THE HIGH COURT

RECORD NO: 2016/34 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 O A CHILD

Between

J.J.

Plaintiff

AND

P.J.

JUDGMENT of Ms Justice Ní Raifeartaigh delivered on 10th February, 2017

1. This is a case in which the applicant, the father of a four year old boy, seeks the return of the child to Poland pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction, 1980 (the 'Hague Convention'), the provisions of the Child Abduction and Enforcement of Custody Orders Act, 1991, and the Matrimonial and parental judgments: jurisdiction, recognition and enforcement, Regulation (EC) No 2201/2003 (the 'Brussels II bis Regulation'). The mother of the child (the respondent) brought the child to Ireland in October, 2014.

Chronology

2. In this case, both parents furnished affidavits to the court and there was no oral evidence. In certain areas, the information provided by the affidavits was somewhat spartan. What can be established is as follows.

3. The mother and father married on the 23rd June, 2012. Their son, O, was born on the 19th August, 2012. The couple lived together in Poland with the child for a period of two years, until the 29th August, 2014.

4. The affidavit of the father says that on the 29th August, 2014, the mother abruptly left the home with the child. He reported them missing on the 30th August, 2014. He says that the mother attended the police department on the 1st September, 2014, "whereon our child was placed under my care" from that date. The mother's first affidavit says that prior to moving to Ireland, she had moved out of the house "as we started having arguments and he started drinking a lot and drank every day", and adds, "[b]efore I left Poland I went to the police station and a verbal agreement was reached that I would give [the child] to the applicant, as on the following day he was starting preschool/crèche". Her second affidavit says that "the police forced me to give the child to his father. The police told me that otherwise I would not be allowed to leave the police station". From these rather terse descriptions, it is clear that there was some kind of rupture of relations around the 29th August, 2014 and that, with some involvement on the part of the police authorities, the child was placed in the care of the father from the 1st September, 2014.

5. From the 1st September, 2014, to the 3rd October, 2014, a period of four or five weeks, O was living with his father. The mother exercised weekly access to him. She says in one of her affidavits that the father limited her access to the child, and that the child would "cry in panic" each time she was leaving him. In a further affidavit, the father disputes that he ever impeded the child's contact with his mother and says that he maintained "extensive contact" between them. It is neither possible nor necessary to resolve this conflict of fact for present purposes.

6. The mother also exhibits certain Facebook messages that she received from the father during the period when the child was living with his father, following the police intervention. The messages are dated 5th September, 2014, and state as follows.

> "JJ: Maybe we could meet :(
>
> PJ: No
>
> JJ: In that case I want to say goodbye
>
> PJ: We'll meet on Sunday
>
> JJ: I may not be here anymore by then
>
> PJ: And where will you be?
>
> JJ: I don't know. I'm leaving, I won't disturb you. be good parents to [O].
>
> PJ: what do you mean, you won't look after him?
>
> JJ: I can't cope with it, every time I see you I can hardly contain myself and I don't want to hurt him in a way that he won't know who his daddy is
>
> PJ: So if you don't want to see me, you can collect [O] from [name], maybe it will be easier for you, I don't want to deprive you of your rights, because you are the father
>
> JJ: I'm a complete asshole. That's a one more reason why I don't want to see him.
>
> PJ: He will always know you're his daddy
>
> JJ: and how will I look him in the eyes in the future. I can't live like this

PJ: Whose eyes?

JJ: [O]'s

PJ: What are you saying? Are you sober?

JJ: I haven't drank alcohol for one and a half weeks now. I was hoping that you would give me one more chance. Now I'm alone with debts and I lost my life, you have no worries because you have no debts. I want to ask you for only one thing- please visit my parents or bring [O] for them to see him from time to time

PJ: But you can sell the car and pay most of the debt

JJ: I love [O] and I love you. All the rest. I don't care. I'd rather escape all this. Raise him well and if you'll want to you will tell him the truth"

The father does not say anything about these messages in an affidavit sworn by him subsequent to the affidavit in which the mother exhibits these messages. The Court has no context to these messages, either from the mother or the father.

