

THE HIGH COURT**2011 22 HLC****FAMILY LAW****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 P, A MINOR****BETWEEN****I. P.****APPLICANT****AND****T. P.****RESPONDENT****JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 7th day of February, 2012**

1. This is an application pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980, as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act, 1991, and Council Regulation (EU) 2201/2003 for the return of the child named in the title to the jurisdiction of the courts of Poland. The child, to whom I will refer in this judgment as Anna (not her real name) was born in August 1996. In August 2012, the Convention will no longer apply to her (Article 4).

2. The applicant is the mother of Anna and the respondent is the father of Anna. The applicant and respondent married in March 1996. Anna is their only child. Unfortunately, their relationship subsequently broke down and they divorced in April 2009. Anna has one half-sister to whom I will refer as Emma in this judgment (not her real name) who is the daughter of the father from a prior marriage. She is not the daughter of the applicant. Since the father's separation and divorce from his first wife, Emma had been in his custody. She was eight years old when the mother and father first met and lived with them after they married until she was a teenager.

3. The mother, the father, Anna and Emma are all Polish nationals. They lived in Southern Poland. In 2006, Emma came to Ireland. She is now an adult, married with three young children and continues to live with her husband in Ireland.

4. The father, after separation from the mother, came to Ireland in 2007 and lives and works in a town in the west of Ireland.

5. The decree of divorce of 7th April, 2009, in its English translation, "entrusts the performance of parental power over the parties' minor daughter . . ." to the mother and grants to the father "the right to co-decide about important matters connected with the daughter, particularly the choice of school and profession".

6. Anna continued to live with her mother after the mother and father separated. Her maternal grandmother also appears to have played a role in her life.

7. The father gave Anna a computer, and since approximately the summer of 2009, she has had regular Skype contact with her father and Emma in Ireland.

8. In August 2010, the father paid for airplane tickets for the mother and Anna to come to Ireland for three weeks, when they stayed with Emma and her family. Anna had been invited to become the godmother of one of Emma's daughters.

9. In July 2011, the father went to Poland. On 12th July, 2011, without informing the mother or obtaining her permission, Anna left Poland with her father and travelled by car with him to Ireland. Prior to leaving Poland, she went with her father to the local police where he made a complaint in relation to alleged treatment of her by her mother and her maternal grandmother. In Ireland, on 14th July, 2011, Anna went to the Polish Embassy in Dublin and had a short handwritten statement signed by her, witnessed by an official in the Polish Embassy. The translation of the document states:

"I [] state that I came to Ireland voluntarily with my dad [] and I also inform that both my mum, namely [] and granny [] have abusing me physically and mentally from the time my dad left for Ireland in 2007."

10. Since July 2011, Anna has lived with her father in a two-bedroomed house in a town in the west of Ireland. She goes to the local secondary school where she has one Polish friend and is also learning English. She regularly visits Emma and her family at weekends.

11. Regretfully, she has had very little contact with her mother since she came to Ireland. She has had no contact with her now for in excess of four months.

12. On 29th July, 2011, the mother commenced steps through the Central Authority of Poland and of Ireland to seek the return of Anna to Poland. Proceedings were issued on 19th October, 2011. The summons was initially grounded on an affidavit of the solicitor for the applicant in accordance with current practice.

13. The father, in the first replying affidavit, explains why he took Anna to Ireland in July 2011. In doing so, he makes a number of serious allegations against the mother. In part they are based on what he states he has been told by his daughter, Emma, of difficulties allegedly encountered by Emma with her stepmother whilst living in the house in Poland. He alleges that the mother behaved differently in his presence and that he was unaware of how bad things allegedly were when he came to Ireland in 2007.

14. At para. 15 of the affidavit, he explains that it was when he visited Poland in July 2011 that Anna revealed to him that, "she was dreadfully unhappy and now found her predicament unbearable". He then describes a number of allegations allegedly made by Anna against her mother and maternal grandmother. He states at para. 23 of the affidavit:

"I believe [Anna] as an individual had a right to participate in the dilemma surrounding her life and in the formulation of her own destiny in a manner commensurate with her age, development and understanding. I also wanted her to be in a safe, loving and caring environment. In this regard, I felt it was my duty to protect my daughter from such a breach of her personal integrity. I agreed to rescue her and bring her back to Ireland with me, as this was the measure that had a real prospect of mitigating the harm. We travelled on 14th July 2011 and also visited the Polish Embassy on 14th. I say that there was no inducement to [Anna] to come to Ireland and that it was an expression of [Anna's] free will to ask to come to Ireland."

