

## THE HIGH COURT

Record No. 2018/27 HLC

## IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY 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/EC

## AND IN THE MATTER OF J.S. AND E.S., MINORS

Between/

S.S.

Applicant

-and-

K.A.

Respondent

**Judgment of Ms. Justice Ní Raifeartaigh delivered on the 19th day of December, 2018****Nature of the case**

1. This is a case in which the applicant seeks the return of two children to France pursuant to the provisions of the Hague Convention on the Civil Aspects of Child Abduction and EU Council Regulation 2201/2003. The key legal issues raised are (i) habitual residence, (ii) whether there is a grave risk of an intolerable situation within the meaning of article 13 of the Convention, and (iii) the views of the children as to their being returned to France, also with reference to article 13 of the Convention.

**Relevant chronology of events**

2. Some distinctive features of this case may be noted at the outset. First, the children have lived for relatively lengthy periods both in Ireland and in France, making the issue of habitual residence somewhat more complicated than in the normal case. Moreover, they have lived with each parent for periods of time; unlike some cases, they have not lived exclusively to date with one parent only. Secondly, there are in existence a number of French court orders dealing with the custody of the children, most recently a court order of January 2016 granting joint parental responsibility to both parents but ordering that the children should live with their father on a day-to-day basis, with access to the mother during the holidays. The alleged wrongful retention in the present case is said to have taken place in August, 2018, when the mother failed to return the children to France after a holiday in Ireland. A third feature is that the children have made allegations that their father was physically abusive to them while they were living with him and have expressed a preference for continuing to live in Ireland with their mother. The two boys in question are aged 10 (almost 11) and 8 (almost 9) at the time of this judgment.

3. It may be helpful if I divide the children's lives to date into periods of time based upon the country in which they were living at the relevant time.

*Up to June 2013: France*

4. The applicant and respondent entered a relationship with one another in 2007 in France. Both the applicant and respondent are French nationals. The older child, J, is almost 11 years old and was born on the 28th December, 2007. The younger child, E, is 8 years old and was born on the 19th February, 2010.

5. In 2009, the parents separated before the birth of E and the children resided primarily with their mother, the respondent, in France.

*June 2013-July 2014: Ireland*

6. In the summer of 2013, the mother came to Ireland on holiday with the children and during the following month, decided to stay in Ireland. There does not appear to have been any objection from the applicant father at this stage. The children may have returned to France for a 3-week holiday with the applicant in February 2014, but it is not in dispute that they resided in Ireland with their mother until August 2014, when they returned to France and stayed with their father.

7. This period in Ireland was one of approximately 1 year.

*July 2014-December 2014: France*

8. Apparently it was agreed that the mother would collect them from France after a holiday with their father, but did not do so. The reasons for this are in dispute. The mother averred in these proceedings that she had become unwell and was diagnosed with a suspected cancer, resulting in a treatment course over a period of two months and was unable to make it to France. She exhibited a report dated the 14th August, 2014, from the HSE certifying that she was suffering from "a severe infection." I note that the judgment of the French Court of Appeal which was subsequently delivered (discussed below) said that she stated that she was unable to travel due to "health and employment problems during this period". The applicant father averred that he did not know of her illness until a few months after August, and disputed the seriousness of her illness based on the medical report exhibited by her. He stated that one week before the intended return of the children to Ireland, the mother had failed to give him any updates by phone, email or post about their return, and therefore he took the initiative and took over responsibility for their care, enrolling them in schools and sports clubs. He says that for 6 months the respondent had no contact with them and they attended school until December. The father instituted court proceedings in October 2014 seeking custody of the children.

9. The mother says that the father took advantage of her illness by refusing to return the children to Ireland during this period.

10. This period of the children living in France was approximately 4 months.

*December 2014-August 2015: Ireland*

11. In December 2014, the mother took the children to Ireland. The applicant father averred that the children's maternal grandmother contacted him, saying she wished to see the children, and that he agreed to this. He said that she took advantage of this opportunity with the children to bring them to their mother, and that he was tricked into handing the children over. He said that the grandmother handed over the children to their mother at the airport, who then took the children to Ireland. He only found out about this as a *fait accompli* when the mother communicated it to him by email at which point he reported it to the police. In her affidavit the respondent said that when she took the children back to Ireland "it was keeping with the previously agreed course of action".

