.

**The Single Issue in this Appeal**

2. Although a number of issues were canvassed in the High Court, it is necessary to emphasise that on this appeal only one issue was pursued by the Appellants, namely that it was contended that this Court should refuse to order the return of the children pursuant to Article 20 of the Convention. As will be seen however, that single issue has given rise to a number of arguments of some complexity. The Court has already announced its decision to dismiss the appeal. This judgment gives the reasons for that decision.

3. The Appellants' case on this appeal was that the Court could, and indeed should, refuse to return the children pursuant to Article 20 of the Convention which is now part of Irish domestic law by virtue of the provisions of the Child Abduction and Enforcement of Custody Orders Act, 1991. Article 20 provides:

> *"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."*

4. The parents' case was that they, together with their children, constituted a family for the purposes of Article 41 and 42 of the Irish Constitution and that return of the children would be in breach of those provisions of the Constitution because the law of the United Kingdom permitted adoption of the children of married couples in circumstances which would not be permitted in this jurisdiction by virtue, it was said, of the constitutional rights afforded to families under the Irish Constitution.

The factual basis for this claim was that since 2002, the law of the United Kingdom adopts what has been described as a "single track approach" which requires that the issue of adoption is capable of being addressed as part of the care proceedings so that the Court may, if it considers appropriate, make an adoption order in such proceedings. In this case, the Appellants pointed specifically to the provisions of form PL04 which is required to be completed in every case in which childcare orders are to be made. One part of that standard form contains the provision: *"this is/is not a case where an application for placement for adoption is among the range of options that will have to be considered"*. In this case, the words *"is not"* had been deleted so that the form in the printed form read

*"this is a case where an application for placement for adoption is among the range of options that will have to be considered"*. It was said that by virtue of the protection afforded to the family based on marriage by the Irish Constitution, adoption – which necessarily involves the permanent termination of one family and the creation of another – would not be permitted in such circumstances. Instead the elaborate procedures provided under the Adoption Act 1988 were the only circumstances in which adoption of children of a married couple could be contemplated by the Irish Constitution.

**The High Court Decision**

5. In the High Court, the trial judge addressed this issue (as well as a number of issues which are no longer in controversy). She had regard to an affidavit of laws which had been submitted on behalf of the Council. That affidavit, sworn by a solicitor in the legal services division of the Council, reviewed the developments in English law and in particular, the provisions of the Adoption and Children Act 2002 which came into force at the end of December 2005. It was said that as a matter of practice, local authorities were now enjoined to consider twin tracking care and placement applications so that the Court could consider a possible disposal by way of adoption at the same time as determining the application for a care order, hence the terms of PL04 referred to above. The solicitor also stated:

> *"In general the English Courts are supportive of local authority adoptive plans where a clear case for adoption is made. This means that the local authority proposing adoption must demonstrate that all other means for providing for the needs of the child in a safe, enduring and legally stable environment have been explored and discounted. The 2002 Act does not create a hierarchy of placement choices but the judicial expectation is that adoption is to be treated as the outcome of last resort."*

6. The High Court judge considered that having regard to this evidence and the factual evidence in relation to the nature of the status of the application before the English Court, that adoption of the children in this case was no more than a *"possibility"*, rather than the object of the application itself. In the circumstances, the trial judge considered that it could not be said to be contrary to any fundamental principle of Irish constitutional law to order the return of the children.

7. In this Court, the Appellants were legally represented for the first time. The Attorney General also appeared through counsel. For the most part, the arguments made in this Court did not focus on the relatively narrow ground upon which the High Court judge rested her decision. Instead, much of the argument involved the assertion of broad principles which it was contended applied to cases where the provisions of the Irish Constitution and in particular, the restrictions which Articles 41 and 42 are contended to place upon the adoption of children of a married couple, are invoked to justify the non return of a child under Article 20 of the Hague Convention.

**The Appellants' Arguments**

8. For the Appellants it was contended that there was a constitutionally protected right not to have the future care of children of a family determined in a judicial setting which did not provide the same constitutional protections to the family as was provided by Articles 41 and 42 of the Irish Constitution. The Appellants also argued that even if this broad proposition was not accepted, that the adoption of children of married parents was permitted in England in circumstances where such an adoption would not be permitted by Irish constitutional law and that accordingly the rights of the family in this regard would be breached if adoption was an option. Finally the Appellants argued that the option of adoption was more than a mere possibility in this case, and that in the light of the form PL04 there was a real risk of such adoption. The parents placed particular reliance in these arguments on the interlocutory decision of the High Court in *Northampton County Council v ABF & MBF* [1982] ILRM 164. Even from this limited summary, it is clear that any of these arguments if accepted would have profound consequences for the operation of the Hague Convention in respect of children brought to Ireland, particularly from England and Wales, but also from any country which did not share the restrictions on adoption of children of married parents

alleged to be contained as a matter of constitutional law in the law of Ireland.

**The Response of the Council and Observations made on behalf of the Attorney General**

9. The Council and the Attorney General responded with arguments which were at times almost as far-reaching as those of the Appellants. For their part, both parties laid particular stress on a short judgment of the Supreme Court in the decision in *Saunders v Mid Western Health Board* (unreported, 26th June 1987). The Council and the Attorney General contended that this case was authority for denying to the Appellants the right to invoke any provision of the Irish Constitution, or at least the provisions of Articles 41 and 42, since as was common case, the Appellants had no prior connection with Ireland and since furthermore it had been determined that they had brought their children to Ireland "wrongfully" within the meaning of the Hague Convention. Since there were care proceedings pending at the time the Appellants brought their children to Ireland, the children had been removed in breach of their right to custody of the Court, according to the jurisprudence of the Convention.

The Council also took issue with the generalisation advanced on behalf of the Appellants in relation to both the laws of the United Kingdom and the interpretation of the Irish Constitution. It was contended that the approach in the Courts of England and Wales was not so different from that in this jurisdiction. The views of the family were given great weight and as already observed, adoption was treated as a remedy of last resort. On the other hand, it was also pointed out that the Irish Constitution did not absolutely prohibit adoption of a child of married parents. It was suggested that the difference was a matter of degree rather than principle and that accordingly, it could not be said that the return of the children would not be permitted by any fundamental principle of Irish law.

**Two Further Arguments**

10. On behalf of the Attorney General, two further arguments of broad application were advanced. First, it was argued in oral submission that Article 20 of the Hague Convention was significantly affected by the provisions of Council Regulation 2201/2003 (Brussels II R). It was argued that Article 10 of that Regulation dealt with jurisdiction in cases of child abduction and conferred jurisdiction upon the courts of the habitual residence of the child (subject to the possibility of transfer under Article 15 by that court to a court *"better placed"*). It followed therefore, that the courts of habitual residence would, or at a minimum could, make orders in respect of the children and that the jurisdiction to which the children had been brought would be obliged to comply with such orders. It was argued that under Article 60 of the Regulation, the provisions of the Regulation took precedence over the Hague Convention 1980 *"insofar as it concerned matters governed by this Regulation"*. While counsel was reluctant to press this argument to what seemed to be its logical terminus i.e. that Article 20 of the Hague Convention was no longer of effect in Irish law, at least as between citizens of member states of the European Union he did suggest that the Court in interpreting Article 20 of the Hague Convention should be aware of this interpretation of the Regulation. It should be said that the Council did not adopt this submission in relation to the effect of the Regulation.

11. Counsel on behalf of the Attorney General also argued that the principle of proportionality could be applied. Thus, even if the Appellants were entitled to invoke the provisions of Articles 41 and 42 and even if they and/or their children could be held to have rights under those Articles, any such rights were not absolute and could be restricted and controlled in the interests of the common good by proportionate means. It was argued that the return of the children to a jurisdiction with a highly sophisticated system of child and family law having at its core the best interests of the child constituted only a very limited interference with the constitutional rights of the respondent Appellants and could not be seen as disproportionate.

**The Importance of the Issues Raised**

12. It is apparent even from this account of the facts and arguments, that the case raises important issues as to the application of the Hague Convention in Ireland when reliance is placed upon the provisions of the Irish Constitution. The Hague Convention places an emphasis on speedy resolution of disputes in part because of the importance time plays in the life of the child, both in terms of a child's understanding of the passage of time and in relation to the relationships which a child develops. However these proceedings were in being for 15 months before the order of the 25th March was made in this Court. Yet these proceedings were advanced both in the Courts of this jurisdiction and those of England and Wales with both admirable efficiency and appropriate concern for the fairness of proceedings in which parties were not legally represented. A large part of the time spent in Court has been caused by the particular difficulties created when a claim is made that the Constitution prevents the return of a child to the jurisdiction of his or her habitual residence on the grounds of the possibility, probability, or even certainty of the adoption of the child in that jurisdiction. That is an issue which can arise, at least in theory, in almost any case in which the return of a child is sought when that child is, or is proposed to be, placed in care of a local authority, in a jurisdiction which adoption is permitted.

