Neutral Citation: [2015] IEHC 548

THE HIGH COURT

[2015 No. 17 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF THE COURT ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND IN THE MATTER OF COUNCIL REGULATION 2201/2003 AND IN THE MATTER OF A AN INFANT

BETWEEN

B

APPLICANT

AND

C

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 13th day of August, 2015.

1. By Special Summons dated the 30th June, 2015 the applicant sought an order under the provisions of the Child Abduction and Enforcement of Court Orders Act 1991 and Council Regulation 2201/2003 directing the return of his son A to the jurisdiction of the Courts of England and Wales. A was born on the 21st December, 2008. The application was grounded upon the affidavit of Mr. Chris Walsh Solicitor retained by the Central Authority established for the purpose of enforcing the provisions of the International Convention on Civil Aspects of International Child Abduction (The Hague Convention). The summons was listed before the High Court (O'Hanlon J) on the 10th June, 2015 and the respondent undertook not to remove the child from the jurisdiction. The Court directed that A reside with his mother, the respondent C, and that a replying affidavit be filed on or before 24th June.

2. On the 24th June, O'Hanlon J. directed that the child be interviewed by Ms. Ann O'Connell, Consultant Psychologist and that a report be furnished to the Court to ensure that he had the opportunity to express his views and be heard in relation to the matter. The order directed that a number of issues be addressed in the interview including the circumstances in which A was living prior to coming to Ireland, his awareness of the reasons for the decision not to return him to England, his wishes concerning his future care, education and living arrangements including where he would like to live, whether and why he has any objection to returning to live in England, his wishes as to how and when any proposed return to England might take place and his father's role in his life. It was also directed that Ms. O'Connell should assess the child and report on *inter-alia* his level of maturity, whether he was capable of forming his own views, whether he objected to being returned to England and if so, the grounds of that objection and whether they may be regarded as independently formed or result from the influence of any other person including a parent or sibling. The Court also granted liberty to the respondent to issue a motion seeking permission to be accompanied by a McKenzie Friend returnable for the 8th July.

3. The assessment was completed on the 6th July, 2015 and a report was submitted to the Court. The motion to permit the attendance of the McKenzie Friend was refused on the 15th July. The Court granted permission to the respondent to have access to Ms. O'Connell's report on terms. The Court was also informed that the respondent had appealed a refusal of legal aid which was still under consideration.

4. When the matter came before the Court on the 20th July for hearing, it was further adjourned to the 22nd July, to clarify whether the legal aid application had been successful. On the 22nd July, it was indicated to the Court that legal aid had been granted and an application was made to adjourn the matter to enable solicitor and counsel to be instructed. This was granted and the hearing was adjourned to the following week. A number of additional affidavits were filed by both sides. Judgment was reserved on the 31st July.

Chronology of Events

5. The parties had been involved in previous litigation in England concerning custody of and access to A. By order of the South Somerset and Mendip Family Proceedings Court made on the 23rd October, 2012 (when A was three), it was ordered that contact should take place between the applicant and the child on alternate weekends. Orders were made in respect of holiday access. In an addendum to the order, a warning appears which states that:

> *"Where a residence Order is in force no person may cause the child to be known by a new surname or remove the child from the United Kingdom without the written consent of every person with parental responsibility for the child or the leave of the Court."*

6. By order made 26th February, 2013 the South Somerset and Mendip Court confirmed the order of the 23rd October, 2012 as the final order in the case.

7. The respondent made an allegation that the applicant physically assaulted A. This allegation was investigated by the Avon and Somerset Police, but no further action was taken by them. In June, 2013 it was also alleged by the respondent that he had raped her, an allegation also investigated by the Avon and Somerset Police and a prosecution was initiated against him. It was a condition of the applicant's bail that he not contact the respondent directly or indirectly except through solicitors for the purpose of child contact. The criminal case was returned to Taunton Crown Court for a preliminary hearing on 11th November, 2013. On the 17th February, 2014 the applicant pleaded not guilty to thirteen accounts of rape against the respondent and a trial date was fixed for 4th August, at Taunton Crown Court.

8. The respondent attended the trial and following a legal submission to the trial judge a ruling was made in favour of the accused as a result of which the Crown Prosecution Service concluded it could not proceed with the trial. The Court agreed that the majority of the thirteen charges would "lie on file". According to a letter dated 5th August, 2014 to the respondent from the Prosecution Service, this meant that though the prosecution could not at that time proceed with the case, "in certain circumstances the case could be

restarted". It is not clear whether all or any of the bail conditions to which the applicant was subject were continued or whether he was discharged by the Court.