7. The mother also says on affidavit that "after we broke up", the father signed the application for issuing an identity document for O, which was necessary for the child to go abroad, which she says indicates an awareness on his part of her intention to travel abroad. She dates this as being "in August/September 2014". The date of her leaving the family home was the 29th August, 2014, as referred to above. The father says that the travel documents were signed in order to allow a family holiday in the Czech Republic.

8. The father's affidavit indicates that on the 3rd October, 2014, the mother removed the child from his crèche without the consent of his father, under the pretext that the child had a medical appointment. On the 4th October, 2014, the mother sent a text to the father, saying "Do not look for me. I'm far away. We will get by". The father immediately notified the police on the same date and filed a missing persons report on the same day. The police later informed him that the mother and child had travelled to Ireland.

9. The father brought proceedings in the Polish courts on the 28th October, 2014. On the 28th November, 2014, a Family and Minors Division of the District Court in Zywiec made an order declaring that the mother had no consent to remove the child and that the father had full parental authority and should use the applicable law to return the child to Poland.

10. On the 14th February, 2015, the father completed a document entitled 'Request for Return'.

11. He says that during 2015 he became concerned with the lack of progress on the application and that he engaged professional legal representation to manage the process.

12. The applicant exhibited a letter from his lawyers dated the 8th July, 2016, some 16 months after his application, which explains to some extent what had happened in the interim period. It says that "the initial proposal with authorisation" was sent to the Polish authorities in April 2015, and that in the absence of a response "we wrote an email" in November 2015 and it turned out that the application had formal defects. Documents were sent again by email on the 2nd December, 2015, but again there were technical problems and on the 25th January, 2016, the applicant sent a request along with a power of attorney. There is no evidence of the applicant having taken any steps between the 14th February, 2015 and November 2015, when the email was sent on his behalf by his lawyers inquiring as to the progress of the case.

13. The Special Summons in the case issued on the 26th October, 2016, more than two years after the removal of the child from Poland. There is no evidence before the Court as to what happened between the 25th January, 2016, when he sent the request together with a power of attorney and the 26th October, 2016, when the Special Summons issued.

14. Meanwhile, the child was living in Ireland with his mother and her partner. A half-sister was born in August, 2015. Further details of his situation are set out below. While he was just over two years old when he was removed from Poland, he was just over four years old at the time of the issue of the special summons, and is now aged four years and five months.

Proceedings before this Court
15. The special summons in the case issued on the 26th October, 2016. On the 9th November, 2016, the mother appeared before the Court. After a number of adjournments to enable affidavits to be filed and translations to be made, the hearing took place on the 2nd February, 2017. Both parents were present and legally represented. No oral evidence was given.

Issues in the Case
16. I do not think that it is necessary to discuss the authorities on the concept of habitual residence in this case because, on the facts, the issue is a straightforward one. The child in this case lived in Poland continuously for a period of approximately two years and one month before he was taken to Ireland by his mother. He was living with both parents during that period, apart from the last month or so (from the 30th August, 2014, to the 3rd October, 2014), when he was living with his father pursuant to the arrangement reached at the police station. There is no doubt but that Poland was his place of habitual residence until his removal to Ireland on the 3rd October, 2014. Even taking the import of the Facebook messages of 5th September, 2014, outlined above, at their height, there was no discussion during that exchange of messages of an intention to leave the jurisdiction and the issue of whether an intention was formed in September, 2014, to change the habitual residence of the child simply does not arise on the facts of this case.

17. Further, there is no question in this case but that the father, the applicant, has and had, custody rights and was exercising them within the meaning of Article 3 of the Hague Convention. The parents were married at the time of the child's birth, the father was named on the birth certificate, and the Civil Code of Poland contains provisions making it clear that he had custody rights in respect of his child. The child was living with the father and mother for two years, and for one month with his father only, prior to his removal to Ireland.

18. The key issues arising in the case are (1) whether the father consented to the removal of the child; (2) whether he acquiesced to the retention of the child in Ireland after his removal to Poland; and (3) whether, in circumstances where the special summons issued some 24 months after the child's removal from Poland, the defence that the child is 'well settled' applies, and, if so, how the Court should exercise its discretion. These issues arise in the context of the Hague Convention and the Brussels II bis Regulation, the relevant provisions of which are set out below.