13. At the level of principle however, two separate issues of general application can be concerned:

> (i) In what circumstances does the Constitution have regard to and/or attribute legal significance, to events occurring abroad? In particular when can acts occurring abroad be said to be in breach of the Irish Constitution?
>
> (ii) When is a non citizen (or non resident) entitled to invoke the provisions of the Irish Constitution in an Irish Court?

14. However the Irish case law on the topic of the circumstances in which an objection can be made under the Constitution to the return of a child to another jurisdiction as, to date, addressed only fleetingly the wider issues just identified. The cases were decided under obvious pressure of time and each case is a decision on its own facts with little discussion of precedent. There is also little developed case law in other areas addressing these or similar issues. The academic commentary on this issue is also limited although the Court was referred to a helpful discussion by Professor William Binchy in a short article "The Importance of the Referendum to Constitutional Protection of Human Rights" (2004) 2 ILTR 154, 161, which builds upon matter discussed in the same author's book, Irish Conflict of Laws (1988). Even so, the discussion in the academic literature of the issues of general principle raised by the arguments of the opposing sides in this case is relatively limited

15. In the light of the limited authority and commentary and the relatively narrow range of authority cited in this case, it seems particularly inappropriate to attempt to seek to provide in this judgment the single all encompassing theory to which some of the commentary aspires. On the contrary, the approach suggested in this judgment is necessarily tentative, and may well require refinement in the light of more precise and focussed argument in particular cases. It will, I hope, be possible however to provide some guidance for Courts dealing, almost always under severe time pressure, with the difficult and distressing issues which arise in any action seeking the return of children to another jurisdiction.

**The Hague Convention of 1980**

16. The Hague Convention itself was adopted in 1980. Ireland decided to adhere to the Convention by decision of the Government made pursuant to its obligation to conduct the external relations of the country under Article 29.4 of the Constitution. The Convention in turn became part of Irish domestic law as envisaged by Article 29.5 by the enactment of legislation in the shape of the Child Abduction and Enforcement of Custody Orders Act 1991. The process of adherence to the Convention and ratification within Ireland was preceded by a comprehensive report recommending such course issued by the Law Reform Commission then chaired by Mr. Justice Walsh. In my view it is not insignificant that both of the other organs of Government have endorsed the provisions of the Convention which clearly enjoys the presumption of constitutionality.

17. In due course, the compatibility of the Convention with the Constitution was challenged, unsuccessfully, *in ACW v Ireland* [1994] 3 IR 232 where Keane, J. dismissed the claim inter

alia on the grounds that Article 20 of the Convention afforded adequate protection to the fundamental rights and freedoms set out in Articles 40-44 of the Constitution.

18. It is not difficult to see why the provisions of the Convention incorporated in Irish law were found compatible with the Constitution. The Convention provides a mechanism for the speedy return to the jurisdiction of the Irish Courts of children habitually resident in this jurisdiction – something which the Irish Courts could not readily enforce by virtue of their own powers alone, or by virtue of the comity of courts. More generally, the Convention recognises that decisions on the future care and custody of children are best made by the courts of their habitual residence which will normally have an understanding of the culture, conventions, mores and norms of the society in which the children (and in all probability their parents and relatives) have been resident. Childcare decisions are rarely straight forward and these nuances can be particularly important. Furthermore, the courts of the habitual residence of the child will have the additional benefit of reports and evidence from that country's social care system as well as familiarity with, and understanding of, the system producing such reports.

19. The Hague Convention also recognises that child abduction is a scourge which can cause untold distress to children and their parents and moreover, that it can be encouraged, or at least facilitated, by the uncertainties and delays that are an unavoidable feature of all legal systems. There is a strong belief that a court seeks to make its own determination as to the best interests of the child. In ordinary cases this does not pose any problem. It is different however in cases where a child is removed to a new jurisdiction. While there may be cases where it is possible to believe, at least at the level of principle, that a court to whose jurisdiction the child has been brought may be able to make just as good if not better decisions in relation to the care of the child than a court in whose jurisdiction the child may have resided perhaps only fleetingly, this theoretical possibility comes at a price that is too high to pay: the certainty that if the issue is raised and discretion given to the requested Court to make its own determination on the custody or care of the child, that all or nearly all cases can become mired in delay, which from the perspective of the child, can be devastating. Furthermore the chance that a court might find that after the passage of time the child's interests are now to stay in a situation where it has put down roots, creates an incentive for child removal, and gives the appearance of rewarding a parent for wrongful behaviour.

20. To this problem of the legal process the Hague Convention provides a legal solution. It was a remarkable achievement to persuade the countries participating in the Convention to accept the fundamental principle of speedy return of a child brought (wrongfully) to the jurisdiction of the court and without permitting that court to itself ascertain what it considered was in the best interests of the child. The Convention also embodies the salutary principle that a person who wrongfully removes a child from a jurisdiction should not obtain by default the benefit of that conduct. However, it is very doubtful that it would have been possible to achieve agreement on an absolute rule of immediate return which was incapable of adjustment in the particular circumstances of the case. Accordingly, the Convention provides for very limited exceptions to the principle of immediate child return. Under Article 13 it is possible for the requested court to refuse to return the child where there has been acquiescence or where there is a grave risk of physical or psychological harm or where the child would otherwise be placed in an intolerable situation. Article 20, as we have seen, permits the refusal of the return of a child when that would not be permitted by the fundamental principles of the requested State's constitutional provisions.

21. Although Articles 13 and 20 are often treated as exceptions to the general rule of speedy return created by the Hague Convention, there is a significant difference between the two Articles. Article 13 prescribes a limited exception to the Convention rule and does so of its own force. The question for any Court is the interpretation and application of that Article by reference to the Convention as a whole. However, Article 20 is somewhat different. It does not so much create an exception as recognise one. If in any given case a court were to determine that the return of the child was not permitted by the Constitution of that State, then the court could not order the return, whatever the terms of the Convention. Article 20 provides a mechanism whereby the necessary flexibility is built into the Convention to avoid a conflict between the international obligations imposed by the Convention, and the dictates of the domestic constitution. The issue in any given case

therefore is not simply the interpretation of the language of Article 20 per se, but is also, the interpretation of the domestic Constitution. For example, the language of the Article *("the return of the child … may be refused …"*) might suggest that the requested court has a discretion whether or not to return the child in cases where it has been demonstrated that the return is not permitted by the fundamental principles of that country's constitution, but in truth in any case in which that issue arose, at least in this jurisdiction, and it was demonstrated that the return was not permitted by the Constitution, then a court obliged to uphold the Constitution simply could not order the return of a child in such circumstances.

22. I should say however that there is in my view no inconsistency between the test required by the Constitution in any case, and that required by the provisions of Article 20. Indeed for reasons which I will address later in this judgment, I consider that Article 20, by directing focus to the question of whether the return of the child is prohibited by fundamental principles of the Constitution, expresses quite precisely the test to be applied independently under the Constitution. It is however important to keep in mind that the ultimate standard for the Court is that imposed by the Constitution. For reasons which I will elaborate upon later in this judgment I consider that the Constitution prohibits the return of children under Article 20 when the adoption or other care proceedings in the requesting state are so proximately and immediate a consequence of the Irish court's order of return, and are so contrary to the scheme and order that the Constitution envisages and guarantees within Ireland, that the order of return would itself be a breach of the court's duty to uphold the Constitution. Why that is so, and the factors which may be considered in applying this test , will be addressed later in this judgment. However it should be said here that in this case the claim falls decisively short of satisfying either limb of the test. An adoption of these children is not so proximate and an immediate consequence of an order of return and in any event, it is not so contrary to the Irish constitutional scheme so as to require an Irish Court to refuse to make an order returning the children.