9. It is common case that up to the date of the initiation of the charges and his remand on bail, the applicant exercised his contact rights with A pursuant to the terms of the Court order. No contact occurred thereafter and there is no evidence that the applicant attempted to avail of access to the child through his solicitors.

10. The applicant resides with his parents in England. Following the successful application by the applicant in the criminal proceedings A's paternal grandparents brought an application for a Child Arrangement Order before the Family Court at Taunton. C was a respondent in those proceedings and A was the second named respondent. The child's father was also a respondent and supported the application made by his parents. The grandparents' application was for "contact" with their grandchild and issued on the 8th December, 2013.

11. In his affidavit the applicant states that the relationship with C broke down in or about August, 2010, when A was approximately 17-18 months old. The parties separated and contact in the form of access to A was granted to the applicant which was maintained until June, 2013. He acknowledges that he had no contact with A since July, 2013 but claims that this is because C insisted that only he could collect the child for access and therefore, because the bail conditions provided that he was not to approach C, he could not do so. He believes the respondent wishes to exclude him from the child's life and this is one of the issues for determination by the Family Court in Taunton on the grandparents' application.

12. The application made to the Taunton Court contained a brief statement outlining these facts. The grandparents state that they wish to facilitate access between their son and A because of the difficulties which have arisen, thereby enabling the child to have continuing contact with both parents, and, of course, with his grandparents.

13. It is clear that the respondent was served and engaged with the English proceedings. She delivered a "first statement" to the Court opposing the application dated the 15th May, 2014. By order of District Judge Brigg dated 21st January, 2015 the application was adjourned due to the necessity for further disclosure between the parties and the fact that additional information had come to light from other family proceedings which may have relevance to the allegations and issues in the case. Two days were reserved for a "contested fact finding hearing" on the 21st and 22nd April, 2015. It was agreed that this hearing was necessary to determine whether allegations made by C were true, and whether it was necessary to appoint an expert psychologist to consider C's anxiety in respect of the grandparents and whether that anxiety would impact upon A's emotional welfare. Ms. P. B. was appointed as the child's guardian for the purpose of the proceedings and the child was represented by a solicitor. C was represented by a solicitor and was directed to seek disclosure from the police of statements, reports, notes, medical notes and interview logs relevant to the police investigation concerning the alleged assault upon the child by his father and disclose this material to the Court and the father's solicitor not later than 28th January, 2015. A similar order was made in relation to the allegations made by the mother against the father of rape and sexual assault. A disclosure order was also made concerning a separate family file in respect of related proceedings concerning the applicant's other son now living with the grandparents. The matter was listed for further directions before District Judge Brigg on the 26th January, 2015 when the date for hearing was set.

14. The respondent did not attend the hearing on the 21st April. In an email sent to the Family Court at Taunton, the respondent complained of late notification of the date of hearing and for the first time indicated that she had withdrawn instructions from her solicitors and intended to act as a litigant in person. She gave contact details at an address in the United Kingdom. She stated that she was unable to attend the hearing which was listed for the following day. She had in fact moved from England to Ireland with A and the rest of her family on 14th April, 2015. In an affidavit sworn on the 27th July, 2015, she states that she and her present husband came to Ireland with the intention of setting up a permanent home here and cutting ties with England, where for various reasons they had a very troubled and disrupted life. She states that her husband came over within a week of her arrival. They have been married since 2012 and the family consists of A, her husband's daughter from another relationship age 7 and their baby daughter age 1. They had lived in Somerset since June, 2011, until they left England. She claims that they vacated the property on the 14th April and hired a lorry for the removal. She has enrolled the children in a national school in County Cork which is due to reopen on the 27th August.

15. On the 22nd April, 2015 the High Court of Justice Family Division, Taunton, upon hearing counsel for the child's guardian, an advocate for the father and the grandparents in person made an order that A be made a Ward of Court and directed that he should live with his grandparents until further order. The mother was aware that the case was adjourned to the 22nd and sent a further email at 8.29 am stating that she was unable to attend the hearing as she was now permanently residing in the Republic of Ireland.

16. She sent a further email on the 23rd April, 2015 reiterating her permanent move to this country and asked that proceedings be transferred here. She indicated the terms upon which she was willing to grant access to the grandparents in Ireland and complained that the Courts, Social Services and the Police had all failed or refused to act on evidence provided to them in respect of A's protection and welfare. She said that she was compelled to leave England in order to keep her son safe and provide a better life. She made an allegation of "corruption" in her case and threatened to make public what she regarded as the failings of those involved in the case to date.