An affidavit from Emma was also filed making allegations against the mother.

15. The solicitors for the applicant in this jurisdiction have had considerable difficulties in obtaining instructions from the mother for the purpose of these proceedings. The mother does not speak English. Assistance has been sought through the Central Authority from the Polish Central Authority, but notwithstanding this, there have been difficulties. The mother furnished an English translation (by a person who is described as an "English Language Sworn Translator") of a ten-page signed statement dated 8th December, 2011, in response to the father's and Emma's affidavits. The Polish document was never furnished, notwithstanding requests made on behalf of the father. The mother was permitted to file the English translation of her statement as her evidence in these proceedings. Certain of the language used in translation creates further difficulties for the Court in this application.

16. The mother, in her statement as translated, at pages 7/10 states:

"[The father] did not arrive in Poland to pay his visit in July 2011. It was a plot created by him, his daughter [Emma] and [Anna]. By communicating through the Skype, internet, they planned precisely her departure or [Anna's] abduction rather to Ireland while I was working at that time.

I hold a grudge against [Anna] but I am also aware that she was under the pressure from her father and her stepsister."

17. The mother, at page 9/10, states that she noticed, since December 2010:

"My daughter behaved differently. She was abrupt and moody, she would [be] rude to me and others close to her. I reckoned that it was the age of adolescence and that these acts of behaviour would pass with time."

She also expresses the belief that Anna "is manipulated by her father and stepsister".

18. This indicates that the mother does not accept that Anna's departure from Poland was only planned in the visit of July 2011. She contends that it was "a plot" created by the father, Emma and Anna in advance of that time. She also refers to a visit by the father to Poland in May in relation to an alleged disappearance of Anna's passport. Elsewhere, she states that Emma travelled with the father in July 2011. Whilst the father, in the further replying affidavit, disputes the facts relating to the alleged disappearance of Anna's passport, he does not dispute that he was in Poland in May, and does not dispute that Anna's departure was planned in advance of his arrival in July 2011, or that Emma travelled to Poland with him. At paragraph 15 of his second affidavit, he states that Anna became very upset in August 2010 when, allegedly, she was told by the mother that she would not be visiting her father and Emma in Ireland, and states that she "was constantly asking to come and live with me, as she found life with her mother intolerable".

19. Pursuant to an order made on 30th November, 2011, Anna was interviewed and assessed by Dr. Anne Byrne-Lynch in relation to the matters set out in that order. This was done with the assistance of an independent Polish interpreter supplied by the Law Centre.

20. Anna, in the interview with Dr. Byrne-Lynch, describes her mother as having very changeable moods; she would become angry and hit out at her without warning. She also reported that her mother could be nice to her and treat her well, but described this as usually done in front of the extended family to present a normal picture. She also reported in some detail alleged behaviour of her mother, which, if it occurred, objectively would constitute behaviour abusive of Anna. This Court is not in a position to determine whether or not the reported behaviour did or did not occur and makes no findings in that respect. The summary of the interview conducted by Dr. Byrne-Lynch and her assessment of Anna were set out at the end of her report in the following terms:

"Summary of Findings

This is a limited assessment based on an extensive interview with [Anna] using a Polish interpreter on 9th December, 2011 and a review of the court documents furnished. The findings are presented under the headings furnished by the High Court in the Court Order of 30th November, 2011.

(a) The circumstances in which she was living prior to coming to Ireland in July 2011. [Anna] describes living in a difficult home situation with her mother whom she reports finding unpredictable and physically abusive at times and socially inappropriate with apparently poor boundaries in terms of exposing the teenager inappropriately to adult nudity and some apparently sexualised behaviour within the home. She reports similarly inappropriate social behaviour from her maternal grandmother. She reports that the difficulties in the home were known to her school and further reports a fall off in her school performance as a consequence of her unhappiness.

(b) The circumstances in which she came to Ireland. She reported that she made her father aware she was unhappy and he arranged to take her to Ireland. She recalled her father taking her first to the local police station to make a statement about her mother's abusive behaviour. Her departure was concealed from her mother until after the event.