12. It will be recalled that the father had instituted court proceedings in France in October 2014, when the children were living with him in France. On the 28th January, 2015, at which stage the children were in Ireland, a French court of first instance made an order granting exclusive parental authority to the father. It was submitted to me that the mother was unaware of these proceedings and although there was a dispute as to whether this was so, it is not in dispute that this order was essentially made *ex parte*, the mother having no involvement in those proceedings. She entered an appeal on the 8th April, 2015, and was clearly aware of the order by that date at the latest. She did not return the children to France despite the existence of the French court order granting exclusive parental authority to the father, albeit that it was under appeal by her.

13. On the 28th July, 2015, after some correspondence between the parties, the father, through his solicitor, agreed that if the children were returned to France in August, he would return them to Ireland thereafter. However, after the children travelled to France in August, he did not return them as agreed. It was submitted on behalf of the mother to me that this was, in effect, a wrongful retention on the part of the father at that time.

14. This period of time in Ireland was approximately 8 months.

*August 2015-7th July 2018: France*

15. The children then lived with their father in France for the next 2 years and 11 months.

16. In January 2016, the French Court of Appeal handed down its decision on the appeal in the French proceedings instituted by the father. It may be noted that the father in that appeal consented to joint parental responsibility even though he had been awarded sole responsibility by the court of first instance. The mother had sought, *inter alia*, that the children's residence would be fixed with her. I note that the judgment makes no mention of her having contested jurisdiction and it appears she took part in a full hearing of the substantive issues by the French court. The Court of Appeal came to the conclusion that the decision of the lower court was correct when it decided that the father alone should have parental authority, but agreed to joint parental authority in circumstances where the father was consenting to this, in the best interests of the children. The court found that during the period when the mother was ill, the father had behaved like a responsible father in enrolling the children in school and taking care of them. The court discussed the mother's living arrangements; the various moves between Ireland and France; the enrolment of the children in different schools; and her current settlement in France, which it found was not "permanently guaranteed". It noted that this could cause the children an emotional lack and instability due the respondent's own "instability", although they had demonstrated great adaptability up to this point. It contrasted the foregoing with the father who had been able to provide the children with "stable and safe living conditions" and found accordingly that the proper residence for the children in such circumstances should be that of the father. In relation to access by the mother, the Court took the view that because of the geographical distance between the parties, she should have access only during half of the school holidays.

17. The children continued to live with their father in France until July 2018. During this period, the mother moved from Ireland to France herself. Her address was some 600km from where the children lived. She averred that she exercised weekend access also by agreement, but this is disputed by the father.

*Ireland: July 2018 to the present date*

18. In July 2018, the children travelled to Ireland with their mother. The father consented to their travelling for the purpose of a holiday. The mother says that during that month, the children made certain disclosures to her concerning physical abuse of them by their father. I will set these out in detail later in the judgment.

19. On the 26th July, 2018, the mother made a complaint to the Garda Síochána. On the 30th July, 2018, she made a complaint to the French social services

20. The children were due to be returned to France in early August, 2018 but when the mother failed to return them, the applicant father made a complaint to the French police and subsequently made a complaint to the public prosecutor. On the 11th September, 2018, he made an application for their return, and on the 10th October, 2018, the present proceedings were commenced by Special Summons and grounding affidavit.

21. On the 15th October, 2018, the Court was told the mother, upon service of the special summons, had indicated she would shortly be moving address. In those circumstances an *ex parte* order was made by the court requiring her to refrain from taking the children out of the jurisdiction and to furnish the passports and other identification documents of both children to the law centre in Smithfield, and that the port and Garda authorities be informed of these orders. Affidavits were exchanged, and a court-ordered assessment report on the views of the children was obtained from a psychologist, Mr. De Villiers.

22. The Court was subsequently given, *inter alia*, a translated version of a report by a French social worker, dated the 25th October, 2018. I will refer in further detail to this report later in the judgment. It arose in response to the mother's complaint to the French social services on the 30th July, 2018, referred to above.

### **Habitual Residence**

23. It was submitted on behalf of the respondent mother that the children did not have their habitual residence in France at the time of their retention in Ireland in August 2018. Essentially the case on behalf of the respondent in this regard is that they had acquired a habitual residence in Ireland by July/August 2015 (having arrived in Ireland in December 2014), and that the only reason they were living in France from August 2015 to July 2018 was because the father had failed to honour the agreement that he return the children referenced in his solicitor's letter of the 28th July, 2015 to return the children after the holidays.