17. The respondent was also clearly aware of the further adjournment of the matter to the 27th April, and sent an email on that date timed 9.45am (the hearing was listed for 10.00am). She set out her concerns in seven typed pages. She made allegations against the grandparents and the child's father. She has serious issues concerning the involvement of the child's guardian in the case because of her association with other related cases concerning the father.

18. On the 27th April, 2015 His Honor Judge Bromilow, having heard the grandparents in person, the solicitor for the father, and counsel for the child through his guardian P.B., having considered the various emails from the C on the 25th and 27th April and having heard the oral evidence of the guardian ordered that:

> *"1 A is declared habitually resident in the jurisdiction of England and Wales.*
>
> *2 For the avoidance of doubt A shall remain a Ward of Court pursuant to the order made 22nd April, 2015.*
>
> *3 The respondent mother…. shall return A to the jurisdiction of England and Wales and in particular Somerset forthwith.*
>
> *4 Upon return A shall not be removed from the jurisdiction of England and Wales until further order.*
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> *5 Upon return (pursuant to paragraph 2 of the order 22nd April, 2015) A shall live with (his grandparents) until further*

order.

6 The respondent father shall have permission to disclose all Court orders in relation to A and all emails received by the Court from C from 21st April onwards to Avon and Somerset Police. Such disclosure shall be made by 4 pm on the 1 May, 2015.

7 Avon and Somerset Police shall disclose to the respondent father's solicitors … for onward disclosure in these proceedings all incidents logs, guardian reports and other information they hold regarding A, C and (her husband) aged over eighteen, generated since 21 April, 2015, such disclosure to be provided on an ongoing basis as and when requested until further order. Such disclosure shall be made as soon as practical on service of this order…

11 The respondent mother's application for a transfer of these proceedings to the republic of Ireland is refused.

12 The respondent father shall have permission to register a Mirror Order in terms herein and in the terms of paragraph 1 of the order of 22 April, 2015 in the High Court in the Republic of Ireland".

19. The matter was then adjourned to the 29th April, 2015 and orders were made directing various persons to disclose all information in their possession concerning the whereabouts of A, his mother and stepfather. In addition, the applicant informed the court that he would issue an application for Wardship on the 28th April 2015:the applicant failed to do this.

20. A was taken to live permanently in Ireland on the 14th April, 2015 one week before the hearing which was listed for the 21st April. No notice of his intended removal was given to the High Court of England and Wales or to the child's father. The respondent claims that she and her husband planned to move the family to Ireland for approximately one year before their departure. This does not explain the stealth with which the removal was carried out. The applicant claims, for example that on the 17th April, the respondent telephoned A's school and stated that he would not be returning to school in the new term but would be moving to Bristol. The respondent's non-attendance at Court on the 21st April was initially said to be due to childcare difficulties. It was only when a summons to attend Court on the following day issued, that an email informing the Court of the removal of the family permanently to Ireland was sent. It is clear that the respondent removed A from the jurisdiction of the High Court of England and Wales primarily to avoid the fact finding hearing which had been fixed for 21st April. Her extensive criticism of the social services, the child's guardian and the Courts and the late dismissal of her legal team all point to a determination to avoid the jurisdiction of the Court. I am satisfied that the removal occurred because of the applicant's deep anxiety arising from what she perceives to be a threat to A's welfare and safety, based on the allegations made against the applicant of assault upon A and his other son, and her allegations of rape and sexual assault. These allegations were described by the respondent in considerable detail to this Court in the course of the hearing.

21. The respondent resists the application to return the child to the jurisdiction of the Courts of England and Wales on the basis that the applicant at the time of the removal of the child to Ireland was not actually exercising custody rights in respect of A and secondly, that there is a grave risk that A's return to England would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

The Hague Convention

22. The applicant seeks A's return because the child was wrongfully removed from the jurisdiction of the Courts of England and Wales. The following Articles of the Hague Convention are relevant:

"*Article 3*

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

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

23. Chapter 3 of the Convention addresses the "Return of Children". Article 12 provides that where a child has been wrongfully removed under Article 3 and at the date of commencement of proceedings in the High Court the child has been in the State for a period of less than one year from the date of the wrongful removal, the High Court "shall order the return of the child forthwith". However, Article 13 vests a limited discretion in the Court not to return the child forthwith in accordance with Article 12 as follows:

"Notwithstanding the provisions of the preceding Article, the judicial … authority of the requested State is not bound to order the return of the child if the person … which opposes its return establishes that –

(a) the person … having the care of the person of the child was not actually exercising the custody rights at the time of removal …

or

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

> In considering the circumstances referred to in this Article, the judicial … authorit(y) shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

24. The Court is authorised to take judicial notice of the law of the State of habitual residence of the child and of that country's judicial or administrative decisions without recourse to formal proofs under Article 14. Article 19 provides that a decision under the Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. Article 20 states that the return under Article 12 may be refused if it is not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Article 3