(c) Her wishes in relation to her future care and living arrangements. [Anna] is very clear that she does not wish to return to her mother's care in Poland reported a lack of trust in her affection and care and difficulty dealing with what is described as intermittent, unpredictable physically abusive and socially inappropriate behaviour on the part of her mother and also her maternal grandmother. She expresses a strong wish to remain living with her father in Ireland and attending her present school.

(d) If those wishes do not include living in Poland whether she has any objection to returning to live in Poland. [Anna] expresses a strong wish to live with her father, wherever he is located and hence does not object to living in Poland per

se but is clearly unwilling to be returned to her mother's care in Poland. She expresses a wish to reside in Ireland with her father.

(e) In the event of any objection to returning to live in Poland being expressed, her reasons for the objections and (f) if she were to return to Poland any wishes as to how the return would take place (g) any other information. [Anna's] objections to living in Poland are centred around her expressed wish not to return to her mother's care. If she were to return to Poland she would wish to return in the company of her father or to be placed with a non related carer or perhaps a relative from her father's side of the family. Her main attachment appears to be to her father and her sense of security appears to reside in him and to a lesser extent in her older sister. (g) This assessment is based solely on interview of [Anna] and it is therefore not possible to corroborate any of the information about family functioning. However she impressed as giving a straightforward account without undue embellishment of her circumstances in her home in Poland as she saw them.

1. The degree of maturity of the said minor

[Anna] presented as a somewhat sheltered fifteen year old who is able to express her views clearly without appearing to dramatise or embellish her account unduly. She could be regarded as having a level of maturity close to or perhaps a year below her age.

2. Whether the minor is capable of forming her own views

My professional opinion is that [Anna] is capable of forming her own views and articulating them. She is at present somewhat polarised in her views seeing only positives in her father's care and a large number of negatives with regard to her mother's care.

3. Whether the minor objects to being returned to Poland

(a) As described above, [Anna] objects to being returned to Poland because this signals to her a return to her mother's care and separation from her father and her older sister. Her objection to returning to Poland relates also to her growing engagement with her education in Ireland and other aspects of her life in Ireland.

(b) My professional opinion is that these views are [Anna's] own views and as such are independently formed but she has inevitably been privy to some adult discussion of the family situation and could be influenced by the important position of her father in her life. No evidence of coaching or any other concerted effort to influence the expression of her views was elicited during the assessment. Her views were consistent and well expressed and in my professional opinion should be regarded as her own views at this time.

(c) It is unfortunate that [Anna] has not had contact with her mother over a prolonged period. She reports upset that she has not experienced her mother as demonstrating any understanding of her viewpoint or sorrow about the family situation. Opening a channel of communication is important, both in the short term for repairing relationships and in the longer term for [Anna's] emotional adjustment, but is, in itself, unlikely to mend the fundamental breakdown of trust between daughter and mother in the short or medium term."

21. Dr. Byrne-Lynch's report has been communicated orally in Polish translation to the mother through the Polish Central Authority. The mother did not travel to Ireland for the hearing of the application. Counsel on her behalf informed me that she was not in a position to do so. She did not furnish any specific instructions on the report of Dr. Byrne-Lynch to her Irish lawyers.

22. Dr. Byrne-Lynch was not asked to give oral evidence nor was she cross-examined.

Issues

23. It is not in dispute in this application that the mother has custody rights to Anna within the meaning of the Convention; that Anna was habitually resident in Poland until July 2011, and that Anna left Poland without the consent of her mother. Counsel for the mother submits there was a wrongful removal and that there should be an order for return.

24. The first submission made by counsel on behalf of the father is that Anna's departure from Poland was inspired by her and at her request, and as such, is not a removal by the father of Anna from Poland within the meaning of the Convention. If, contrary to the above, the Court holds that there was a wrongful removal of Anna from Poland, then counsel on behalf of the father raises two defences under Article 13:

(i) Anna objects to being returned to Poland and has attained an age and degree of maturity at which it is appropriate to take account of her views; and

(ii) there is a grave risk that her return to Poland would place her in an intolerable situation within the meaning of Article 13(b).

25. If either or both of those defences are accepted by the Court, then it is submitted that the Court should exercise its discretion in favour of refusing to make an order for return. Counsel for the mother submits that the defences are not made out and that the Court, if it has a discretion, should give effect to the policy of the Convention, and, as Anna has lived with her mother all her life until July 2011, make an order for return.