24. It is clear from the authorities on habitual residence that it is a question which is highly fact-specific. In *PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306, the Supreme Court cited with approval the statement of McGuinness J. to this effect in *C.M. (a minor): CM. and O.M., v. Delegación Provincial de Malaga* [1999] 2 I.R. 363:-

"[I]t has to be recalled that, by universal accord, the issue of habitual residence is essentially one of fact. To quote again from the judgment of McGuinness J in the CM. case, at page 381:

'Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that "habitual residence" is not a term of art, but a matter of fact, to be decided on the evidence in this particular case...'

Moreover, the fact that a child is physically present within a jurisdiction does not of itself establish habitual residence. The authorities also make it clear that a court should have regard to factors such as the extent to which a child is integrated into a social and family environment, as well as the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State (*A v. Finland*, Case C-527/07) [2009] E.C.R. I-02805, *Mercredi v. Chaffe*, Case C-497/10, *C v. M*, C-376/14 PPU) as the CJEU recently stated in *Case C 393/18 PPU UD v. XB* [2018] ECLI:EU:C:2018:749 at para. 65:-

"this criterion [habitual residence] relates to the proximity between the child and a social and familial environment established in a given place rather than to the mere geographical proximity between the child and a given place."

25. Furthermore, two decisions from the Court of Appeal also make it clear that a parent cannot unilaterally opt to alter a child's habitual residence if the other parent has joint parental responsibility and has not consented. In the first decision, *DE v. EB* [2015] IECA 104, the Court of Appeal (Finlay Geoghegan J.) discussed the situation where one parent (who had custody rights) did not consent to the permanent change of residence of the child, and how this affects the question of habitual residence, stating:

"In a case such as the present — where both parents hold parental responsibility and each have a right to participate in a decision as to where a child should live — *a consent given for a visit of limited duration or, to put it another way, the absence of a consent to a change in the habitual residence is a factor to be taken into account and weighed against other relevant factors.* It does not appear to me that the judgments of the CJEU when considered collectively in the context of the relevant features of each case identify that any one or more competing factors should be given an overriding consideration. The weight to be attached to each will depend on the facts of the individual case. Differing considerations will apply depending on all the different factors identified by CJEU.

[33] It is accordingly clear from the case-law of the CJEU that *a court should properly take into account as a factor the absence of consent of one parent who holds parental responsibility to a move of the habitual or ordinary residence of the child to another Member State.* It follows that the court must weigh that factor against other relevant matters of fact identified which — as the CJEU put it in *C. v. M.* — might demonstrate a degree of integration of the child in a social and family environment in the State to which she has moved. Those latter facts may include the intention of the other parent to settle permanently with the child in the other Member State as manifested by steps taken and all the other potential factors identified by CJEU in paras 50–53 of *C v. M.* *The question of parental authority may be of particular relevance to an assessment of the intention of the other parent who may wish to settle permanently with the child in the new Member State but may not be in a position to make that decision unilaterally if the other parent also holds parental authority.*

[34] If it were otherwise it could set at nought the entire concept of wrongful retention. In all cases of alleged wrongful retention, the child will have spent time in the Member State to which it has moved. It is of the essence of wrongful retention, as distinct from wrongful removal, that the child moved lawfully from its Member State of habitual residence to another State but has not returned at the end of the period for which the permission or consent was given. Wrongful retention will only arise if at the end of the permitted period the child remains habitually resident in its State of origin. Unless a court may give appropriate weight to the conditions and permissions under which or reasons for which the child moved together with all other relevant identified factors in assessing habitual residence it is difficult to envisage wrongful retention as a concept surviving." (emphasis added)

26. The second decision, *K.W v P.W* [2016] IECA 364, also makes this clear where Hogan J said:-

"[35]. The authorities establish that young children can lose their habitual residence where the family makes a settled decision to leave one country (in this instance, Australia) in order to take up residence in another country (in this case, Ireland) and do in fact take up residence in that other country: see, e.g., in *re B (Minors: Abduction) (No.2)* [1993] 1 F.L.R. 993; *PAS v. AFS* [2004] IESC 95, [2005] 1 I.L.R.M. 306 and *AS v. CS (Child Abduction)* [2009] IESC 77, [2010] 1 I.R. 370. On the other hand, it is clear from the judgment of this Court in *DE v. EB* [2015] IECA 137 that a unilateral decision by one parent to move a child to another country without the consent of the other is a factor which militates against a finding that there had been a change of habitual residence."