25. It is agreed between the parties that the child was habitually resident within the jurisdiction of the Courts of England and Wales at the time of his removal on the 14th April, 2015. It is accepted by the respondent that the applicant has rights of custody under United Kingdom legislation, as the natural father of the child registered on his birth certificate. It is also accepted that the removal took place without the consent of the applicant which was in breach of his rights of custody. However, it is submitted that at the time of removal, the applicant's custody rights were not actually exercised by him. Consequently, it is submitted that the removal was not a "wrongful" removal under Article 3. The respondent relies upon the following facts:

> (a) Though the applicant had contact rights pursuant to the orders of the South Somerset and Mendip Court confirmed on the 26th February, 2013, he had not exercised those rights since June, 2013 and had no contact with the child since that time;
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> (b) There is no evidence in the affidavits submitted on behalf of the applicant indicating any attempts to exercise his contact rights or any interest in doing so whether by letter, telephone, greeting card or otherwise since June 2013;
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> (c) During the course of the criminal proceedings the applicant was precluded from making direct or indirect contact with the applicant, but was permitted in accordance with his bail terms to make contract through his solicitors for the purpose of child contact. It was open to the applicant to seek access and maintain contact with the child during this period through his solicitors or a third party and he failed to do so;
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> (d) The applicant made no attempt to assert his contact rights or claim any breach thereof and did not an initiate any proceedings in respect of those rights before the Courts of England and Wales. The applicant was joined as a respondent in the grandparents' application which sought contact only and did not seek to disturb the custody arrangement under which A was in the care and control of his mother subject to the right of contact of the father as set out in the earlier orders.

26. In *M.S. H. v. L.H.* [2000] 3 I.R. 390 the Supreme Court considered the case of a mother who had removed her children to Ireland from England when there were proceedings pending before the English Courts relating to the welfare of the children. The plaintiff, the father of the children, was serving a prison sentence and subsequently initiated proceedings in Ireland under the Hague Convention seeking the return of the children to England. It was submitted that the father was exercising his rights of custody under English law at the time of the removal. It was accepted that the children were visiting the plaintiff in prison once or twice a month in the company of the paternal grandparents and that they had access to him. There was no evidence that the plaintiff was availing of the maximum possible number of opportunities to see his children while he was in prison. Counsel on behalf of the plaintiff submitted that the father took as much part as was open to him in the care of his children and the evidence was that he had a good relationship with them. When he apprehended that the children might be removed from the English jurisdiction, he immediately obtained an order from the English Courts prohibiting their removal which showed that he exercised his authority and right to determine their place of residence. McGuinness J. in delivering the judgment of the Court rejected the proposition that the father's rights under English law could be negatived or nullified by the fact that due to his imprisonment he was not at present playing a large part in the physical day-to-day care of his children. There were many circumstances in which one parent might have a low level input into the day-to-day physical care of a child but that would not deprive the parent of a legally established right of custody. A prisoner serving a term of imprisonment was not divested of a legally established right to custody of his or her children. It was clear from the evidence that the father was exercising his right to see his children and maintain his relationship with them. McGuiness J. also stated that:-

> "In addition his application to Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody. Failure to exercise rights of custody must be clearly and unequivocally established. In my view the defendant has not discharged the burden of proof required and I consider that Article 13(a) does not apply in this case".

27. In particular, the learned judge approved the judgment of the High Court judge (Herbert J.)who quoted approvingly from the explanatory report on the Hague Convention written by Madame Elisa Perez-Vera in which she stated at paragraph 72 that the burden of proving that the requesting parent was not exercising rights of access falls on the abducting parent.

28. Herbert J. stated:

> "I do not understand Professor Perez-Vera in these paragraphs or in any part of her report to be advancing the proposition that it is not sufficient for persons seeking relief under Article 12 of the Hague Convention to establish that the particular custody right upon which reliance is placed and which is alleged to have been breached by the other party was exercised by them but that such persons must in addition in every case establish that they were to some extent taking immediate care of the person of the child at the date of the alleged wrongful removal.
>
> Should this be the case, then persons under disability, for example, a person serving a term of imprisonment, persons incapacitated by sickness or accident and persons whose occupation necessitates long absences from home such as mariners would all be deprived of the benefits of the Hague Convention in the case of an unauthorised removal of their children. In my judgment, this could hardly have been the intention of the contracting states in entering into this agreement on the Civil Aspects of International Child Abduction".