26. On the undisputed facts herein, Anna left Poland voluntarily with her father. She has informed the Court through her interview with Dr. Byrne-Lynch that she did this of her own volition. This is supported by her father's evidence. Her mother contends that she was, at the time, under pressure from or manipulated by her father and Emma.

27. In my judgment, regardless of whether Anna left Poland with her father as a result of a request from her, agreement by her to a suggestion from her father, or was under pressure from or manipulated by her father to do so, her travelling out of Poland with her father in his care constituted a removal of Anna from Poland within the meaning of the Convention. The Convention, in Articles 1 and 3, includes two separate concepts. The first is one of fact, namely, the removal to, or retention of a child in a Contracting State other than the child's State of habitual residence. The second is a legal one, namely, that such factual removal or retention was wrongful within the meaning of Article 3 of the Convention. The submissions of counsel for the father are limited to the first of these.

On the facts herein, Anna travelled in the care of her father out of Poland to Ireland. Whilst not expressly stated on affidavit, it was confirmed in the course of submission that the travel was by car from Poland to Ireland. Factually, Anna's father drove her in his car from Poland to Ireland. Her travel from Poland to Ireland was organised and executed by her father. In my judgment, she was removed from Poland to Ireland within the meaning of Article 1 of the Convention. For the purpose of determining whether or not this was a removal, it appears to me it is irrelevant that Anna willingly participated or may even have instigated such removal.

28. I have considered the submission of counsel for the father that the Perez-Vera report suggests, in particular at para. 11, that a removal in which a child willingly participates is not intended to be included in Article 1 of the Convention. Such a construction is not sustainable. A full reading of the first part of the Perez-Vera report in relation to the object of the Convention (paras. 10-34 inclusive) makes clear that all factual removals or retentions which are wrongful in the sense of being in breach of the custody rights of a person exercising them in accordance with the law of the State of habitual residence are included in the Convention.

29. Insofar as counsel sought to rely upon certain comments made in the Hague Convention on International Child Abduction: Beaumont and McEleavy, Oxford University Press at p. 199, in relation to the treatment of teenagers under the Convention, it must be noted that those comments are made in the context of considering defences under Article 13. In the scheme of the Convention, this is where a child's voluntary participation in his or her removal to or retention in another State falls to be considered. The fact that a child wanted to leave or voluntarily left her State of habitual residence would normally be relevant to any assessment of objections to return.

30. As Anna's travel to Ireland with her father in July 2011 constitutes her removal from Poland to Ireland within the meaning of Article 1 of the Convention, it is correctly conceded on the father's behalf that such removal was wrongful within the meaning of Article 3 as it was in breach of the mother's rights of custody in accordance with the laws of Poland which were then being exercised.

Article 13 Defences

(1) Anna's Objections

31. Pursuant to Article 13 of the Convention, this Court is not bound to order the return of Anna where her father, who opposes the order for return, establishes that Anna objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of her views.

32. Counsel for both parties were in agreement with the approach to this issue previously set out by me in the judgment delivered in *C.A. v. C.A. (Otherwise C.McC.)* [2010] 2 I.R. 162, 171 at para. 25:

"Counsel for both parties were in agreement that the proper approach of this court is what has been termed the three stage approach to a consideration of a child's objections. Potter P. in *Re. M. (Abduction: Child's Objections)* [2007] EWCA Civ 260, [2007] 2 F.L.R. 72, at p. 87, stated:-

'Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return'."

33. On the first question, I am satisfied from a consideration of the full report of Dr. Byrne-Lynch of her interview with Anna (and not just the summary set out above) that Anna does now object to being returned to her mother's care in Poland. However, Anna's primary objection is being returned to her mother's care. Her objection to being returned to Poland is because she perceives that a return to Poland is a return to her mother's care. On the present facts before the Court herein, a return to Poland is inevitably a return to the mother's care. In accordance with the divorce decree, the mother has parental power. There is no evidence before the Court of any consent by the mother or arrangement in place which would enable Anna live with any other person if returned to Poland. On those facts, it appears to me that Anna's present objection does constitute an objection to a return to Poland. However, the reason why she now objects to returning to Poland is a relevant matter if the Court reaches a stage where it has discretion not to make an order for return.