**Aids to Construction of the Convention**

23. Since the 1991 Act gives effect to an international instrument, regard may be had to certain aids to construction of that text. This is particularly important to ensure so far as possible, uniform application of the provisions of the Convention in the domestic law of the subscribing states. While keeping in mind therefore the fact that the issue of the application of Article 20 in any particular case is ultimately a matter of domestic (and in this case Irish) constitutional law, it is nevertheless useful to have regard to those sources to seek to understand the general application of the Convention and the place of Article 20 within it.

24. In this case, the High Court was referred to the *Perez Vera* report on the Convention which contains the following short passage in relation to Article 20:

> *"Consequently so as to be able to refuse to return a child on the basis of this Article, it would be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible with the principles."*

This is of some assistance but does not resolve the question. I am not sure that there is in truth much useful space between the concepts of *"not permitted"* and *"manifestly incompatible"*. It seems to me that if for example the return of a child was manifestly incompatible with the fundamental provisions of the Irish Constitution, then it would not be permitted.

25. We were also referred to one case of a national court in which Article 20 was considered. In the Australian case of *Director General's Department of Families Youth and Community Care v Rhonda May Bennett* [2000] Fam CA 253, the full Court of the Family Court of Australia (Kay Coleman and Barlow, JJ) had to consider the provisions of the Convention and in doing so made some general observations on the proper approach to interpretation of it. The judgment is helpful in identifying the background to the Convention and the policy underlying it which led to an attempt to provide for only narrow and specifically identified exceptions to a general principle of immediate return. Of Article 20, the Court observed that the exception *"is extremely narrow and is limited to circumstances in which the return of the child ought not to be permitted…"*. The Court also observed:

> *"According to the Report of the Second Special Commission meeting to review the Convention's operation, Article 20 was inserted because the Convention might never have been adopted without it, and it was intended as a provision which could be invoked on the rare occasion that the return of the child would utterly shock the conscience of the Court or offend all notions of due process."*

26. For myself I would be reluctant to adopt a phrase such as "shock the conscience" or "offending all notions of due process" as a definitive guide to the analysis of Article 20. The discussion of a concept of "shock the conscience" in the jurisprudence of the United States Supreme Court on the question of the incorporation into the 14th Amendment ( and thus made applicable to the Sates) of the rights protected by the federal Constitution illustrates some of the difficulties in translating such a concept into a workable test. Nevertheless, the result, and the general approach is I think broadly consistent with the approach proposed in this judgment.

**The Case Law**

27. There is a small but significant body of case law dealing with the question of the intersection between the provisions of Article 41 and 42 of the Constitution and a request for the return of children to another jurisdiction whether under the Convention or at common law. In reviewing this case law it is important however to keep in mind that it was not decided against a static background of law or indeed of social attitudes. In particular, prior to the 1991 Act, questions of the return of children to another jurisdiction fell to be determined by common law and the reference to the issues such as the comity of courts and the determination in what is in the best interest of child. Other significant events during the period covered by the case law included the passage of the Adoption Act 1988 which permitted, albeit in very restricted circumstances, the adoption in Ireland of children of married parents. That Act was the subject of an Article 26 reference where the Supreme Court found that the Bill was consistent with the Constitution. See *In re Adoption No. 2 1987* [1989] IR 656. During this period, the Oireachtas also enacted the Adoption Act 1991 which set out conditions for the recognitions of foreign adoptions, distinguishing in that regard between adoptions effected abroad by Irish residents and those effected by residents of other states. Finally and most importantly, 1991 saw the incorporation of the Hague Convention into Irish law. This is the somewhat complex background against which the case law must be understood.

**The Northampton Case**

28. The first, and arguably most significant, case in the sequence occurred in 1982 at a time prior to the coming into force of the Hague Convention in Ireland and when there was no provision for the adoption of children of married parents, and indeed when as Professor Binchy observes, there was a widespread (if erroneous) belief that the adoption of such children would be unconstitutional in any circumstances. In *Northampton County Council v ABF and MBF* , the plaintiff Council sought, it appears, the return of an infant child born in England to an English couple who were married to each other but who were at the time of the case separated from each other. The child had been placed by court order in the care of the plaintiff Council. The child however was removed by its father and brought to Ireland and placed in the care of the defendants. It was common case that if returned to England, the child would be adopted with the consent of the mother but against the wishes of the father.

29. The application to the Irish Courts for the return of the child to the United Kingdom appears to have been in the nature of an interlocutory or summary proceeding since the order made by the court was merely to direct a full plenary hearing. In the High Court the rival propositions were surprisingly blunt. On behalf of the father it was contended that the return should not be ordered because the result would be an adoption against the wishes of the lawful father which was, it was said, *"a development which is not permissible under the Irish law of adoption"*. This is very similar to the Appellants' arguments here. The submission on behalf of the Council was equally forthright. The father it was said, simply could not make that argument since he was not an Irish citizen and moreover, he had illegally taken the child out of the jurisdiction of the English Courts. This it should be noted is an argument made on behalf of the Council and the Attorney General on this appeal.

30. Hamilton J. (as he then was) rejected the submission that the protections of Article 41 and 42 were restricted to Irish citizens. Relying on a passage in the judgment of Walsh J. in *McGee v Attorney General* [1974] IR 284. Hamilton, J. continued:

> *"It seems to me however that non citizenship can have no effect on the interpretation of Article 41 or the entitlement to the protection afforded by it. What Article 41 does is to recognise the Family as the natural primary and fundamental group of society and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, which rights the State cannot control. In the words of Walsh, J. already quoted "these rights are part of what is generally called the natural law" and as such are antecedent and superior to all positive law.*
>
> *The natural law is of universal application and applies to all human persons, be they citizens of this State or not, and in my opinion it would be inconceivable if the father of the infant child would not be entitled to rely on the recognition of the family contained in Article 41 for the purposes of enforcing his rights as the lawful father of the infant the subject matter of the proceedings herein or that he should lose such an entitlement merely because he removed the child to this jurisdiction for the purposes of enforcing his rights.*
>
> *These rights are recognised by Bunreacht na h-Éireann and the courts created under it as antecedent and superior to all positive law: they are not so recognised by the law or the courts of the jurisdiction to which it is sought to have the infant returned."*

31. Accordingly, Hamilton, J. directed a full plenary hearing. There is no record of any such hearing and it appears to be assumed that the case was settled. (See *Shatter Family Law* 4th edition, para 13.160). There, and rather unhelpfully, the trail comes to an end.

32. The *Northampton* decision is heavily relied on by the Appellants in this case. It represents the high point of the argument that the possible adoption of children of a marriage would prevent the return of children to a jurisdiction where that was envisaged even when neither the child nor the parents had any prior connection to Ireland and even though the circumstances giving rise to their presence in this jurisdiction was wrongful.

33. It is perhaps noteworthy however that the decision does not clearly distinguish between the two separate issues identified at the outset of this judgment: first, the extent to which a non citizen can rely on Articles 41 and 42 and second, the extent to which anyone (citizen or non citizen) can rely on Articles 41 and 42 as preventing the return of children to a jurisdiction of their habitual residence and in this case domicile, on the grounds that what might occur in that jurisdiction would not be permitted under the Constitution. As Professor Binchy observed in *Irish Conflicts of Law* at page 336-337:

> *"Some obvious difficulties attach to this approach. At a very straightforward, practical level, the laws of very many countries provide for compulsory adoption of legitimate children in certain circumstances regardless of the wishes of the parents. The constitutionality of such a process in this country is the subject of debate. One may ask whether Northampton County Council v ABF and MBF constitutes a precedent for protecting parents throughout the world from having their children adopted against their wishes. Common sense suggests strongly that it does not; the problem is to identify precisely why it does not."*

34. In *McDonnell v Ireland* [1998] 1 IR 134, Barrington J. observed that *"Constitutional rights should not be regarded as wild cards which can be played at any time to defeat existing rules"*. There can be few better examples of the successful playing of the Constitution as a wild card than the *Northampton County Council* case. In spite of the fact that the decision is merely an interlocutory decision and is in very general terms, the case has a very significant impact not just upon subsequent decisions, and perhaps by reason of the breadth of the concepts invoked, caused considerable uncertainty in the field of childcare and conflicts of law generally. Subsequent decisions have however tended to treat

the decision in *Northampton County Council* with some caution.