29. This matter was further considered by Finlay Geoghegan J. in *M.J.T v. C.C.* [2014] IEHC 196 in which an issue arose as to whether an applicant father was actually exercising rights of custody. The child had been brought to Ireland in 2011. The learned judge was not satisfied that there was *prima facie* or preliminary evidence that he was exercising the right of custody which he held in relation to the child in accordance with the laws of England for a significant period of time prior to the removal of the child to Ireland. It was held that the precedent required the plaintiff to demonstrate that he kept or sought to keep regular contact or a relationship with his

child. There was no evidence that he did so during a three year period prior to the child's removal from England. He was living in the same country as the child at that time but the payment of maintenance in respect of the child's upkeep was not sufficient to establish that he was maintaining the stance and attitude of a custodial parent. The learned judge (at par.29) concluded:

> "The definition in Article 5 of The Convention of rights of custody as including "care of the person of the child", (emphasis added) underlines the requirement for personal contact or seeking to maintain contact or a relationship as part of the exercise of rights of custody. There may, of course, be factual situations where there is evidence that personal contact is precluded by court order or other reason, despite attempts made. There is no such evidence herein."

30. The learned judge therefore concluded that there was no *prima facie* evidence that the removal of the child from England in 2011 was a wrongful removal. The Court emphasised that a very liberal view should be taken as to what constitutes the exercise of custody rights but that does require the demonstration by the applicant parent that he either maintained or attempted to maintain contact or a relationship with his child.

31. It is submitted on behalf of the applicant that the conditions laid down by the respondent as to how the applicant might avail of access by personally attending and collecting the child were rendered completely unworkable by the bail conditions imposed following the charges made against him in June 2013. It is accepted that up to that time he availed of regular access to the child in accordance with the Court orders. As appears from the Court papers and from the affidavits submitted in these proceedings, serious and continuing allegations were made by the respondent against the applicant concerning his alleged abuse of A, his other child and the sexual offences referred to above. In those circumstances, he was happy to support the grandparents' application for contact which was stated to be for the purpose of facilitating and enabling contact to be maintained between father and son. The applicant gave his consent in January, 2014 to enable his parents to make an application for contact with A and to their inclusion in the contact order already in place between A and the applicant. Though he was a respondent in the grandparents' case he was at all relevant times represented during the course of the proceedings in Taunton which were clearly calculated to give full effect to his rights of contact with A.

32. The burden of proof lies on the respondent to establish that the applicant was not actually exercising his rights of custody in the broad sense in which that term must be interpreted (see *R.C. v. I.S.* [2003] 4 I.R. 431).

33. I am satisfied having considered the evidence in the case that at all material times the applicant wished to exercise his rights of contact with A pursuant to the terms of the earlier orders. He continued to do so until charges were brought against him in June, 2013 when he was precluded from directly contacting the applicant which rendered access difficult for him. A period of some four to five months passed before any action was taken to remedy the situation in December, 2013 when the application was made by the grandparents. The applicant was fully engaged in this process up to and at the time of the removal of the child from the jurisdiction of the Courts of England and Wales. He and the grandparents sought to have the issue of contact resolved by the court. He was also facing serious criminal charges during this period up to August, 2014. Thereafter, he continued to engage in the judicial process as did the grandparents and the respondent. I am satisfied having regard in particular, to the decision of the Supreme Court in *M.S.H* that his engagement in those proceedings was a clear exercise of his right to custody under Article 3 at the time of the removal of the child to this jurisdiction. There is little evidence of direct contact between the child and his father during the course of the criminal proceedings. This is explicable by the dominating circumstance of the pending criminal trial and the allegations made against him that he assaulted his son. These, and other allegations made against the grandparents, were to be the subject of the fact finding hearing on the 21st and 22nd April to which they were happy to submit thereby ensuring that any future contact between grandparents, father and child was regulated and supervised by Court order. I am therefore satisfied that the applicant was actually exercising his custody right on the 14th April 2015 and that A was wrongfully removed from the jurisdiction of the Courts of England and Wales.

Article 13

34. Article 12 of the Convention requires the Court to direct a child's return to a contracting state forthwith if a period of less than one year has elapsed from the date of the wrongful removal, as in this case. As already stated, Article 13 provides that notwithstanding the provisions of Article 12 the Court is not bound to order the child's return if the respondent establishes that:

> (a) the applicant was not actually exercising his custody rights at the time of removal or
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> (b) there is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

35. I have already determined that the respondent has failed to establish that the applicant was not exercising his custody rights for the reasons set out above.