34. On the second question, Anna is now 15 years old. She will be 16 in August 2012, when the Convention no longer applies to her. Dr. Byrne-Lynch's professional assessment is that she has a level of maturity "close to or perhaps a year below her age" i.e. 14 years old. She also expresses the professional opinion that Anna is capable of forming her own views and articulating them. In my judgment, Anna is now a person whose age and maturity are such that it is appropriate for the Court to take account of her objections to now returning to Poland. The weight to be attached to those objections in the exercise of the Court's discretion is a separate matter.

(2) Article 13(b) "Intolerable Situation"

35. Prior to considering whether or not the Court should exercise its discretion in favour of making or refusing an order for return, it appears to me that I should consider the second defence pursuant to Article 13 advanced by counsel for the father. The defence advanced is pursuant to Article 13(b) that on the facts, there is a grave risk that to return Anna to her mother's care in Poland would place Anna in an intolerable situation.

36. This Court should not and will not, in these proceedings, make any findings or form any views as to whether any of the alleged behaviour of the mother and grandmother disclosed by Anna to Dr. Byrne-Lynch did or did not occur. What is relevant to this defence is the fact that Anna has made these disclosures and allegations to Dr. Byrne-Lynch. Further, these reported allegations have been communicated (as fair procedures requires) in the course of these proceedings to the mother.

37. The statement of the mother is dated 8th December, 2011, and was translated on 9th December, 2011. The report of Dr. Byrne-Lynch is only dated 12th December, 2011, and was communicated to the mother later. Accordingly, the mother's statement pre-dates her knowledge of the disclosures made by Anna in interview with Dr. Byrne-Lynch.

38. The statement of the mother is made in response to the first affidavit of the father and the affidavit of Emma. Regretfully, there appears to be a total breakdown of relationship between the mother and the father and between the mother and Emma. The statement and affidavits disclose an extreme level of bitterness which, in the context of all three persons' relationship with Anna, is extremely unfortunate.

39. The proper approach of the Court to a potential defence under Article 13(b) is now well established. It has been repeated by the Supreme Court of the United Kingdom in *Re E. (Children) Abduction: Custody Appeal* [2011] UKSC 27, at paras. 29 to 38 in the judgment of the Court delivered jointly by Baroness Hale of Richmond and Lord Wilson JJSC. In that decision, the UK Supreme Court considered *inter alia* the application of the Hague Convention by national courts in the context of an article 13 defence subsequent to the judgment of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [GC] no.41615/07 ECHR [2010] - (6.7.10). That case concerned the interrelationship between Article 8 of the European Convention on Human Rights and orders for return under the Hague Convention.

40. As stated in that judgment, the defence provided for in Article 13(b) of the Hague Convention is one which should be given a restricted application but that does not mean it should never be applied at all. The burden of proof normally lies with the person who opposes the child's return. The standard of proof is the ordinary balance of probabilities. It is for them to adduce the evidence to substantiate the exception. On the facts of this case, it is primarily the report of Dr. Byrne-Lynch, who interviewed Anna, which is the evidence primarily relied upon. Having regard to Anna's age and degree of maturity, and Dr. Byrne-Lynch's view expressed in her report to the Court that Anna's "accounts of incidents did not appear rehearsed or unduly embellished", it is evidence which in my judgment the Court should take into account.

41. There are limitations imposed on a court in evaluating evidence on an application for summary return pursuant to the Hague Convention. It is rare to hear oral evidence or even cross-examine deponents and a court will not normally attempt to resolve factual disputes. There was no oral evidence and no cross-examination in this application and the Court, as already stated, should not and will not attempt to resolve the dispute as to whether the alleged incidents did or did not occur.

42. Article 13(b) is forward-looking, in the sense that it looks at the situation, as it would be if Anna were immediately returned to Poland.

43. The UK Supreme Court, at paragraph 36 of its judgment, in *Re E.*, refers to the "tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true". That case concerned allegations of domestic abuse. It appears to me that the pragmatic solution to the tension referred by the UK Supreme Court is of use to a that tension herein. The solution is that this Court should first ask whether, if the allegations are true, there would be a grave risk that the child would, following the summary order for return, be placed in an intolerable situation. If so, the Court should then ask how the child can be protected against the risk. That case concerned a return to Norway so the Regulation did not apply.