**Subsequent Case Law**

35. Two years after the *Northampton* case an attempt was made to invoke the same argument in *Kent County Council v CS* [1984] ILRM 292. That case involved a three year old boy of divorced parents in the care of Kent County Council on a court order made in the divorce proceedings. The Court had also ordered that he not be removed from England and Wales without leave of the Court until he reached the age of 18. The father, however, on the pretext of bringing the child on a trip, brought him to Dublin. As it happened in this case, the father was an Irish citizen who had been living in England for a long time and had been married and divorced there. Kent County Council invoked the procedure under Article 40 of the Constitution to seek the return of the child to their custody. The father expressed the fear that the child would be taken away from him and *"placed away in someone else's care or even given up for adoption"*. While this argument sought to copy the argument advanced in the *Northampton* case it will be observed that the factual circumstances were quite different from those in the *Northampton* case. In particular the adoption even if a possibility, was a much more remote option than was the case in the *Northampton County Council* case.

36. Finlay, P. (as he then was) directed the return of the child to Kent County Council. He observed that *"the entire legal framework as a result of which this child was born of a lawful marriage in England and as a result of which a decree nisi in divorce has been granted in England concerning that marriage is a legal framework which is not known to the law of this country"*. He distinguished the *Northampton County Council* case on the grounds that in *Northampton* there was an immediate intention to place the boy for adoption whereas there was no such immediate plan in this case. This distinction between cases in which adoption is actually proposed and those in which it can be said to be no more than a possibility, has remained the basis of Irish law on this area and was indeed the basis of the decision in the High Court in this case.

37. A further child return case came before the Irish High Court in 1988. In *Oxfordshire County Council v JH (1*9th May 1988) Costello, J. made an order returning that child to the care of the County Council in England on the basis of his analysis of the position under English law and accordingly, that there was no risk of adoption. He did however observe in passing *"although it may seem somewhat strange so to hold, the situation is that people who come into this jurisdiction, even for a short while, are entitled to gain the benefits that the Constitution confers on citizens as well as non citizens"*.

**The Saunders Case**

38. The next case in the sequence played a large part in the submissions to this Court made on behalf of the Council and the Attorney General. *In Saunders v Mid Western Health Board* (High Court 11th May 1987) and (Supreme Court 24th June 1987), an application was made by the parents of children, English citizens again, under Article 40 of the Constitution, seeking custody of their three children, then in the custody of the Mid Western Health Board.

39. Although Hamilton, P. was the trial judge in *Saunders*, no reference was made to the judgment in *Northampton County Council* (although it should be noted there was no immediate proposal for adoption in the Saunders case and the cases were thus distinguishable on their facts). The High Court upheld the entitlement to custody of the Official Solicitor on the somewhat unilluminating basis of the "comity of courts". The parents' appeal to the Supreme Court was dismissed. Finlay, C.J. delivered judgment on the 26th of June 1987. The judgment stated that the parents had brought the children to Ireland unlawfully and in breach of an order made by the English courts. Finlay, C.J. continued:

> *"I do not accept that they can, by that act alone confer on themselves and their children constitutional rights under Article 41 and 42 of the Constitution."*

40. This case was central to the submissions made both by the Applicant Council and the Attorney General in this Court. It was suggested that the decision of the Supreme Court was a wider and more principled one than that adopted in the High Court. It was the only judgment in which the Supreme Court had specifically addressed the issue of the assertion

of constitutional rights in the context of the wrongful removal of the children from the jurisdiction of their habitual residence. It was suggested that the decision was correct and should not be overruled, but should be followed.

41. The argument based on *Saunders* was advanced to the trial judge herein, and it was suggested to her that it was binding upon her. However, because she believed that the judgment was difficult if not impossible to reconcile with subsequent decisions of these Courts in which non citizens had been entitled to rely on provisions of the Irish Constitution, the learned trial judge did not accept that argument but rather decided the case on the basis that adoption was only a *"possibility"* in this case and that on the distinction established in *Kent*, such a possibility was not as sufficient to mean that a return was not permitted under the Constitution.

42. On this appeal the opposing sides seem agreed only on the desirability of making large generalisations, albeit that their proposed generalisations are almost diametrically opposed. It seems to me however that the small body of case law referred to in this case, is itself a salutary reminder of the dangers of basing large propositions upon individual cases decided almost in a vacuum and sometimes under significant pressures created by both the demands of time and the often distressing facts of the cases themselves. I consider therefore that the conclusions the Court should draw in this case should, so far as possible, be more nuanced.

**The Appellants' Arguments Considered**

43. It is convenient to deal first with the narrowest argument advanced on behalf of the Appellant. It was suggested that the trial judge was wrong to conclude that adoption was only a possibility in this case. That argument depended in part on discounting the averment in the affidavit of law submitted in this case to the effect that adoption in the United Kingdom was always a remedy of last resort. Furthermore it depended almost entirely on the terms of the standard form document PL04 which required county councils to state whether adoption was a possibility in the case. On this narrow ground upon which the High Court rested its decision (in conformity I should say with the distinction clearly drawn in the decided cases), it seems to me the High Court judge was entirely correct. There was here no proposed adoption as was the case in the *Northampton* case nor was there an active care proposal by the local authority envisaging adoption as occurred in the case of *Foyle Health Trust v EC* [2007] 4 IR 528. This case therefore is much closer to those cases where it could be said that adoption was a mere possibility. This conclusion might dispose of this case, but since the argument ranged much further and since it is necessary to consider why the mere possibility test is consistent with both the Constitution and Article 20 of the Convention, it is necessary to consider the more expansive arguments raised in this case.

44. It can said that the most far-reaching proposition advanced on behalf of the Appellants – that no child should be returned to a jurisdiction which does not recognise the inalienable and imprescriptible rights of the family – is one which if correct could mean that Article 20 would no longer be the exception but would, as least as far as Irish law is concerned, become the rule. As Professor Binchy has observed, it can be fairly said that few if any countries have constitutional provisions relating to the family which can be said to be identical to those contained in Articles 41 and 42. Thus if the Appellants broadest argument was correct then almost any return of any child would not be possible under the Convention. However, in my view the principle asserted on behalf of the Appellants here has no basis in Irish constitutional law.

45. Neither in its general provisions, nor in the specific provisions of Articles 41 and 42, does the Irish Constitution contain any suggestion that Ireland wished to assert the form of constitutional splendid isolationism (whether relating to the family or more generally), which would be involved in determining that there could be no useful cooperation with the legal systems of any other state, which had not adopted something approximating to the very specific provisions of the Irish Constitution. It is an obvious but nonetheless compelling point that if such an unusual provision was intended, one would expect it to have been set out in explicit terms in the text of the Constitution. Not only is there no such starkly fundamentalist provision contained in the Constitution, but in my view, for reasons I will elaborate upon later in this judgment, every indicator in the Constitution is to the contrary.

46. The next argument advanced by the Appellants seeks to avoid the absolutism of the argument just advanced. It was argued that an adoption would not be permitted under Irish law on the facts of this case. It was contended therefore that in this case it would offend a fundamental principle of Irish constitutional law to return the children to a jurisdiction where the adoption of a child against the wishes of a parent or parents was contemplated.

47. In my view the argument contains at least three errors. First, it assumes that the present state of Irish legislation necessarily reflects the limits imposed by the Irish Constitution. Second, it makes exaggerated claims about the state of the law and practice in England and Wales based on a slender evidential foundation. Finally, by simply assuming that it is sufficient to assert that *if* the English legislation was enacted here, (or perhaps *if* it was applied in this case) it (or the decision made) would be unconstitutional, the argument simply ignores the important conditionality in that formulation and thus simply avoids one of the most important and difficult constitutional issues arising in the case.

48. The Appellants' arguments assume that something which is not permitted – at present – by Irish law is ipso facto not permitted by the Constitution. There is no basis for this assumption. As has been observed elsewhere, there was, prior to 1988, belief in some circles that the Irish Constitution prohibited adoption of what were then described as *"legitimate"* children. That fallacy was exposed by the decision of this Court in *In re Article 26 and the Adoption No. 2 Bill 1988*. In my view, it is a similar error to assert that only the adoptions permitted under the particular procedure of that Act are permitted by the Constitution. In fact, all that can be said both as a matter of logic and as a matter of now impregnable constitutional law is that the provisions of the 1988 Act do not offend the Constitution. However, it would be extremely surprising if the provisions of that Act, designed to safely surmount constitutional challenge, were by some happy or unhappy chance to identify the only circumstances in which the Constitution would permit adoption of children of a married couple.