36. The respondent claims that under Article 13(b) there is a grave risk that the child will be exposed to physical or psychological harm or will be otherwise placed in an intolerable situation if returned. It is also submitted that the Court should exercise the further discretion vested in it under Article 13 to refuse to return the child because the child objects and has attained an age and degree of maturity at which it is appropriate to take account of his views. As previously stated, the Court has the benefit of a professional and expert assessment of the child's view by Ms. O'Connell on these issues and in respect of the child's best interests and welfare. In reaching its conclusions, the Court has considered the report and the totality of the admissible evidence adduced.

37. The discretion vested in the Court under Article 13(b) is very limited. The Court is dealing with a summary application for the return of the child. When allegations are made that the return will give rise to a grave risk of physical or psychological harm or an intolerable situation for the child, it is not for this Court to determine whether the alleged incidents relied upon did or did not occur. That issue is in large measure the subject of the proceedings before the Family Court at Taunton. The proper approach to be adopted under Article 13(b) is set out in the decision of the Supreme Court in *A.S. v. P.S.* [1998] 2 I.R. 244 in which Denham J. (as she then was) in delivering the judgment of the Court stated (at page 259) that:

> "The law on "grave risk" is based on Article 13 of the Hague Convention, … It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.
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> This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.

> The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across State borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access".

38. The object of the Hague Convention is to ensure that children are returned to the country of their habitual residence where their future will be decided by the appropriate authorities. Consequently, Article 13(b) imposes a heavy burden of satisfying the Court that there would indeed be a grave risk of substantial harm if a child were to be returned (applying *Re. HV (Abduction; Children's Objections) (1997) 1 FLR 392).* The Supreme Court also considered that the Court was entitled to have regard to the practical consequences of directing the return of a child and whether any risk of harm could be reduced or extinguished by undertakings or by reliance on Court procedures in the Convention State (at pages 261-263).

39. The Court must first determine whether Article 13 applies and if it does, the Court may exercise its discretion as to whether the child should be returned. In *R.J.v.J.K.*[2000] 2 I.R.416 it was held that a grave risk exists only in two situations (a) when return of the child puts the child in imminent danger prior to the resolution of a custody dispute; for example, returning the child to a zone of war, famine or disease or (b) in cases of serious abuse or neglect or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, might be incapable or unwilling to give the child adequate protection. The basis of the defence must *prima facie* spring from the circumstances which prompted the wrongful removal. Events which occur subsequent to the removal are only material insofar as they tend to either aggravate any original intolerable situation or create one and would normally relate to matters which occurred in the State of origin. The physical or psychological harm of which there is a grave risk must be harm to a degree that amounts to an intolerable situation. (*Minister for Justice (E.M.) v. J.M.* [2003] 3 I.R. 178 at pages 189-190).

40. These principles were applied by Finlay Geoghegan J. in *C.A. v. C.A.* [2010] 2 I.R. 162 and helpfully summarised as follows:

> "21. It is common case, in accordance with the decisions of the Supreme Court … that the potential defence provided for in Article 13(b) is a rare exception to the requirement under the Convention to return children who have been wrongfully removed from their jurisdiction of habitual residence and that it is an exception which should be strictly applied in the narrow context in which it arises. Further, it is common case that the evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return, … and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence"."

41. Apart from the extensive documentation submitted to the Court, the respondent relies upon the following facts as evidence of a grave risk to A if returned to England. It is submitted that the evidence establishes that the family as presently constituted is happy and settled in Ireland and that the return of A to England would cause a traumatic disruption of his family life, in particular, because he would then be transferred immediately to the custody of his grandparents pursuant to the wardship order. He has been in his mother's care and custody since the breakup of her relationship with the applicant. It is claimed that his return to the care of his grandparents with whom his father resides would place him in an environment and under the care of his grandparents and father who are said to be the cause of his anxieties and fears. He is doing well at school and numerous positive social reports have been submitted concerning the family and the care provided to the children by the respondent and her husband. It is submitted that even if the respondent was in error in removing A from England, the consequences of her actions should not be visited upon the child. For his part, the applicant denies any wrongdoing in respect of A and states that he was for the first eighteen months of A's life residing with and caring for A. It is also submitted on his behalf that there has been no complaint of any recent difficulty by the respondent against the applicant and that the events outlined in her complaints relate to matters before August, 2013. Furthermore, it is submitted that the Family Court at Taunton is fully seised of the matters which are said to give rise to a grave risk under Article 13 and was about to consider those matters at the time of the removal of the child.

42. I am not satisfied that the evidence adduced by the respondent is so clear and compelling as to establish as a matter of probability any grave risk of physical or psychological harm or the existence of an intolerable situation based on the allegations advanced against the grandparents or the applicant. The child was removed at a time when the Court at Taunton was considering an application for contact by the grandparents. There was no application to vest custody of the child in the grandparents or the applicant at that time. The Court at Taunton was fully seised of all issues which the respondent wished to raise in respect of any suggested risk to A's welfare posed by contact with his grandparents or indeed the applicant. Even if a risk could be established there is overwhelming evidence that it would be fully and properly addressed by the English High Court.