Consent and Wrongful Removal

19. Article 3 of the Hague Convention defines wrongful removal in the following terms:

> "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."

20. Article 13 of the Hague Convention, further provides, in relevant part, that:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> > a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;"

21. In the Case of *S.R. v M.M.R.* [2006] IESC 7, the Supreme Court considered an appeal from a High Court order for the return of children to the USA under the Hague Convention. One of the issues before the Court was the proper approach to the issue of consent. In addressing this issue, Denham J. (as she then was), for the Court, adopted the principles outlined by Hale J. (as she then was) in the UK decision of Re. K. (Abduction: Consent) [1997] 2 F.L.R. 212:

> "(i) the onus of proving the consent rests on the person asserting it; and
>
> (ii) the consent must be proved on the balance of probabilities; and
>
> (iii) the evidence in support of the consent needs to be clear and cogent;
>
> (iv) the consent must be real; it must be positive and it must be unequivocal;
>
> (v) there is no need that the consent be in writing;
>
> (vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."

22. *F.L. v C.L.* [2007] 2 I.R. 630 was a case involving questions of consent to the removal of the children to this jurisdiction and acquiescence to their retention here. On the mother's account, the applicant father had consented to the removal of the children from Northern Ireland. The father contended that he had merely consented to the removal of the children from Northern Ireland for the purpose of spending a weekend with the respondent mother's parents. Against that backdrop, Finlay Geoghegan J made the following comments on the evidential onus of establishing consent:-

> "Prior to considering this legal issue the court must determine, on the facts, whether or not the father consented to the children being retained in this jurisdiction for a period longer than a weekend in November, 2004. The principles according to which the court should determine whether there was consent are not in dispute. The onus is on the mother to establish the consent. The consent need not be in writing. However, the consent must be real, it must be positive and it must be unequivocal: see Re K. (Abduction: Consent) [1997] 2 F.L.R. 212 and the judgment of Hale J. at p. 217.
>
> The consent must be proved on the balance of probabilities and the evidence in support needs to be clear and cogent. It is not necessary in all instances that there be an express statement such as "I consent". The court may in an appropriate case infer consent from conduct."

23. The authorities therefore make it clear that consent to removal must be clear and unequivocal, and that the burden of proof in this regard is upon the party seeking to prove consent. In this case, the mother seeks to rely upon the Facebook messages of September, 2014, to suggest that the father had indicated a clear willingness to disengage from his son's life and to hand over responsibility to the mother for the indefinite future. It is somewhat peculiar that the father did not seek on affidavit to explain or contextualise these messages. However, the court is aware that they were sent during the period when the child was in fact living with the father and the mother was having access to the child only, and that the child must have in fact returned to the father after these messages were sent. Of further relevance is the manner in which the mother removed the child from Poland, which is consistent only with a belief on her part that the father was not consenting; she went to the crèche, told a false story about the child having to go to the doctor, took the child away, did not tell the father where she was going, and sent him a text the next day saying "Do not look for me. I'm far away. We will get by". None of this is in my view consistent with a belief on her part that the father was consenting to her removal of the child from Poland and I am of the view that there was in fact no consent from the father in this case at the time of the removal. I do not know exactly how the Facebook messages fit into the overall picture of what was going on in their relationship and their individual minds during the month of September as a whole, but I am satisfied that the Facebook messages in themselves, without any surrounding explanation, are not sufficient to meet the evidential threshold for proving consent, nor does the issue of a travel document alter the situation. It is simply not clear when this was obtained and in what circumstances. I therefore find as fact, on the balance of probabilities, that on the date of the removal, the father had not consented to the removal of the child from the jurisdiction of Poland.

24. It follows that I am of the view that the removal of the child from Poland was a wrongful removal within the meaning of Article 3 of the Hague Convention and that this is not a case to which Article 13 of the Hague Convention applies by reason of a consent to the removal of a child from their jurisdiction of habitual residence.