44. "Intolerable" is as has been stated "a strong word" and when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" in *re D* [2007] 1 AC 619 at para 52. In *In re E* the Court, at para 34, having referred to this definition observed, "Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse or neglect of the child herself." I respectfully agree with this observation and would add in relation to the facts of this case that discomfort and distress may be almost inevitable for a child whose parents are in dispute.

45. In my judgment, if the incidents disclosed by Anna to Dr. Byrne-Lynch in relation to her mother's behaviour are true, then, for this Court to make an order for summary return, the practical consequence of which is that Anna returns to the care of her mother would, in my judgment, place Anna in an intolerable situation within the meaning set out above. I stress that this is my conclusion if the allegations are true and not any finding that they did occur. The situation as described by Anna goes well beyond that which she might be expected to put up with even where her parents are in dispute and her father is living in another country.

46. Accordingly, I now turn to consider whether there is any evidence of protective measures available to protect Anna against the identified risk if the Court now made an order for return. Article 11(4) of the Regulation emphasises this as an appropriate approach by providing:

"(4) A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

47. In the Irish adversarial system, it must primarily be a matter for the applicant to establish to the satisfaction of the Court that such adequate arrangements "have been made" to secure the protection of the child upon return. As previously indicated, counsel and solicitor acting for the applicant in this jurisdiction have had difficulties in communicating with the mother and have not been in a position to date to put forward even any proposed arrangements. The difficulties in this application are not unusual in an application from a geographically distant EU Member State with a different language. It raises questions about the potential practical application of Article 11(4) of the Regulation.

48. In the absence of protective measures, I am forced to the conclusion that the contention by the father that on the facts herein a summary order for the return of Anna to Poland would constitute a grave risk of placing her in an intolerable situation has been made out. I must emphasise that this is an exceptional case and unusual by reason of the age of Anna; the fact that her father was already living and working in Ireland prior to the date of removal, and that an order for her return to Poland on the facts adduced to date, inevitably has, as a practical consequence, her return to the care and custody of her mother. In many instances, the parent who removed a child will have travelled to this country with the child and on an order for return, it can reasonably be expected that such parent will return with the child to the country of prior habitual residence and provide appropriate protection for the child pending an order of the courts of the State of habitual residence. On the facts herein, I am satisfied that it not reasonable to expect the father to leave his employment in Ireland and return to Poland. Even if it were, by reason of the current order of the Polish court in the absence of any alternative arrangements consented to by the mother and put in place, Anna would be required to return to live with her mother pending any application to the Polish courts.

Exercise of Discretion

49. It follows from the foregoing conclusions that both by reason of Anna's objections to return to Poland and the conclusion on the Article 13(b) defence, that the Court now has a discretion whether or not to make an order for the return of Anna to Poland. It is well established that the child's objections are not determinative, but rather, must be taken into account and balanced against the general policy of the Convention. On the conclusions reached herein, it is not only the child's objections which gives rise to the discretion vested in the Court, but also the grave risk of placing the child in an intolerable situation which exists in the absence of

there being any protective measures in place.

50. The policy of the Convention referred to includes that the child's best interests are served by the courts of her habitual residence determining any custody dispute between the parents and its purpose in deterring child abduction. This has been reconsidered in the context of the decision of the European Court of Human Rights in *Neulinger*. Whilst such decision was not expressly referred to in the judgment of the Supreme Court delivered by Denham J. in *U.A. v. U.T.N.* [2011] IESC 39, it appears that the Supreme Court must have been aware of the *Neulinger* decision, and the current approach of the Supreme Court, which is binding on me, where children's objections to return have been established, is as stated at para. 32 by Denham J.

"The learned trial judge was entitled to have regard to the children's stability and contentment in determining what policy of the Convention should prevail. The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views."

51. The general policy of the Convention that the best interests of the child is served by disputes in relation to her custody being determined (if they cannot be agreed between the parents) by the courts of her habitual residence applies to the facts of this case. I am satisfied that it is in the best interests of Anna that any continuing dispute in relation to her custody between her parents, if necessary, be decided by the courts of Poland. All three persons involved are Polish nationals, speak Polish, and, in the case of the mother, appears to have no English, in the case of Anna, very little English, and in the case of the father, even though he has some English, he availed of a Polish interpreter to follow the proceedings before this Court. The policy of the Convention to deter child abduction is also relevant. The father made a deliberate decision to remove Anna from Poland without obtaining the consent of the mother, or if that was not forthcoming, without seeking an order from the courts of Poland. However, as pointed out by Denham J., the policy of the Convention also includes that in exceptional cases, a court may refuse to return a child if the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of his or her views. It also forms part of the policy of the Convention that if the court determines that there is a grave risk that a summary order for return would place the child in an intolerable situation, a court may refuse to make an order for return. There are inherent conflicts within the different aspects of those Convention policies and those conflicts must be resolved on the facts of the individual case in the best interests of the particular child.