49. When shorn of the rhetoric that has become encrusted upon Articles 41 and 42 through successive generations of judicial decision and legal commentary, it is perhaps possible to see that Articles 41 and 42 say nothing in explicit terms about adoption. On the contrary, the Articles at least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State's position is one which does not seek to pre-empt the family but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved. This is not to say that these Articles do not express a distinctive view and do so with considerable force. However, I would be very slow, at a minimum without much more elaborate and comprehensive argument than was made in this case, to conclude that in some way the 1988 Act prescribes the absolute minimum that can be permitted in respect of adoption of children of a family so that any statutory code which does not reproduce the precise details of the 1988 Act would if part of the law of Ireland, be unconstitutional.

50. If anything, the Appellants' argument in relation to the law of England and Wales is even more exaggerated and crude than the assertion of the position in respect of Irish law, just discussed. It is only fair to acknowledge that the only evidence of the law of the United Kingdom was that contained in an affidavit submitted on behalf of the Council. Counsel on behalf of the Appellants in this Court was thus forced to try and rely on some parts of that affidavit while at the same time inviting the Court to treat other portions of the same affidavit with scepticism and even disbelief, even though there was no cross-examination on this affidavit in the High Court. This is not entirely satisfactory. However given the fact that the parents were not represented in the High Court when such evidence as there was adduced, I do not think it would right to rest any decision on the inadequacies of the evidence, and accordingly I am prepared to accept the assertions made in relation to the law of the United Kingdom at least for the purposes of this argument.

51. Even on the limited materials put before us, it does not seem to me that the stark distinction which the Appellants seek to draw between the provisions of Irish law and that of the United Kingdom is at all as clear as the arguments would suggest. As counsel for the Council pointed out, the recent decision of the House of Lords *In re G (Children)* [2006] UKHL 43, [2006] 1 WLR 2305, was cited with approval in a decision of this Court *N v Health Service Executive* [2006] 4 IR 374. The judgment of Lord Nicholls of Birkenhead, emphasised the significance of the biological link between parent and child. As Hardiman, J commented, at page 502 in his judgment in *N*:

> *"It is interesting to see that, in a jurisdiction lacking the specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision, the interest of a child in being reared in his or her biological family is nonetheless fully acknowledged."*

52. There can be little doubt that in certain respects, the law of Ireland in relation to the care of children, particularly children of married parents, occupies a different place on a spectrum of views than that of the present law of England and Wales. However in my view, the fact that they are recognisably part of the same spectrum is at least as important as the differences between them. Thus it seems to me, that this part of the Appellants argument is also not made out. It is not sufficient to show that some aspect of the law of England and Wales is *different* from that of this jurisdiction or even that some aspect of the law of England and Wales, if enacted in this jurisdiction, would be found to be unconstitutional in some respect. It is necessary to go further and show that the manner in which these children would be dealt with by the courts of the requesting jurisdiction must necessarily offend against the provisions of the Irish Constitution if administered in an Irish court. There is I think, considerable difficulty in attempting to determine what would be done ads a matter of fact in the courts of a requesting country and whether*, if occurring in Ireland*, it would be permitted by the Irish Constitution, but in my view the difficulty of the task does not mean that it can be ignored. In my judgment, the Appellants' argument falls short of establishing even this proposition.

53. However, there is a more fundamental objection to the Appellants' argument. That argument seems to assume that it is sufficient to establish that a legislative provision of the requesting state is different to that of the law of Ireland, at least in respect of an area where Irish law is derived from or influenced by the Constitution. In my view, as set out above, what is required on this leg of the argument, goes much further i.e. that a legislative or administrative provision of the requesting state would be applied in a particular case and would, if part of the law of Ireland, be unconstitutional. Even that, however, is not the test set by either Article 20, or the Irish Constitution.

54. Article 20 does not ask whether the law, or even the constitutional law, of the requested state *differs* from that of the requesting State. If it did, it would be difficult to see how the Convention could function effectively. In such circumstances Article 20 might not merely prevent the return of children from Ireland, but might just as effectively inhibit the return of children to Ireland. The text of the Convention makes it clear however that this is not the test. The focus of Article 20 is not upon what occurs or may occur in the requesting State (in this case England). On the contrary it is what occurs in the requested State (the return) which is the focus for the Court of the requested State (in this case Ireland). The concept of *"return"* directs attention to at least two relevant matters. First, that the child has a prior connection with the State requesting the return (defined under the Convention as the State of habitual residence) to which he or she may be going back. Second, that a difference in the legal regime, and even a constitutional difference, will not itself suffice to trigger Article 20. The test is rather whether what is proposed or contemplated in the requesting State is something which departs so markedly from the essential scheme and order envisaged by the Constitution and is such a direct consequence of the Court's order that return is not *permitted* by the Constitution. It is the return, not the possible adoption, that must be prohibited and which is therefore the focus of the court's inquiry when Article 20 of the Convention is invoked. This is I think consistent with the decision of the Australian Court in the *Rhonda May Bennett* case referred to earlier in this judgment.

**Application of the Test**

55. In applying this test it is important to remember that Article 20 was not drafted with the Irish Constitution alone in mind: on the contrary, it applies equally to all jurisdictions. It is therefore entirely possible in theory at least, that a national constitution may contain express prohibitions against the *"return"* of persons in certain circumstances. The test posed by Article 20 must therefore be whether the return is prohibited either by the express provisions of the Constitution or by necessary implication. There is no express provision in the Irish Constitution prohibiting the return of children of a marriage who may be adopted and therefore the question arises whether such a prohibition is to be necessarily implied from the Irish Constitution, as properly interpreted.

56. It is conceivable that what is proposed, contemplated or feared in a foreign jurisdiction will be so remote a possibility the an Irish Court could not properly consider that return is not permitted. This is in essence what underlies those decisions describing the proposed adoption as a mere *"possibility"*. However it is also conceivable that what is proposed is proximate, and perhaps even a certain consequence of the order of return, but yet is not so offensive to the values of the Irish Constitution that it can be said that return is not permitted by the Constitution. In other words, a return has to satisfy both tests before a court would be justified in concluding that return was not permitted. It must be said that the feared consequence is so closely linked to the order for return and is itself so offensive to the Constitution that return cannot be permitted. In my judgment, in this case, neither limb of the test is established. First I agree with the trial judge that adoption is only a possibility and not a certainty or near certainty in this case. This does not require any further elaboration. Second, I do not consider the likely application in this case of the law of England and Wales in relation to childcare has been demonstrated to be so at variance with the dictates of the Irish Constitution that a return of a child would be a breach of the constitutional duty of the Irish Courts.

57. All we know is that in childcare applications the Courts in England and Wales are required to take a single track approach so that all issues including adoption can be addressed in a single hearing. It may perhaps be inferred that in practice adoption orders may be made more readily in England than in Ireland, but that is by no means enough to prohibit return. It is I think important in this regard that even in the case of an adoption order made in England (or anywhere else) in circumstances where it could be positively demonstrated, that such an order would not have been permitted in Ireland, Irish law would not interfere with such an adoption, and would in all probability recognise it under the Adoption Act 1991. That is, in part, because the relationship between Irish law and that of other States is itself a constitutional issue.

58. The essence of the argument of the Appellants in this case is that an adoption of the children in this case *"would be a breach of the constitutional rights of the family".* On any analysis, the act which it is alleged would constitute a breach of the rights of the family is the feared adoption of the children which if it were to occur, would happen in England. The *Northampton* derived argument however treats such an adoption as if it occurred in Ireland. However that is to beg the question at the heart of the case.

59. The statement that the return of a person by order of the court to another jurisdiction is not permissible if the person may be subject to some process which *"would be a breach of his constitutional rights"*, is perhaps a short hand which might be thought to be in itself unobjectionable. But it is important to recall that the question of the extent to which Irish law has regard to events occurring abroad and under and in accordance with the law in another jurisdiction is in itself a distinct constitutional issue.

60. If the Irish Constitution is viewed solely through the lens of the reported cases, a somewhat distorted picture might emerge. It is natural that most constitutional litigation and commentary has focussed upon the important provisions of the Constitution contained in Articles 40-45. But the Irish Constitution is much more than simply a vehicle for the fundamental rights provisions. It regulates the relationship between the People and the State they created. It establishes the machinery of government and allocates responsibility between the different branches, and importantly for present purposes, it seeks to locate the State in an international context. In this regard, the Irish Constitution is not unique. In truth it can be said that every constitution regulates the relationship between a state and its

citizens and indeed those obtaining the benefit of the society created and maintained by the state. But it follows in my view, that any question of interaction between Irish law and events occurring abroad, and in particular events occurring pursuant to the law of another state, raises issues of constitutional dimensions. To say that an adoption, carried out as it would be in accordance with the law of the United Kingdom, and in respect of persons who were subjects of that jurisdiction, is nevertheless itself contrary to the Irish Constitution should raise an alarm. .