Commencement of proceedings

25. Article 12 of the Hague Convention provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 *and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention*, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child." (emphasis added).

While there is apparently no authority directly on point, it seems to be clear from the highlighted portion of Article 12 that the key date for assessing the time elapsed since the wrongful removal of the child is the date of the commencement of proceedings in the Irish courts. The relevant date must therefore be the date of the issue of the plenary summons, which in this case was two years after the date of the removal of the child. This is not to say that the reasons for the proceedings not having issued until more than one year after the removal may not be relevant, and perhaps highly relevant, to how the Court's discretion pursuant to Article 12 may be exercised. However, on the narrow issue of whether the proceedings were commenced more than one year after the removal, I find in the affirmative. Therefore, the 'well-settled' defence falls to be considered and the Court must also consider how, if it is satisfied that the child is 'well-settled', the discretion should be exercised.

The well settled defence, and discretion

26. Article 12 of the Hague Convention provides:

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

27. Article 13 of the Hague Convention provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

28. The issue of whether a child is 'well settled', in proceedings commenced after one year, falls to be considered against the backdrop of the following authorities.

29. In the Supreme Court case of *P. v. B. (No. 2)* [1999] 4 I.R. 185, Denham J said as follows:-

> "The interpretation of the phrase "settled in its new environment", referred to by the learned trial judge, by Bracewell J. in *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413 at pp. 417 and 418 states:-
>
> 'The second question which has arisen is: what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the defendant can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas L.J. in Re S. did advert to art. 12 at p. 35 of the judgment and he said:-
>
> > 'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.'
>
> He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in *M. v. M.* and at first instance in Re S. The phrase 'long-term' was not defined, but I find that

it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the defendant, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.'

I find this to be a very helpful analysis. As too is the description by Garbolino J. in the Guide at p. 136 where he describes art. 12 and its application in the United States as:-

> 'The delay in filing an action for more than one year is only the first prong of the 'delay' defense. Even if it is established that a year or more has passed since the wrongful removal or retention, the second prong of this defense requires that the child must have been 'settled' in his or her new environment. In absence of evidence that the child has become settled, the defense is not established'".

30. In *P.L. v. E.C.* [2009] 1 I.R. 1, the Supreme Court referred inter alia to the law as set out in *P v B*, adding that,

> "Settlement must be assessed according to all the circumstances. It is ultimately a matter of appreciation of all the facts. The court must make a careful and balanced judgment. There is a physical and an emotional element. Family, home and school come into it, as does the absence, to the extent that it is relevant, of contact with the applicant parent. It is the emotional element in particular which calls attention to the evidence of Dr. Greally. Dunne J. referred to Dr. Greally's evidence that C.'s presentation suggested that "he would settle anywhere". She was entitled to do so. It was consistent with the general tenor of Dr. Greally's evidence in which she described C. as a detached child. Furthermore, Dr. Greally's strictures on reliance on what she called the "verbalisations" of an eight year old point firmly against the usefulness of an adjournment for the purpose of further inquiry into the question of whether C. had settled. Finally, anticipating to some extent my judgment on the question of delay, I agree with Dunne J. that 'there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts'. This must also be put in the balance when considering the issue of settlement."

31. In *Z.D. v. K.D.* [2008] 4 I.R. 751, McMenaman J. said,

> "79 The issue of "settlement" denotes more than adjustment to surroundings. It must include a strong emotional attachment to a place. In *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413, the Court of Appeal at p. 418 observed that a new environment 'must encompass place, home, school, people, friends, activities and opportunities, but not, per se ,the relationship with the mother, which has always existed in a close, loving attachment'. It is not mere adjustment to surroundings. There is both a physical and an emotional constituent. It involves integration into a new environment."

32. The question of whether a child is settled in a new environment under the Hague Convention has also been considered in a US context and was discussed in the case of *Wigley v. Hares* (82 So. 3d 932):

> "The Ninth Circuit has provided a list of factors to consider when making the "settled environment" analysis. These include:
>
> (1) the child's age; (2) the stability and duration of the child's residence in the new environment; (3) whether the child attends school or day care consistently; (4) whether the child has friends and relatives in the new area; (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and (6) the respondent's employment and financial stability. In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation. Although all of these factors, when applicable, may be considered in the "settled" analysis, ordinarily the most important is the length and stability of the child's residence in the new environment...".