43. The Supreme Court has emphasised that it is in the best interests of a child that such issues be determined by the Court of the child's habitual residence and there is nothing to indicate that there is any compelling reason why a similar view should not be taken in this case. However, it seems to me that what commenced as an access or contact issue has escalated into a custody issue. The Order of the 27th April that the child when returned to England should reside with his grandparents, will alter his life in a fundamental way which was not contemplated by the parties when the proceedings commenced. It appears to me that if the child is to be returned, every effort should be made to ensure that his family life is disrupted as little as possible consistent with the implementation of the order that he be returned. I do not consider that it is appropriate to return the child directly to the custody of his grandparents when there are outstanding issues to be determined by the English High Court in relation to allegations concerning the grandparents and the applicant, if another less upsetting and disruptive process can be adopted.

44. Following the wrongful removal of the child by the respondent, the Family Court at Taunton made the order that the child be returned to England forthwith and live with his grandparents. I can readily understand the reason for that decision, which was caused by the unilateral and unlawful action of the respondent in removing the child at a time when the Court was actively considering issues in respect of his welfare. However, it seems to me that it is in the best interests of the child that if he is to be returned to England it should be on the basis of an undertaking that an application would be made to the High Court at Taunton to seek a variation of the order so that the return of the child to England in the custody of his mother may be facilitated. This is the least traumatic way in which the return may be effected. Having regard to the length of time which he has been in the custody of his mother and the fact that it was never sought to alter the custody arrangements in the initial application by the grandparents, I consider that his return to England in her custody is preferable. I am told that the applicant is willing to give such an undertaking and that an appropriate application will be made.

45. I therefore consider it to be in the best interests of the child that he be returned to the jurisdiction of the Courts of England and Wales pursuant to an undertaking that all steps will be taken to vary the order made in respect of the custody of the child so that his return to England may be effected in the custody of his mother in whose custody, it is now accepted by the applicant, he should remain pending further order of the High Court at Taunton.

46. It would not be in accordance with the purpose of the Convention to hold that an "intolerable situation" for the child had been

created by an order made in the jurisdiction of habitual residence which flowed directly from the wrongdoing of the respondent. The undertaking furnished undoes the harmful consequences that might ensue for the child on his return arising out of the order which was made necessary because he was removed and for which the respondent bears responsibility.

47. No specific claim is made that the proposed return of the child is contrary to the provisions of Council Regulation 2201/2003 and I am entirely satisfied that the order which I propose to make is in accordance with the regulation.

The Child's View

48. The Court has also considered whether an order of return should be refused on the basis that A objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his views under Article 13. In considering this matter the Court had the benefit of Ms. O'Connell's report which sets out the family history and the facts that A, his mother, stepfather and two stepsisters relocated to Ireland in April 2015. At the time of assessment he was aged 6 years and 6 months. He told Ms. O'Connell in interview that when in England he was living in a small house surrounded by people who were not nice. He said that when he saw his father and grandparents they did not bring him anywhere or do any fun things. He recalled leaving his English home and travelling on the ferry. He did not know where it was going but was excited to be on a ship. He loves his new house and garden and has no wish to go back and did not appear to be missing friends or anybody else in England. He indicated a desire to stay in his current house and school "with mammy, daddy and my sisters". He said that he liked living in Ireland and that it was "where I want to stay forever". When asked about his biological father he went very quiet and looked hesitant and uncertain. He said that he lived "a long way from here". He said that he had last seen him a long time ago. He expressed no opinion as to the role his biological father might play in his life. He clearly saw his current family unit as his permanent family as far as he was concerned. Ms. O'Connell assessed A on the Wechsler Intelligence Scale for Children – IV on which he scored on the low average level of ability. She concluded, however, that in view of his distractibility and impulsiveness, his potential level of functioning was in the average range of abilities. She assessed him as clear and happy where he is but notes that at his age one would not expect him to think too much into the future. He objects to being returned to England and wishes to live with his mother in Ireland. He has no concept of access visits to his father and does not appear to think about any obligation on his part to spend time with his father. As far as he is concerned his family is in Ireland. Ms. O'Connell did not believe that he was influenced in these views but is in fact expressing his contentment with the current situation.

49. As noted in *C.A. v. C.A.* by Finlay Geoghegan J. the proper approach when considering a child's objection is set out by Potter P. in *Re. M (Abduction: Childs Objections)* [2007] EWCA Civ 260, [2007] 2 FLR 72 where he stated at page 87:

> "60. 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 tried 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 it 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."