61. The true question for an Irish Court is whether what is done within this jurisdiction can be said to be contrary to the Constitution. This is why Article 20, can be seen to precisely focus attention on the correct issue. That is whether the return (and not the adoption) would itself be a breach of the Irish Constitution. Now, if the law was that an Irish Court could not return a person if there was a possibility of some event occurring which would, if it occurred in Ireland, be a breach of the constitutional rights of the citizen, then this would be a merely verbal distinction. However framing the issue as to *whether* the return itself would be a breach of the Constitution focuses attention on the very issue of *whether* the Irish Constitution does, or does not, distinguish between events occurring abroad and those occurring in this jurisdiction. There is no a priori answer to this question. It is a matter of constitutional interpretation.

62. Even assuming that an adoption in this or any other case was not merely a possibility but rather a certainty, had the family not left England I do not consider that any such adoption would give rise to any concern as a matter of Irish constitutional law. If the parents had come to Ireland without the children and sought an injunction to restrain an adoption taking place in the United Kingdom, I do not conceive that an Irish Court would have entertained the application. By the same token if an adoption were effected in the United Kingdom and subsequently an issue arose in an Irish Court as to the status of the children, there would as I understand it be little doubt but that the adoption would be recognised here under the Adoption Act 1991. It might therefore be asked in what way is this case any different? A difference does lie however in the fact that in the examples considered above, the English jurisdiction is able to carry out its orders without the assistance of an Irish Court. In the case of an application under the Hague Convention, the Irish Courts processes are invoked and the Court is obliged to uphold the Constitution. It is thus a legitimate question whether the Court can lawfully make such an order when it is said that the end point of the process may be an order of the English court which would not be constitutionally permissible in Ireland. The issue is the approach that the Constitution requires a court to take when such a claim is made.

63. It is conceivable, at least in theory, that any particular state at any particular time might have so ideological or fundamentalist a view, or be so self-absorbed or self-confident, or indeed simply so powerful, as to insist that it would, through its legal system only deal with those countries who conformed to its precise standards. Again it is conceivable that an international convention adhered to by a number of countries might require a country to concern itself with the manner in which persons are dealt with in another country. There may be many reasons why a constitution or human rights instrument may require that courts enforcing that instrument should not order the return of a person to another jurisdiction where it is considered that the treatment to be afforded in that jurisdiction will fall below the standards required by that constitution or instrument.

64. It seems plain however, that the Irish Constitution does not demand the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us. First and most obviously, the Constitution simply does not say so. Indeed it might be expected that such a sensitive issue would be dealt with if that was the intention of the drafters and thus the people who adopted the Constitution. Furthermore, the historical context in which the Constitution was introduced was one in which international relationships were to the forefront of public concerns.

65. Article 29 of the new Constitution addressed the position Ireland was to take in its international relations. This in itself was a significant departure from the 1922 Constitution and a conscious attempt to assert nationhood. The significance of this Article, particularly in its historical context, was explored by Mr. Justice Barrington in his Thomas Davis lecture, *The North and the Constitution*. As he points out, it is of some significance that Mr.

deValera was the President of the League of Nations in 1936 when the Constitution was being drafted. Indeed it appears that some of the values of the Covenant of the League of Nations were reflected in the Constitution and in particular in Article 29. The Article affirmed Ireland's devotion to the "The ideal of …. friendly cooperation amongst nations". In one sense accession to the Hague Convention can be seen as a particular example of such cooperation. Such cooperation necessarily encompasses recognition of differences between states and the manner in which they approach the organisation of their societies. This together with the Constitution's recognition of the territorial boundaries of the State and the reach of its laws are important parts of the Constitution to which regard must be had when it is contended that the return of a child in another contracting state is not permitted by the Constitution. This is why in my judgment the Constitution requires the Courts to refuse return only when the foreign procedure is so contrary to the scheme and order envisaged by the Constitution and so proximately connected to the order of the Court, that the Court would be justified, and indeed required, to refuse return.

66. This may explain why the pragmatic approach adopted by the court below and supported by precedent, is grounded in the Constitution. The question whether what is argued to be impermissible is a possibility rather than a certainty, is an entirely relevant inquiry. The more inextricably linked the Irish Court is to the outcome, the more plausibly it can be said that to order the return would be a breach of the obligation to protect the constitutional rights. However that is not the sole inquiry. If it were otherwise, it might simply be a question of the timing of the particular application. In my view, as set out earlier in this judgment in the context of Article 20, the question also involves the nature and degree of the differences between the law of the requesting state and the law which it is asserted the Irish Constitution would permit or require in this jurisdiction, in a context where it is clear that the Constitution expects the legal systems of friendly nations will differ from that of Ireland. In that regard it is relevant whether what is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids absolutely or permits in certain circumstances, and in any case whether the difference asserted is one of degree, or one of fundamental principle. It is here that I consider that the origin of the Appellants may become relevant. It is fundamental to the structure of the Irish Constitution that its principal focus of application is to persons within its jurisdiction. It follows from the approach of Article 29 that the Constitution expects and recognises the same essential structure in other states. Therefore, the application, for example, of French law to French citizens, or to those who by residence in France have obtained the protection of the French state, is to be expected, and it is only in rare cases that the Constitution would require a court to seek to inhibit the application of such law. Again this is consistent with Article 20 of the Convention. The focus on *"return"* makes it clear that a child is normally being returned to the jurisdiction of habitual residence, and thus the jurisdiction with which it has the closest connection.

67. When these tests are applied here they make it plain that there is no breach of the Irish Constitution in making the order sought in this case. As I have already set out, I consider that the trial judge was quite correct to find that a proposed adoption in this case lay closer to the range of possibility in the spectrum of outcomes than to a certainty. I consider however, that it is possible to further. On the evidence advanced to this Court at least, the regime for adoption in the United Kingdom both in its terms and in the manner of its application is not so fundamentally at odds with the forms of adoption which can be permitted under the Irish Constitution that even if such a proposed adoption were in any given case much more likely, that in itself would not in my view be a sufficient ground for refusing to order the return of the child pursuant to the Hague Convention whether under Article 20 or indeed by direct reference to the Irish Constitution itself.

68. The focus on what occurs in Ireland is also important in another respect. Assuming for the moment that Article 41 does apply to the parents and children in this case at least while in Ireland, then the only thing that the family is doing in this jurisdiction is making a decision (through the parents). Assuming again for the moment that such a decision has a constitutional value, that decision is not however a decision in respect of the *care* of the children in question. That is a matter to be determined under the law of the relevant jurisdiction. It is at best, a decision in which jurisdiction and under which code the decision in relation to care of the children will be taken. The State's obligation to guarantee to

protect the family in its constitutional authority does not mean that decisions made by a family, and in particular parents in respect of a child, must override the State's decisions in relation to its relations to other countries. In this respect, the origin of the applicants is perhaps again relevant at this point of the inquiry. The decision of parents who are subjects or citizens of another country, or who have been habitually resident elsewhere, that they do not want their affairs to be regulated by the laws of the country in which they have been habitually resident, can have little if any value on the constitutional scale, even if the parents happen to be in Ireland when they make, or seek to give effect to, that decision.

69. Any test which requires a court to determine whether something is so clearly contrary to the values protected by the Constitution that an Irish Court could not make an order which would in any way facilitate such a result, contains an unavoidable element of relativity and subjectivity. There may be marginal cases, but that in itself may be unavoidable. As Holmes, J. observed in *Irwin v Gavit* (1925) 268 US 161:

> *"Neither are we troubled by the question of where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night youth and age are only types."*

70. In such a case the Court is obliged to attempt to articulate the considerations of fact and law which apply and lead it to the conclusion that in any particular case there is or is not any basis for refusing the return of the child, or the deportation or extradition of an individual.

This present case is however in my view a very clear case. The facts, and just as importantly, the evidence and lack of it, are remote from the circumstances which would oblige an Irish Court to exercise its power under Article 20 of the Convention. First, it is in my view utterly insufficient to merely raise the constitutional claim as is it were a trump card in itself. Nor is it sufficient to make generalisations either about the Constitution of Ireland or the law in practice of the requesting state.