27. In applying these principles to the facts of this case, I do not find persuasive the argument on behalf of the mother that the children had lost their French habitual residence by July/August 2015 and that the father had wrongfully retained them thereafter. Quite apart from anything else, the father had at all times legal parental responsibility for the children and there is no suggestion that he had consented to the children living in Ireland permanently. The absence of the consent to a change in habitual residence of a parent who has parental responsibility is a significant factor in assessing whether there has been a change in habitual residence. Perhaps more importantly, the children lived in France for almost three years prior to summer 2018, the mother herself moved to France in June 2017, and she did not raise any objection to jurisdiction in the French legal proceedings which culminated in the judgment of the French Court of Appeal of the 26th January 2016. It may be noted that the children themselves described to Mr. De Villiers, the psychologist who interviewed them for these proceedings, as having come to Ireland "on holiday" during the summer of 2018. Clearly, they themselves viewed France as their home at that point in time.

28. I therefore find that the children's habitual residence at the time of the retention of the children in Ireland, in August 2018, was France.

### Grave risk

29. The authorities make it clear that there is a "heavy burden" on any party seeking to make out the defence of grave risk and that it is a defence which should be "construed strictly" (*A.S. v P.S.* [1998] 2 IR 244). In *P.L. v. E.C.* [2009] 1 IR 1., Fennelly J. referred to *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416, and cited with approval the following passage from the judgment of the United States Court of Appeals Sixth Circuit in *Friedrick v. Friedrich* (1996) 78F 3d 1060:-

"Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in

imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."

30. In *I.P v T.P* [2012] IEHC 31 Finlay Geoghegan J. considered the decision of the Supreme Court of the United Kingdom in *In re E (Children)* [2011] UKSC 27 where that court discussed 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" and approved its approach as the correct one for a court to adopt when assessing grave risk:-

It appears to me that the pragmatic solution to the tension referred to by the Supreme Court of the United Kingdom is of use to resolve the 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. "

She also considered what was meant by the phrase "intolerable situation" and cited the well-known statement from *In re D* [2007] 1 AC 619 that it is "a situation which this particular child in these particular circumstances should not be expected to tolerate". She also cited with approval the following passage from the same case:-

"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".

31. The authorities therefore appear to require me to consider the allegations of physical abuse in the first instance and then, if there are irreconcilable conflicts of fact, to take the allegations at their height and to consider whether child can be protected from that risk, if returned to the requesting jurisdiction.

32. The following is a summary of the evidence in the present case concerning whether the children were subjected to physical abuse by their father while in his care.

#### *The mother's evidence*

In her affidavit, the mother said that the children's disclosures arose in the following circumstances. She said that she had been scolding the younger child, E, for hiding and became concerned when he stated that he was hiding for fear of being beaten. When she queried this with him, he would not explain. She averred that the older child, J, told her that the applicant would "hit [E] pretty hard", that both children confirmed that the applicant had been violent towards them on several occasions, and that both had said that when E did something wrong his father would grab him and throw him on the ground. She averred that E had told her that his father slapped him on the face every time he did something wrong and she gave a series of examples which, she said, E disclosed to her; (1) when he hurt himself playing outside without his father's knowledge, his father grabbed him and threw him against a wall, leaving him in pain for two days; (2) when he refused to go biking on holidays, his father grabbed him and hit him on the knee hard, leaving him in pain for three days; (3) for reasons that were forgotten, his father hit him with a book on the head and then punched him in the ribs; and (4) his father tried to throw a sharp piece of wood at him which he found while mowing the lawn. The mother also averred that the older child, J, had disclosed that his father had kicked him in his back for losing his scarf, causing him back pain.

33. In a letter written by the maternal grandmother, exhibited in the mother's affidavit, she described E having two dark blue marks on his cheeks from the corner of his eyes to his jaw when she brought him to Ireland in July 2018. She said that she first thought of paint/mask, then of marks from slaps but put that idea aside, but that her daughter subsequently told her that E had said "he was beaten up on the face by his father, one or two days before we left France". I note that the mother herself did not say this.