50. It is clear that the child objects to returning to England for the reasons set out by Ms. O'Connell. She does not believe that he has been influenced in this view but is expressing his contentment at his current situation. I am satisfied that it is appropriate to take into account his views notwithstanding his tender years. In articulating his views clearly to Ms. O'Connell, he has demonstrated that he is expressing opinions in the manner appropriate to his age. He is capable of doing so and is of an age and maturity at which it is possible, appropriate and important that the Court should have regard to his views. I do so bearing in mind that he is 6 years and 7 months old and making appropriate allowance for that fact in considering how to determine its weight and exercise the court's discretion. In exercising that discretion it is important to be mindful of the general policy considerations which must be weighed with the interests of the child in any individual case. These include the swift return of abducted children, comity between the contracting States and respect for one another's judicial processes. In addition, the Convention exists to deter abduction. Furthermore, the child's objections are not determinative of the matter but are to be taken into account and balanced against the policy considerations of the Convention. (per Finlay Geoghegan J. in C.A., per Sheehan J. in *S.R. v S.R.* [2008] IEHC 162; see also *B v. B (Child Abduction)* [1998] 1 I.R. 299 and *In re M (Abduction Rights of Custody)* [2008] 1 A.C. 1288 at page 1307 per Baroness Hale of Richmond).

51. I must also take into account that fact that it is in A's best interests that issues relating to his custody or access to him by his parents or grandparents are best determined by the Courts of his habitual residence. I am therefore not satisfied that I should exercise my discretion to refuse to make the order sought

Best Interests of the Child

52. In considering each element of the decision in this case the Court has considered the best interests of the child. When doing so it is necessary to ensure that a fair balance is maintained between the competing interests of the child and his parents and the purpose of the Hague Convention to ensure a prompt return of wrongfully removed children to the jurisdiction of the Courts of their habitual residence. I have considered all of the evidence adduced in relation to this family including the effect of A's return, on the other children. The Court has taken into account the rights of A the family under Article 8 of the European Convention on Human Rights and the courts obligation under Section 2 of the European Convention on Human Rights Act 2003 when interpreting and applying any statutory provision or rule of law, to interpret and apply it in a manner compatible with the State's obligations under the convention. The best interests of the child underpin the provisions of the Hague Convention as recognised in its preamble which states that the interests of children "are of paramount importance in matters relating to their custody". The jurisprudence of the European Court of Human Rights provides that in considering the return of children pursuant to the terms of the Hague Convention Article 8 requires that the best interests of the child from the perspective of his/her personal development must be considered. This will depend on a variety of individual circumstances including the child's age and level of maturity, his/her environment and experiences: each child's interest must be assessed on an individual basis. This task is primarily one for the domestic authorities because they have the benefit of direct contact with the persons concerned. The purpose of the Hague Convention is to ensure a prompt return of children wrongfully removed from the jurisdiction of habitual residence precisely because it is harmful to their best interests to do so. It has been determined by the contracting parties that prompt return is in a child's best interests as a matter of general principle. In this case there has been no delay in seeking the return of the child. I am satisfied having regard to the short period during which the child has resided within the State that the difficulties and issues raised within his family concerning his best interests, care and custody and contact with his father and extended family should be resolved by the Courts of England and Wales which are fully seised of the matter. The court has carried out an extensive review of the circumstances including the likely effect on the child of his return to England in reaching its decision. (see *Neulinger and Shuruk v. Switzerland* [2010] ECHR 1053 ; *JJ v. LMcL* [2013] IEHC 549 and *In re E* [2012] 1 A.C.144).The child has been in Ireland with his family for only four months and these proceedings were initiated promptly approximately ten weeks after his removal. That removal itself necessitated a sudden change of school and residence. I am satisfied that the order proposed is necessary to achieve the legitimate social aim of returning wrongfully removed children under the

Convention and is proportionate and reasonable in the circumstances.

Conclusion

53. I am satisfied that it is appropriate to grant the application to return A to the jurisdiction of the Courts of England and Wales. I am completely satisfied that the jurisdiction of the Family Court at Taunton is ample to address any concerns and make any appropriate orders consistent with the best interests of the child pending the determination of any of the contact issues the subject matter of the proceedings in that jurisdiction. Any issue pertaining to the child's welfare will be fully addressed by that Court. It is important that he return in the care and custody of his mother pending further order of the Family Court at Taunton on his return. To that end the applicant has given an undertaking to apply to the Family Court at Taunton for a variation of the Wardship order. I will hear counsel concerning the appropriate form of the order.