71. Adoption is a significant event and the circumstances in which adoption can be permitted can vary significantly from society to society. Indeed within those societies attitudes can change quite dramatically in relation to the circumstances in which adoption would be permitted the age of the person who can be adopted, the legal consequences of adoption, the range of persons and relationships which can become adoptive parents. It is not surprising therefore that issues of public policy and constitutional claims may arise and may have to be adjudicated. As Professor John Morris has observed in, Some Recent Developments in the English Private International Law of Adoption, in Festschrift for FA Mann, quoted in Binchy, Irish Conflicts of the Law p.372:

> *"Public policy is probably more important a reservation in the law of adoption and of any other part of the conflict of laws, because the laws of some foreign countries differ so sharply from English law as to the object and effects of adoption."*

72. Adoption raises legitimate constitutional issues in Ireland since it is by definition the creation of one family, and the possible termination of another. In my view however, it ought to be rare that a child genuinely resident in another country and with a family or ties to that other country and with little if any connection with Ireland, could successfully persuade an Irish Court that the prima facie judgment of the countries adhering to the Hague Convention and endorsed by both the Government and the Oireachtas, that the welfare of the child is best determined in the courts of the country of habitual residence, should nevertheless be overturned. This is simply because Articles 41 and 42 of the Irish Constitution, forceful though they are, exhibit no intention to establish Ireland as a form of sanctuary for marital families from other jurisdictions. It may be that, and particularly in the case of a child and family with an established relationship and ties to Ireland, and with little connection to the country of habitual residence, and where the regime of childcare in that country is so dramatically different to that contemplated by the Constitution, and where it is apparent that drastically different treatment will be afforded to the child as a probable and almost certain consequence of return, that in such cases, a court might consider that it could not properly permit the return of the child. That however is something which exists at

the moment only in the realm of speculation. The present case is clear.

**The Respondents/Notice Party's Arguments**

73. The fact that I cannot accept the Appellants' argument does not however lead to the conclusion that the arguments of the Respondent and Notice Party are therefore correct. The arguments made by the Respondent and Notice Party were very far ranging. Indeed, there was in this respect, a curious symmetry between the arguments on both sides in this case. To some extent, both parties sought to assert far reaching propositions in law based on a single case: in the case of the Appellants, *Northampton County Council*, and in the case of the Respondent/Notice Party, the case of *Saunders v The Mid Western Health Board*. While the Respondents and Notice Party argued that the approach taken by the learned High Court judge described as *"the narrow approach"* was correct, their support for that aspect of the decision was somewhat perfunctory and they showed greater enthusiasm for broader arguments rejecting the Appellants entitlement to rely on Articles 41 and 42 of the Constitution. In particular, the Respondent/Notice Party contended that *Saunders* was a directly relevant precedent which should be reaffirmed by this Court as establishing a principle that the Constitution could not be invoked, at least in the context of Article 20 of the Hague Convention, by persons who had only just arrived in Ireland (and arguably had brought a child to Ireland wrongfully within the meaning of the Convention).

74. In *Saunders*, children who had been made wards of court in the United Kingdom and given into the care of custody of Hampshire County Council were brought to Ireland in breach of the order. Although it was not expressly stated in either the High Court or Supreme Court judgments, it may be that the fact that removal of wards of court from the jurisdiction of the court is itself a contempt of court which would normally be considered to preclude a party from being heard, (see, *Hadkinson v Hadkinson* [1952] P 285), may itself have been significant in the outcome of *Saunders*.

75. Hampshire County Council sought the assistance of the Mid Western Health Board which obtained a warrant pursuant to the provisions of the then applicable Children's Act 1908. That warrant authorised the gardaí to search for children and if found that the child or children were being assaulted ill treated or neglected, to take them into a place of safety. The warrant was executed by the gardaí without any inquiry as to whether the children were being assaulted or ill treated or neglected. The parents' response was to initiate an inquiry pursuant to Article 40.4.2 of the Constitution contending that the children were unlawfully detained by the Mid Western Health Board. Hampshire County Council then applied to the Court seeking the return of the children to the jurisdiction of the English Courts which had made an order for the return of the children to the care of the County Council.

76. Hamilton, P. who had been the trial judge in the *Northampton County Council* case heard the case in the High Court. He held that the execution of the warrant by the gardaí was unlawful (since there had been no determination by the gardaí that the children were being ill treated, which was a precondition to the execution of the warrant) but went on to hold that that did not entitle the parents to the order they sought. He was, he considered, entitled to resolve the entire issue of the entitlement of any party to custody. Accordingly, he refused the application of the parents and directed the Mid Western Health Board to return the children to the care of Hampshire County Council. The essence of this aspect of the judgment was contained in a single paragraph:

> *"Having regard to the degree of comity which existed between the Courts of the relevant jurisdictions I have no option but to make the order sought by the Hampshire County Council on behalf of the official solicitor."*

77. The matter was appealed to the Supreme Court. The case, it appears, was heard on the 23rd June 1987, and it appears that the argument was reported in the Irish Times of the following day. A written judgment was delivered by the Supreme Court two days later on the 26th June 1987 and a copy was obtained from the Supreme Court Office for the purposes of this case. Counsel is technically correct therefore in pointing out that the textbook references to this decision as *"ex tempore"* are not correct. However, the very short timescale between argument and the delivery of a written judgment, and the absence of

any reference to any decided authority, suggests that this was little more than a giving of reasons for a decision which in the particular case seemed obvious.

78. In spite of its brevity, *Saunders* has continued to attract attention because of the manner in which the Supreme Court dealt with the claim by the parents that they had constitutional rights pursuant to Articles 41 and 42 which precluded the High Court from making an order for return of the children. Finlay, C.J. stated:

> *"Where as happened, as happened in this case, parents having no connection with Ireland bring their children unlawfully from the country in which they are, into the jurisdiction of this Court, in breach of an order made by the court in the jurisdiction in which they are domiciled and in which the children were being reared, I do not accept that they can by that act alone confer on themselves and their children constitutional rights under Article 41 and 42 of the Constitution. These parents do not claim any grounds for asserting constitutional rights under Articles 41 and 42 of the Constitution other than that they arrived in this country in the circumstances which I have just outlined. I am accordingly satisfied that the submission made on their behalf that the existence of these constitutional rights prevents the making of the order made by the learned President must be rejected."*

79. When faced with the citation of *Saunders* in the present case, the learned High Court judge raised with the Respondents the existence of subsequent Supreme Court decisions which appeared to indicate that a family, even if made up of exclusively non Irish citizens, may, while in this jurisdiction, be entitled to the constitutional recognition and rights of a family pursuant to Articles 41 and 42 of the Constitution. By way of example she referred to the judgment of Murray, J. (as he then was) *in AO and DL v The Minister for Justice Equality and Law Reform* [2003] 1 IR 1 at pages 81-83 where he stated:

> *"In my view the protection afforded by the Constitution to the family is not dependent entirely on whether it counts one of its members a citizen of the State … when a family of non nationals within the State it has all the attributes which the Constitution recognises as a "moral institution". I do not think that there can be any question but that the non national children of such a family have a constitutional right to the company, care and parentage of the parents within a family unit while in this State and that one or both parents could not be removed from that role on grounds any different from those which the Constitution permits as the basis for removing children from the custody of their parents who are citizens."*

80. Accordingly the High Court judge was hesitant about accepting that *Saunders*. *"was authority for the applicants' submissions that the respondents and their children should be not entitled to recognition as a family whilst in Ireland for the purposes of Articles 41 and 42 and, whilst here, to rely on the constitutional rights accorded to families and their members thereunder"*

81. In my view, the learned High Court judge was entirely correct to take this approach. The broad principle the Respondents sought to deduce from *Saunders* and apply in this case would be extremely far-reaching. Even within the narrow confines of the case itself, the proposition, if correct, raised a number of difficulties. Why if *Saunders* was justification for holding that parents were disentitled to rely on Articles 41 and 42, were the parents in *Saunders* nevertheless entitled and permitted to invoke the jurisdiction under Article 40.4? Would it follow that while the children in *Saunders* or in this case were in the care of the HSE or its statutory predecessor that by reason of the circumstances in which the children came to Ireland alone that the Health Board/HSE would be entitled to treat the children and the parents differently from an Irish family? Would it be possible to pass legislation allowing the adoption of children of any married non nationals, or even just those brought to Ireland *"wrongfully"* within the meaning of the Hague Convention? These are substantial issues which are not addressed in the decision itself or in the arguments sought to be constructed on foot of it.