#### *Mr. De Villers' evidence of what the children told him*

34. Both children gave certain accounts of physical assault to the psychologist Mr. De Villiers. The older child, J, said his father slapped him whenever he did anything wrong. He spoke of one incident where his father kicked him and pushed him hard up against a wall. He stated that at other times his father would have him sit in corner with his hands above his head or behind his back. He said his father would have him write out lines as punishment, that he would curse and use bad language at him, using a particular word which was an offensive English word, and would often shout at him about how he played soccer. He described another incident when he fell and was injured while playing soccer and said that his father did not take him for medical attention. Mr. de Villiers reported that J showed him the scar resulting from this incident.

35. The younger child, E, said that his father beat him and that this was because he was naughty. He described being struck on the leg with a stick and said that his father had also pushed him up against a wall. I note there was no allegation, for example, of his having been beaten around the face one or two days before he travelled to Ireland in July 2018.

#### *The French social services report of 25th October 2018*

36. This report notes that the mothers' report to them was as follows: "that the children told her they were being hit by their father or thrown on the ground when they got in trouble", and "that the father apparently pushed the eldest down the stairs". The report goes on to describe an interview between the father and the French social services during a visit to his home. In response to the allegations of physical abuse, he told them that both children move around a lot and that they quarrel, and he admitted that it was possible that he grabbed J, the elder child, by the arm or the ear. He denied ever throwing his children on the ground and stated that E often rolls on the ground by himself and screams when told off. He stated that he sometimes punishes his children by having them write out lines or by giving them timeouts. He described the younger child E as a "little boy who can lie and get up to a lot of mischief" though "is able to be helpful", and he described the older child J as "calmer". The report noted the mother was unable to attend an appointment offered and that she had inquired with an Irish organisation (presumably Tusla) which could perform the assessment of the situation and that of the children at her home, and that she offered to translate the assessment's conclusions and send them to the French social services. The report also notes that between August and October the respondent moved house and that they were concerned about her "instability". The social services also interviewed E's primary school teacher in France. The teacher told them that he never confided in her, that he was a little boy who spoke little of his home life and that she noticed no change in his behaviour and that the applicant always showed an interest in his son's education. I understand, from reference to a letter at the end of the hearing before me, that the Irish organisation Tusla was liaising with the French social services with a view to further investigative steps.

37. I wish to discuss my conclusions in relation to the above evidence in the context of the evidence of the Mr. De Villiers, set out below.

### **Objections of the children**

38. Both children were assessed by a psychologist for the purpose of ascertaining their views in accordance with article 13 of the Convention. Mr. Michael de Villiers, a chartered psychologist specialising in child, adolescent and educational psychology carried out interviews with both children on the 9th November, 2018. The assessment report was completed the following day on the 10th November, 2018.

#### *The report of Mr. De Villiers*

39. Mr. de Villiers described the older child, J, *inter alia*, as an intelligent child, with satisfactory cognitive development, executive functioning, and social skills, and said he presented as a boy who likes to please others. He noted J as appearing to enjoy school in Ireland very much, preferring it to school in France; he stated that he was friends with everyone in his current school, owing to its small number of pupils, and that his teacher was very good to him, as well as discussing what he found enjoyable or difficult in his studies, noting a slight difficulty with English spelling. J also described his hobbies; soccer, walking, computer games and playing with his brother and their puppy. In relation to their living arrangements in Ireland, J described a large house in the countryside where he lived with his mother, her partner, his brother and their two sisters. He stated that he and his brother had their own bedrooms and that the house was close enough from his school to walk. It later became apparent that Mr. De Villiers did not know that the child had only started in this particular school 4 days before the date of the interview; further, he did not know that the house described was one to which they had recently moved.

40. I have described earlier what J told Mr. De Villiers about physical assaults by his father.

41. As regards the child's wishes in relation to living in France, Mr. de Villiers noted that J stated that he would prefer to live in Ireland with his mother. When asked what he would think if he was instructed to go back to France without any choice, J said he would not want to go back and that this was because he was scared of receiving the same treatment from his father. J also stated that he would like to see his father but would prefer that he would visit him in Ireland. He stated that he was scared to stay anywhere with his father as he may try to take him back to France.