33. I also have regard to the decision in *Cannon v. Cannon* [2004] EWCA Civ 1330 in which the impact of subterfuge and delay on the settlement of a child were considered in some detail in a useful analysis. This was a case in which the mother of the child retained the child, whose habitual residence was in America, in Ireland at the end of an agreed holiday. A consent order for the child's return to California was made, following the institution of Hague Convention proceedings by the father. The mother returned to America for a short time before again removing the child from the jurisdiction, this time to England, and assuming new identities for herself and the child in attempt to evade detection. They were detected over four years later. The court gave extensive consideration to the jurisprudence in this area across a number of jurisdictions and in particular, the exercise of the Court's discretion under Article 12 of the Hague Convention, saying:-

> "50. There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.
>
> 51. In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.
>
> 52.In his skeleton argument for the hearing below Mr Nicholls offered this conclusion: -
>
> > 'Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return.'

53. I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.

54. Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong will vary from case to case. Furthermore abduction may also be a criminal offence in the jurisdiction where it occurred. The abductor may have been prosecuted, convicted, and even sentenced in absentia. There may be an international arrest warrant passed to Interpol to execute either in respect of a conviction and sentence. The abductor may have entered the jurisdiction of flight without right of entry or special leave. The abductor may therefore be, or may rapidly become, an illegal immigrant.

55. At this point I would draw a parallel between an assertion that a child has become settled in a new environment and our case law regarding the acquisition of habitual residence. There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of an habitual residence in a new environment. The decision of Sir George Baker P in *Puttick v. Attorney General* [1980] Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority.

56. This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.

57. This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr Nicholls' proposition holds good.

58. There will often be a tension between the degree of the abductor's turpitude and the extent to which the twelve-month period has been exceeded. Obviously the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history that it has achieved. It is of course an injustice to the deprived father that the longer the deprivation extends the less his prospects of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child's life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years.

59. The third category of case might be termed manipulative delay, by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the twelve-month limit. An instance is the Canadian case of *Lozinska v. Bielwaski* [1998] 56 OTC 59. In ordering the return of the child the court held that the father had engineered the delay in the proceedings in order to invoke Article 12(2). The court accordingly ruled he could not take advantage of the delay he had created. In this category of case the rejection of the defence comes closer to the application of a principle of disregard than to arriving at the same result by a broad and purposive construction of the asserted settlement. Such an approach is consistent with that taken to a defence under Article 13(b): an abducting primary carer cannot create a defence by relying on circumstances that flow from his or her refusal to return with the abducted child: see *Re C (A Minor) (Abduction)* [1989] 1 FLR 403."

34. In the present case, the evidence concerning the child's settlement is as follows. The mother swore an affidavit on the 20th December, 2016, in which she stated that,

"I say that I have started a new life in Ireland. I left Poland in October 2014. I have now been living in Ireland for the past 2 years and 2/3 months with my son and new partner. I say that the child [O] was born on the 19th of August 2012. I say that [O] is now attending pre-school in [location]. My partner and his brother also live in Ireland. I also have a child [E] born on the 30th of August 2015. [E] was born in [location]. My partner's name is [A] and he is working as a mechanic.

Presently, I do not work. I am a house-wife/Homemaker.

[O] is now four years and 5 months of age.

I say and am advised that [O], myself and my partner are for all intents and purposes "well settled" within this jurisdiction. There is significant stability and over two years in duration residing in Ireland. My child is attending pre-school and has a number of friends in Ireland.

[O] is also involved in [name of pre-school], preschool and has many friends and is popular in his group.

During the weekdays he will attend the pre-school from 9a.m. to 12midday, every Monday to Friday.

He is very happy in this pre-school and enjoys attending. He asks every morning if he has school, even at weekends.