52. On the facts of this case, whilst I am satisfied that it is in Anna's best interests that any continuing conflict between her parents in relation to her care and custody be determined by the courts of Poland, I am also satisfied that it would be contrary to her best interests to make a summary order for her return to Poland, the practical consequence of which will be to return her to her mother's care. I have reached this view by reason of the Courts finding of the grave risk of an intolerable situation in the absence of protective measures; the objections expressed by Anna, her age and degree of maturity as assessed by Dr. Byrne-Lynch; Dr. Byrne-Lynch's assessment that these are Anna's own views and of the regrettable breakdown of trust between daughter and mother described in the final paragraph of her report.

53. Anna's best interests would undoubtedly be served by the restoration of her relationship with her mother. Dr Byrne-Lynch's final comments suggest that careful work is needed to achieve this. An order for summary return despite Anna's objections would not in my judgment assist. This court presumes that the mother loves Anna and wants what is best for her notwithstanding understandable upset or anger at the manner of her leaving Poland. In my judgment, it would be severely prejudicial to a potential restoration of the relationship between Anna and her mother for this Court to make a summary order for the return of Anna to Poland where, at aged fifteen and a half years (albeit with the maturity of approximately fourteen and a half), she expresses her own view that she objects to returning and in a context where she has stated that she voluntarily left the care of her mother and Poland.

54. Accordingly, I have concluded that having regard to the differing policies of the Convention, all the evidence herein and what is now in the best interests of Anna that I should refuse to make an order for her summary return to Poland.

55. I wish to emphasise that pursuant to Article 19 of the Convention this decision is not a determination on the merits of any custody issue in relation to Anna. Further, that the policy of the Convention in ensuring that a decision on custody in relation to Anna is taken by the courts of Poland is secured by the provisions of Article 11 of Regulation 2201/2003. In accordance with Articles 11(6) to (8), this Court will now transmit, through the Central Authorities to the relevant Polish courts, this judgment, the order to be made pursuant thereto and other relevant documents. Thereafter, in accordance with those provisions, the Polish courts have jurisdiction to examine "the question of custody of the child", and if having done so, a Polish court determines to make an order to require Anna to return to Poland, such order is enforceable in this jurisdiction in accordance with Article 11(8) and the provisions referred to therein. The father should now arrange to participate in those proceedings in Poland. The Polish Courts will have jurisdiction to conduct a full welfare enquiry into Anna's future care which this court may not do on this application.

56. Counsel for the mother submitted in the alternative to the submissions that the Court should now make an order for return, that the Court might take the approach taken in *C.A. v. C.A. (otherwise C.McC.)* and by Sheehan J. in *S.R. v. S.R.* [2008] IEHC 162, and *M.N. v. R.N.* [2009] IEHC 213, and make an order for return but place a stay on the order for return pending an application by the father to the courts of Poland for custody of Anna. If the only Article 13 defence made out had been that of Anna's objections, it is an approach that may have had merit. However, it appears to me that the finding on the facts herein that there is a grave risk that the making of a summary order for return would place Anna in an intolerable situation precludes such an approach herein.

57. Following this decision, as already stated, the Polish Courts now have jurisdiction to examine the question of custody of Anna and make orders enforceable in this jurisdiction. I just wish to add that it is to be hoped that within the Polish system there may be mediation or other assistance available to the mother and the father to help them reach agreement on a decision which is in the best interests of Anna and which would permit Anna to restore, in the case of her mother, and continue, in the case of her father, a good relationship with each parent. Both parents have indicated that they want what is best for Anna. It is they and not the courts who are the experts in their daughter.

Relief

There will be an order refusing the application and directing pursuant to Article 11(6) of the Regulation that this judgment, the order to be made thereto, the full report of Dr Byrne-Lynch and transcript of the hearing be furnished via the Central Authorities to the relevant Court in Poland.