42. The younger child, E, was also interviewed by Mr. de Villiers on the same date. Mr. de Villiers noted that E presented as gentle, kind and respectful, showing signs of being sensitive, empathic and realistic. He spoke English for most of the interview and occasionally looked to the translator for assistance. E stated that he liked his school and his teacher and that he had lots of friends, preferring it to his school in France. He described his studies and reported some difficulty with English in school. He told Mr. de Villiers that when he was not in school or doing homework, he played with his brother and sisters. When he was asked about his father, E said that he did not miss him nor his extended family, but that he did miss his half-sister. I have already set out what E told Mr. de Villiers in relation to his father's physical treatment of him above. When he was asked what it would be like for him if he was told to return to live in France, E stated that he would go but that he would feel sad. He also stated that if given the choice, he would prefer to live in Ireland with his mother. When he was asked if he would like to visit his father he said that he would but that he was also afraid of being shouted at. He also stated that if he did go to visit his father in France, he would want his father to collect him in Ireland. I also note that when Mr. de Villiers asked if he had three wishes he said that he would not wish for anything.

43. In coming to his conclusions about both children, Mr. de Villiers noted the preferences they had shown and that it was clear that both children had a fear of their father shouting at them and of his approach to discipline. However, he noted that neither boy spoke particularly negatively about their father in regards other aspects of parenting such as providing for their physical and material needs, the capacity and disposition to give them the guidance they require, or providing for their education. He was of the opinion that both children presented as sincere boys who had no difficulty presenting their needs and wishes in a way that was appropriate for their ages and was of the opinion that there had been no obvious coaching of the children or indication of alienating behaviour.

44. I decided at the hearing of the case that I would like to hear oral evidence from Mr. De Villiers and he came to Court on the 14th December. He was cross-examined by counsel for both parties on that occasion. Some of his answers included the following.

45. He did not ask either of the children how long they had been in the school where they described themselves as very happy and involved with friends and sports, and did not realize that they had only been in that school for four days at the time of interview. He was very surprised by this, as he had assumed they had been there since September 2018. He did not probe their experiences of sport and school in France. He did not probe their living arrangements in Ireland, such as how long they had been in their current house. He accepted, when put to him by counsel on behalf of the mother, that the answers to questions about school had arisen in the context of a broader discussion about French schools compared to Irish schools as opposed to a discussion of their current school and that one possible explanation for why the child highlighted their current school and did not mention any previous school in which they had spent a longer time, was due to the excitement and novelty of being in this new small school.

46. Mr. De Villiers said that when he asked each boy about their father, the *first* point they raised was the issue of physical abuse by him. Also, it was the *only* thing they mentioned about their father. Neither of them mentioned anything else about their father. I asked him whether he would find it surprising that a child of the age of J (almost 11 years old) would have nothing but this one negative thing to say about his father, which seemed to be a rather black-and-white view. He said that he did find it surprising, and that the conclusion he drew was that the children knew why they were coming for the assessment and that they would have to find a reason for not going back to France, and, as a result, placed their main focus on the disclosures of abuse. He accepted, in answer to a question by counsel on behalf of the mother, that since the disclosure of abuse was precisely the reason they had not been returned to France, it was not surprising that they would mention it as the first thing about their father, but he said he was still surprised that this was the only information they provided about him.

47. When Mr. De Villiers was asked whether he had taken into consideration the fact that J was that living with his mother since July, he answered that children can pick up on messages from adults, that there can be certain influences, and that they may overhear things. He stated however that he was of the opinion that not all of the criteria for "parental alienation had been met", although he said that he was sure that J was very much aware of his mother's wishes. He said that he was using the criteria laid down in "The Scientific Basis of Child Custody Decisions" (2009) by Robert Galatzer-Levy at p. 404 and "The Handbook of Child and Adolescent Clinical Psychology" (2010) by Alan Carr at p.1082. These included: first, that the child engages in a campaign of denigration; second, that the child may offer weak, frivolous or absurd rationalisations for the deprecation; third, that the child shows a lack of ambivalence in their relationships with their parents, viewing one as "all good" and the other as "all bad"; fourth, the child shows reflexive support for the alienating parents in the conflict; fifth, the child shows an absence of guilt over the exploitation of the alienated parent. In answer to certain questions by me, Mr. De Villiers was somewhat prepared to revise his views that certain criteria

had not been met, such as the child stating 'black and white views' about one parent. He stated that he did not inquire as to when the children had last spoken to the applicant, only when they last saw him. He admitted under cross examination on behalf of the father that in hindsight he should have examined this for the purposes of examining whether alienation had occurred. Counsel also asked whether the fact that no telephone/skype access had been provided by the respondent to the applicant from August to November 2018 could be seen as alienating. He answered that it could be. He also stated that he was aware that the respondent had removed the children from France previously for six months and that he found this to be "concerning".