After pre-school he will go home with me, or we will visit with friends, or have play dates with other children or we will have other children over to play in our home. He often visits with and maintains contact with the children from his last preschool year of 2015/2016 who have moved onto primary school.

In the evening, he will stay at home with me and play at home with me and his sister with whom he enjoys a close affectionate and loving relationship.

He is now reaching the stage where he is attending birthday parties and other events for his age level for example, play dates with other children and he has expressed a wish to play sport next year with the other children from his group.

> He is a very happy child and I fear that a removal of [O] back to Poland will cause him significant upheaval and significantly discommode him and possibly cause him grave harm."

35. An affidavit was sworn by one of the employees of the pre-school facility in January, which said as follows:

> "[O] has been attending pre-school here since September 2015. He is a very outgoing, popular boy within the classroom. He is very settled and happy within this service. He always comes in with a big smile on his face. His language skills have developed significantly since he began pre-school here and he is able to partake in conversations with the other children in English now without any difficulty. He is able to keep up with the work in class without any difficulty and he is very intelligent.
>
> He has established great friendships within the room and formed strong bonds with the children in his class. He is always excited to see them and engages in lots of games with them throughout the morning. These children will be going to school with [O] in September 2017, where I feel he will settle in well as he will be going to school with his friends whom he has formed excellent relationships with over the past year and a half. [O] is always happy to come to playschool and we never encounter any difficulties with him in any area."

36. Counsel on behalf of the father was critical of the evidence concerning the child's settlement, pointing out that there was, for example, insufficient detail concerning the employment of the mother's partner, no evidence as to the physical surroundings in which the child lives, and no evidence of his engagement with the community outside his family other than the evidence about his attendance at the crèche. I agree that the evidence could have been a little more comprehensive on some of these matters. However, I consider that the evidence of the mother and the pre-school employee, taken together, establishes a sufficient picture of a happy, well-adjusted child, who is interacting with his peers in the English language and expecting to start school with them next year, sufficient to satisfy the test that he is 'well settled' in Ireland and was so at the time the plenary summons issued in October, 2016. The evidence establishes more than a mere attachment to his mother, and presents sufficient evidence of his living in a family unit with his half-sister, and of being integrated into his local peer group. There is, from the point of common sense, a limit to the degree to which a 4 year old can be demonstrated to have links with the outside community. At that age, the parameters of family and crèche/school are often the outer limits of the child's daily world. Also, while there was 'subterfuge' in the manner in which the mother took the child from his crèche in Poland, it does not seem to me that there is any evidence of subterfuge in the manner in which she and the child are currently living in Ireland.

37. The Court was urged on behalf of the father that, in the event that the Court found that the child was well settled, it should nonetheless exercise its discretion in favour of returning the child to Poland, and that one of the relevant factors was that the delay in issuing proceedings was by reason of administrative error and through no fault of the father's. The Court was referred by Counsel on behalf of the respondent to the case of *Re M and Anor* [2007] UKHL 55, in which Baroness Hale said:-

> "... the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.
>
> [...]
>
> In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community."

She went on to examine the facts of that case, which showed that the children were well settled and had personally indicated they did not want to return to Zimbabwe, and she commented:-

> "Against all this, the policy of the Convention can carry little weight. The delay has been such that its primary objective cannot be fulfilled. These children should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide. I would therefore allow the appeal and dismiss the father's Hague Convention proceedings, without prejudice of course to his right to bring any other proceedings to resolve his dispute with the mother."

38. One can envisage, for example, a case where, solely through administrative error, the commencement of proceedings fell a short period outside the one-year bright-line, such as a number of days beyond the 12 months. However, in this case the delay was much more substantial, and I am not convinced that all of the fault lay with the administrative authorities. To repeat, the wrongful removal was on the 3rd October, 2014, and the plenary summons issued on the 26th October, 2016, which involves a two year gap. Such a period is extremely significant in the life of a small child. In this case, the child went from the age of 2, to the age of 4, half of his young life. If one looks at the documents and explanations offered on behalf of the father, there are considerable periods of unexplained delay. For example, while the judgment of the domestic court was handed down in November 2014 indicating that he should apply for return of the child, he did not make any formal application until February, 2015. While he says that he became concerned at the lack of progress during 2015, the next event appears to be an email sent by his lawyers in November, 2015. There is no information about any steps taken by him to progress the case or make any inquiries between February, 2015, and November, 2015. There is then some activity in December, 2015, and January, 2016, when further documents are furnished by him to progress the application. But there is again, no explanation as to what takes place between January, 2016, and the issue of the plenary summons in October, 2016. While the bureaucracy involved in such cases may be cumbersome, there is too much in this case in the way of unexplained passage of time for the Court to be satisfied that the father was putting significant effort into progressing his case expeditiously, particularly having regard to the effect of the passage of time on a child as young as O.