82. I should say immediately that in my view the decision in *Saunders* is much too slender a

basis to bear the argument the Respondents seek to construct. Nor can reliance be placed upon *Saunders* as part of any wider proposition without a comprehensive analysis of case law extending well beyond the question of child abduction. The question of the entitlement of non citizens to invoke the provisions of the Constitutions is discussed helpfully in both Kelly, *The Irish Constitution* 4th edition, Hogan and Whyte at pages 38-46, and Casey *Constitutional Law in Ireland* at pages 444-449 and in Professor Binchy's article already discussed. Each of these works discussed the significant number of cases where non citizens have sought, and on occasion have been permitted, to invoke provisions of the Constitution. There may be a disjunction between the sometimes laconic judgments in this area and the elaborate unifying theories detected in those decisions by some of the academic commentary, but the fact that these intractable issues have been discussed in academic works makes it regrettable that the arguments here were so narrow in their consideration of the available authority, while so far reaching in the propositions sought to be advanced.

83. There were in my view many reasons why the applicants in *Saunders* were bound to fail in their application. At a most basic level they do not seem to have articulated any basis for saying that either the return of the child to England, or indeed the existence of the wardship jurisdiction in England, was in any plausible or arguable sense a breach of Article 41 and Article 42. Furthermore and plainly, *Saunders* does not purport to establish any general principle. It does not itself address any other authority most notably the *Northampton* case. Second, if it did decide that the fact of a breach of a court order disentitled the parents in that case from reliance on the constitutional provisions, that reason cannot be readily applied here where the breach does not amount to contempt of court. Indeed, if the Respondents and Notice Party were correct, then a consequence would be that Article 20 would have no meaning whatsoever at least in the case of Ireland. That article can only apply when removal is *"wrongful"* within the meaning of the Convention. If however such wrongful removal prevented the Constitution being raised, then Article 20 is a dead letter. Instead, Article 20 has precisely the opposite effect: the wrongful nature of the removal is what gives the court jurisdiction and a party may then assert that Article 20 means that a child should not be returned by reason of the infringement of the Constitution. Of course, it might be said that *Saunders* represents authority under the Irish Constitution alone and that Article 20 continued to have effect in other jurisdictions, but that only leads to the question of how the breach of a statutory provision (or perhaps more correctly the fact that under an applicable statute certain actions are deemed *"wrongful"*) can alter the constitutional status of parties. The Constitution itself contains no such provision and the Respondents do not suggest how such a principle, and just as importantly, its limits, are to be derived from the text of the Constitution as properly interpreted. Is for example an Irish citizen albeit non resident, debarred from invoking the provisions of the Irish Constitution if removal to this jurisdiction is *"wrongful"* under the provisions of the Convention? Is the prohibition on invoking the Constitution absolute or is it limited to certain of its provisions and does it apply only in certain circumstances? In my view, in this respect, *Saunders* far from establishing a principle of broad and general application, is a case to be treated as one decided on its own particular facts.

84. The issue of whether some or all of the constitutional provisions are limited to citizens was first raised almost 50 years ago in *State (Nicolaou) v An Bord Uachtála* [1966] IR 567 and was debated in that case over nine days in the High Court, and eleven days in the Supreme Court without definitive resolution. It has not been resolved since, albeit that a modus vivendi appears to have been arrived at in which non citizens have been permitted to invoke some provisions of the Constitution that while it is accepted that some aspects of the Constitution essentially related to voting and representational matter are nevertheless properly limited to citizens. It has not however been possible to articulate any unifying theory. It follows, that the related and even more complex question as to whether and if so how, a person can assert that the act of travelling to Ireland can give rise to constitutional rights or claims, has not been addressed yet. However, the requirement that issues are determined in cases which are the subject of a real dispute which requires resolution, and the necessity and desirability that any such issues should be the subject of comprehensive argument both in the High Court and Supreme Court, means that it is neither necessary, nor possible to seek to resolve the issue here. If the issue is to arise in any future case, it will be necessary to consider carefully the constitutional text, many more decisions than were

cited in this case, and a number of different fact situations including questions as to the significance of citizenship, residence, or fleeting presence in the jurisdiction. It may be that regard might usefully be had to the provisions of Article 40.1 of the Constitution which does not appear to have figured significantly in the decisions or commentary to date. Whether that provision or any other provision is of any assistance, is a matter which may however properly await a case in which the issue is squarely addressed, and where it requires determination.

**The Brussels II Regulation.**

85. A further argument advanced on behalf of the Attorney General relied on the terms of the Brussels II Regulation. In its pallid form – that the Court should be conscious of the possibility that a jurisdiction under the Regulation could be required to be assigned to one state, while another might have custody pursuant to its decision under Article 20, and that such a circumstance was to be avoided – the argument was of little assistance. In the first case, it is to be assumed that countries will do their best to cooperate in difficult and exceptional circumstances in which a country might feel obliged to apply Article 20. In any event, it is hard to see how if such a case arose, the undesirability of such an outcome could affect the interpretation of the Constitution and the conclusion the Court might draw as to the requirements of the Constitution. In its strong form – that Article 20 no longer operates between the Brussels II Regulation and the member states of the European Union – the argument was startling. I would have been very slow indeed to accept that such a significant result had been achieved merely because of the provisions of Article 67 of the Regulation. First and fundamentally, the Regulations and Convention are not meant to conflict and the Regulation is not intended to override the Convention either generally or in particular. Instead, they are intended to work in harmony. There is no necessary conflict between them in this area. In circumstances where it appears to be accepted that the Hague Convention would not have been adopted without the safety valve of Article 20, it would be remarkable if the mere absence of a reference to Article 20 in the Regulation was to be interpreted as removing that provision at least between member states of the European Union. Such a conclusion would indeed be disturbing. It would also be surprising if such a conclusion had been reached by the Brussels II Regulation without any express reference in the Regulation itself, any apparent discussion in the travaux preparatoires, and so far at least as the submissions before this Court go, unnoticed in any subsequent commentary. If the Court did not resolve this case on other grounds, and could not conclude the matter was clear, it might have been necessary to seek a preliminary reference from the E.C.J. which even with the fast track procedure available, would inevitably have led to regrettable delay in this case. In the light of the view I have taken it is not necessary to offer a definitive response, and certainly not necessary to seek any reference. If this issue was to arise in any further case, it would require more detailed and elaborate argument than was possible in this case.

**Proportionality**

86. It is also argued on behalf of the Attorney General and the Council, that if it was considered that the constitutional rights of the family was interfered with by an order for return, then any such interference or restriction was nevertheless proportionate.

87. It has now become common place to refer to proportionality in constitutional litigation. I think it is necessary however to recognise that proportionality in itself is not an entirely transparent concept. It can be applied strictly to strike down legislation or generously to sustain it. It is important to remember that proportionality is a tool for analysis, rather than an end in itself. The mere statement that something is *proportionate* is almost as delphic as the statement that it is *reasonable*. The analysis of whether any particular restriction or limitation is consistent to the Constitution may be assisted by the structure proportionality analysis provides, but only if it is explained *why* any particular provision is permitted by the Constitution, and is proportionate. In my view it is an error to approach the constitutional issue by simply asking, almost in the abstract, whether any particular provision is proportionate as an almost self standing test of constitutionality and detached from careful consideration of the text and the values necessarily implied by it. As Geoghegan, J. observed in *Maguire v Ardagh* [2003] IR 721:

> *"There is a danger that constitutional rights can be excessively whittled away by arguments based on so called "balance". In this case the wording of that paragraph in the Constitution is of relevance …"*

88. In this case it is not apparent how the proportionality argument advances the case made by the Attorney General and accordingly I would also leave that to another day.

**Conclusion**

89. Because of the particular history of this case, the argument in this Court was limited to a single though significant issue. Because of the absence of representation in the Court below, the arguments were not supported by a sufficient evidential foundation. Perhaps for these reasons the arguments on either side in this Court were in bold and stark terms, although within the relatively narrow confines of the approach to cases of child abduction regulated by the Hague Convention. I have come to the conclusion that the case cannot be answered by unqualified acceptance of any of the rival contentions advanced to this Court. It may well be necessary to revisit the issues raised in this judgment in a case with a more developed factual foundation, and which calls for further analysis. For the purposes of this case however it can be said that both on the narrow ground upon which the High Court rested its judgment, and on the further considerations set out in this judgment, the appeal must be dismissed.

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