48. When he was asked whether he thought J's complaint of physical assault was genuine, Mr. de Villiers responded that he would always take what a child was telling him seriously but would bear in mind that children sometimes want to be seen as victim, that they sometimes embellish. Concerning the allegation that the children were made to sit with their hands behind their heads as an example, he said he wondered if this was as severe in reality as the child stated or whether he was trying to engender sympathy from his interviewer.

49. He was of the view that J's objections were stronger than E's, but that both children would prefer to stay in Ireland. He was also of the view that this was their own decision and that they had not been influenced.

## Conclusions

50. I have found reaching a conclusion in this case difficult. The difficulty arises from a number of factors.

51. First, the evidence I have read and heard leaves open two possibilities regarding the allegations of physical abuse. One possibility is that the children have been subjected to physical abuse by their father and that their preference not to return to France is precisely because of this. The possibility that the children have been subjected to physical abuse is supported by the evidence of the mother of their disclosures; their own evidence to Mr. De Villiers; and the opinion of Mr. De Villiers that something had happened which had caused the children to fear their father and not wish to live with him, albeit that they may have exaggerated the incidents in question. The other possibility is that the children and/or the mother have blown some minor incidents out of all proportion in order to provide a justification for their not being returned to live with their father; and, further, that the children were (innocently or not) influenced by their mother's desire that they remain in Ireland when they discussed this matter with Mr. De Villiers. In my view, it is worth noting that there is considerable inconsistency between the various accounts of the physical abuse described, for example, as between what the mother says the children described and what the children themselves described to Mr. De Villiers. Further, I am troubled by the grandmother's description of blue marks on one child's face at the time of travel, and her statement that the mother told her the child had been beaten around the face before he travelled; I find it hard to accept that this would not have been noticed at the time if the child had in reality been beaten, and think that this is much more likely to be some kind of retrospective interpretation. An allegation that a father beat an 8-year old boy around the face is extremely serious; and yet it does not feature in the mother's affidavit in these proceedings; the allegation comes from the grandmother (who says the mother told her). Such inconsistencies do not inspire confidence. Further, there were no allegations of physical mistreatment by the boys during the entire period of nearly three years when they were living with their father. Given the state of the evidence in these proceedings, which are of course summary proceedings primarily based on affidavit, I find myself unable to reach conclusions on whether there was physical abuse of the children. I can say that that I have a concern that there may have been some unacceptable physical treatment of the boys. However, the authorities appear to require me to take the allegations at their height and then consider whether are not measures can be taken to eliminate the risk to the boys. If I were to take the allegations at their height, what has been described would amount in my view to a grave risk of an intolerable situation for these particular children. As to measures which could be taken to eliminate the risk, it seems to me that the best way to protect the boys from any potential physical mistreatment would be if the French authorities, such as the courts or social services, were made aware of the evidence in the present proceedings. I do not think that an undertaking from the father (for example, not to physically assault the children) would be of any particular benefit in these particular circumstances; useful undertakings usually arise in relation to matters such as accommodation and finance.

52. I am highly conscious of the fact that there is in existence a French court order (of January 2016) requiring the children to live with their father. Therefore, not only is France the place of the children's habitual residence (as I have found), but there is in existence a French court order concerning with whom they should live. On the other hand, the alleged disclosures to the mother only took place in summer 2018, and therefore no French court has had an opportunity to consider them to date.

53. Both of the above factors would point, in my view, towards the children being returned to France where the courts of their habitual residence can examine the allegations in further detail and reach appropriate conclusions. This approach would be consistent with the Hague Convention policy that decisions concerning children are best left to the courts of habitual residence; as well as in accordance with the policy of deterrence of child abduction.