39. Accordingly, I am of the view that the discretion in this case should be exercised against returning the child to Poland. This is a case in which considerable time passed, during which the child became increasingly settled in Ireland. In the words of Baronness Hale in Re M, this is no longer a 'hot pursuit' case, and the major Convention objective of securing a swift return to the country of origin can no longer be met. The delay is such that this primary objective cannot be fulfilled and the child "should not be made to suffer for

the sake of general deterrence of the evil of child abduction worldwide".

40. It is important to emphasise that this decision does not in any way decide custody or access issues in relation to the child. This judgment is concerned solely with the narrower issue of whether the child should be returned to Poland within the parameters of the Hague Convention. Thereafter, the provisions of Article 11, subsections 6-8, of Brussels Regulation II bis apply.

41. For completeness, I should say that I have considered the issue of acquiescence, in the sense of whether the father, through his delay in progressing his application, was acquiescing to the retention of the child, O, in Ireland after he had been removed from Poland. The relevant principles have been set out by Lord Browne-Wilkinson in In *Re H and Ors (Minors)* [1998] A.C. 72, approved by Denham J in *RK v. JK* [2000] 2 I.R. 416:

> "To bring these strands together, in my view the applicable principles are as follows:
>
> 1. For the purposes of Article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In re S. (Minors) 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact'.
>
> 2. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
>
> 3. The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
>
> 4. There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

While the father in the present case did not progress his application expeditiously from his end in Poland, I am not satisfied that this slow activity could be said to amount to acquiescence to the retention of O in Ireland, in view of the fact that his application for return was still a live one, albeit one that was progressing slowly. There might be cases where the overall picture was one of such inactivity that it could be inferred that, notwithstanding a formal application for return having been made, the parent was tacitly acquiescing to the retention of the child in the jurisdiction to which he or she had been wrongfully removed by failing to progress the application thereafter. It does not seem to me that the present case is so clear-cut as to allow for that interpretation.

42. Nor could his Facebook messages be relevant to the question of acquiescence, because they predated the wrongful removal; it seems to me that acquiescence to retention is distinct from consent and relates to the period after the date of the wrongful removal. On the facts of the present case, I am not satisfied that the father acquiesced to the retention in Ireland, and I prefer to view the delay in progressing his application as a matter which goes to how the discretion should be exercised pursuant to Article 12.

43. Further, it was submitted on behalf of the mother that there was a 'grave risk' to the child within the meaning of Article 13 if he were to be returned to Poland, by reason of the potential effects of any such separation from his mother upon the child. Article 13(b) refers to "a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". I am satisfied that this consideration should not be taken into account in this case; the threshold for establishing 'grave risk' is very high, as set out in authorities such as *A.S. v. P.S.* [1998] I.R. 244, *R.K. v. J.K.,* [2000] 2 I.R. 416, *T v. M* [2008] IECH 212, and is not met by an assertion such as that made in this case, even if it were made out upon the evidence.

44. In all of the circumstances, while I accept there was a wrongful removal of the child to Ireland from Poland, I refuse the relief sought in the exercise of the court's discretion in circumstances where the proceedings were commenced more than one year after the wrongful removal and the child had become, in my view, "well settled" within the jurisdiction. Central to the exercise of my discretion is a finding that there was significant delay on the part of the father in progressing his proceedings, not all of which can be attributed to administrative confusion or error on the part of the Polish or Irish state authorities in processing his application, and most of which remains unexplained.