54. The difficulty I have in reaching a conclusion to simply return the children to France forthwith arises out of the views of the children expressed to Mr. de Villiers, as well as a more general concern on my part as to whether their general best interests would be served by another move at this point in time. In *Neulinger & Shuruk v. Switzerland* (Application no. 41615/07), The European Court of Human Rights found that the general best interests of the child ought to be factored in in consideration of article 13 at p. 62:-

"The proper approach in the application of Article 13 of the Hague Convention would be a balanced consideration of the rights protected in Article 8, keeping in mind that in this context the proper balance can be established only if the best interest of the child is a primary consideration."

55. These two children have had considerable instability in their lives to date, with relatively frequent moves back and forward between Ireland and France, and they express themselves now as being very content in their current school, which by their account is a small, caring and stimulating environment for them. Christmas is approaching, and they are already one term into a school year. The older child has expressed what I would describe as an objection to returning to France, and the younger child has expressed what I would describe as a preference not to return to France. On the issue of whether their views are authentically their own, my view is that while the boys may have been influenced by their mother in "talking up" the allegations of physical abuse when speaking to Mr. de Villiers, their expressions of contentment about the school they are currently attending are genuine. It is not, therefore, a simple situation, such as one where two brothers might express strong objections which are clearly and authentically their own views. The waters are more muddled here; their wishes vary in strength, are interlinked with factual matters (physical abuse) upon which the Court is unable to reach conclusions; and may have been influenced to some degree by their mother's views.

56. Accordingly, I do not propose to make any order at this time. Instead, I propose to adjourn the case to enable certain steps to be taken: (1) Copies of the affidavits, the report of Mr. de Villiers, a transcript of his evidence, and this judgment should be furnished to the French social services and I will lift the *in camera* rule to that extent and for that purpose; (2) The mother should take steps as soon as possible to apply to the French courts to bring the allegations to their attention and make a relocation application to them. The father should participate with regard to any such application as swiftly as possible. I may consider adjourning the making of any

further order until the French court has ruled upon the matter, but I am not prepared to do so unless there are concrete indications that the French courts will in fact deal with the matter swiftly. I will lift the *in camera* rule to allow for copies of the affidavits, the report of Mr. De Villiers, a transcript of his evidence, and this judgment to be released to the French court and the legal teams of the parties in France.

57. I base this highly unusual course of action upon the principle that, where I have found a grave risk of an intolerable situation for a child, I am required to investigate whether or not steps can be taken in the requesting jurisdiction to reduce or eliminate the risk to the children. I note that in *re E* itself the Supreme Court of the United Kingdom went on to discuss the circumstances in which a Court may find itself when attempting to assess how the requesting state could protect the child against the risk:-

“The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country. This is where arrangements for international co-operation between liaison judges are so helpful. Without such protective measures, *the court may have no option but to do the best it can to resolve the disputed issues*. To this Mr Setright would add that it would be even more helpful if there were machinery in place for recognising and enforcing protective orders (and, between common law countries at least, undertakings given to the courts) made in the requested state in order to protect the children on their return to the requesting state at least until the courts of the requesting state are seized of the case (if they ever are). The Brussels II revised Regulation clearly contemplates that adequate measures actually be in force and without some such machinery this may not always be possible. We therefore take this opportunity to urge the Hague Conference to consider whether machinery can be put in place whereby, when the courts of the requested state identify specific protective measures as necessary if the article 13b exception is to be rejected, then those measures can become enforceable in the requesting state, for a temporary period at least, before the child is returned.”

58. In the present case, whatever steps may be necessary to protect the children from physical mistreatment would appear to require the involvement of the French social services and/or the French courts and that is why I am adjourning in order to provide further clarity as to what they can do, and when. I also base my decision upon what I consider to be best interests of the child, in particular their need for stability, and taking into account what these two boys have said about their current living and school arrangements. I would not go so far as to refuse a return order outright, based upon their views, because of my impression that there has been some influence from the mother and because of my scepticism as to whether all the allegations of physical mistreatment are accurate. However, I am prepared to factor their views in to the extent of not ordering an immediate return but rather adjourning the case so that further steps can take place in the country of their habitual residence, without disrupting their daily lives by ordering a return just yet. I propose to put the matter in for mention on the 14th January, 2019 for the purpose of an update as to what developments have taken place with regard to the French social services and the French courts. In the meantime, the boys are to continue living in Ireland with their mother and attending school, although it may be that access arrangements will have to be discussed for the Christmas period.