THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 323

[Appeal number 2018/329]

Birmingham P.
Edwards J.
Whelan J.

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 1980 AND IN THE MATTER OF COUNCIL REGULATION 2201/2003

IN THE MATTER OF E.G. (A MINOR)

BETWEEN

C.D.G.

APPLICANT/

RESPONDENT

AND

J.B.

RESPONDENT/

APPELLANT

JUDGMENT of Ms. Justice Máire R. Whelan delivered on the 3rd day of October 2018

1. This is an appeal against the judgment and orders of Ms. Justice Ní Raifeartaigh made in the High Court on 23rd July 2018 directing the summary return of the minor named in the title of these proceedings to the jurisdiction of the courts of Sweden pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereinafter "the Hague Convention") and Articles 10 and 11 of Council Regulation (EC) No. 2201/2003 (the "2003 Regulations"). The order of the High Court noted certain undertakings by the parties, as in the order provided.

2. It is acknowledged by all State parties to the Hague Convention that it is in general in the best interests of children that they not be abducted and where an abduction across international borders occurs that there is a prompt return to the state of habitual residence. State parties accept that it is in the best interests of the welfare children to operate the Convention, save in narrow and exceptional circumstances.

The facts
3. These proceedings pertain to the son of the parties, who was born in November 2012. For the purposes of this appeal to protect his anonymity he will be referred to as Oscar. The appellant is Oscar's Irish-born mother. The respondent is his Swedish father. His parents met in Ireland in 2010. Oscar was born in Ireland. His parents subsequently married in April 2013. In early 2015 the family moved to England. Later that year, in or about the month of June 2015 when Oscar was aged about two and a half, they moved to Sweden. At all material times thereafter until the events the subject matter of these proceedings they have resided in that jurisdiction. The marriage was not a happy one. Just over two and a half years following their marriage their relationship irretrievably broke down. In November 2015 when Oscar was aged three, the mother left the family home with him. Thereafter she instituted divorce proceedings and a decree of divorce issued in Sweden in October 2016.

Oscar's circumstances
4. Oscar has been the subject of a number of assessments and reports by health professionals in Sweden. They suggest that developmental delays were identified. They state that he experiences difficulties in interacting with other children and in social communication with his peers. A report of November 2017 by Dr. Katarina Freydman, a child psychologist, states that his difficulties are typical for functioning within the autism spectrum. Professional advice is that he requires a stable everyday life and encouragement in developing language skills, either in Swedish or English, and assistance with interaction skills.

Mother's concerns
5. The mother asserted that the father has sexually abused Oscar. The Swedish Courts found that her preoccupation and fears in this regard stems from her own familial experience. She has a very strong preoccupation around the risk of sexual abuse of Oscar by his father. The Swedish courts found that these fears and preoccupations predate even the birth of Oscar.

Swedish Court orders 2016 - 2017
6. Following the institution of divorce proceedings by the mother in March 2016, the issue of the custody of and access to Oscar came to be determined by the Swedish courts. On the 11th May 2016 the mother was granted custody on an interim basis.

7. On the 20th May 2016, the father obtained an order providing for supervised access which remained operative for five months.

8. On the 26th October 2016, the Stockholm District Court reviewed the operation of access and found no further necessity for supervision of that access.

9. Between May and October 2016 Oscar enjoyed some supervised contact visits with his father. The expert advice was that there was no nexus between the child's unusual behaviour at preschool and events that occurred during supervised access.

The Allegation - Police investigation
10. Following the mother's departure from the family home in November 2015, she disclosed to the Swedish police her suspicion that the father had sexually abused Oscar and this allegation was investigated. That investigation concluded four months later, on the 16th March 2016, with a decision to "take no further action". In early January 2017, the mother made a fresh allegation to the effect that Oscar had disclosed directly to her a sexual assault perpetrated by his father upon him and that same had occurred on the 31st December 2016, during an unsupervised access visit for New Year's Eve. On foot of this allegation Oscar was referred to trauma unit for counselling and therapy in January 2017 and a social worker commenced an investigation of the family circumstances. The social worker's report was concluded four and a half months later, in late May 2017. It was inconclusive, suggesting that social services could not confirm whether Oscar had been subjected to sexual abuse by his father. The report concluded "this is a matter for the police and should be investigated by the police."

February 2018 orders
11. Throughout the period from mid-January 2017 to mid-August 2017, while these allegations were being inquired into, Oscar had no access to his father. On the 10th August 2017 the Swedish courts ordered that the father be permitted to resume access visits with Oscar. That interim order for supervised access continued until the 20th November 2017 when, having heard expert evidence from Dr. Katherina Freydman, the court directed that unsupervised access resume. The mother did not facilitate such access in December 2017 on the basis that Oscar said "he did not want to meet his father".

12. This precipitated a further court application. A hearing took place on the 2nd February 2018 at Stockholm District Court. The father and mother were fully legally represented throughout the Swedish custody and welfare hearing and were free to call such witnesses adduce such evidence as they saw fit. A three-person court, comprised of two lay persons and presided over by a district judge, heard all the evidence advanced in regard to the welfare issues. At the conclusion of the hearing the Court delivered a written judgment and made orders which granted custody of Oscar to his father with access to the mother.

13. Almost immediately after the making of the said orders the mother, in clear breach of the order of Stockholm District Court and without the knowledge or consent of Oscar's father, removed the minor from the jurisdiction of the courts of Sweden and took him to Ireland where she resides with her family. The father has had some limited contact with Oscar during the intervening period since early February 2018.

14. No application was made on the mother's behalf for a stay on the orders of the Stockholm court. Neither did the mother appeal the orders.

15. On the 18th February 2018 the father signed a written authorisation pursuant to Article 28 of the Hague Convention authorising the Swedish Central Authority to take steps to seek the summary return of Oscar to the Kingdom of Sweden pursuant to the provisions of the Convention. The within proceedings were instituted by way of special summons on the 16th April 2018.

The defence
16. Several grounds of defence were raised in the High Court on behalf of the mother. These included a claim of grave risk, within Article 13 (b) of the Hague Convention, that were Oscar to be returned to the jurisdiction of the courts of Sweden he would be at risk of sexual abuse by his father. It was argued that there was a grave risk that a return of Oscar to Sweden would place him in an intolerable situation, within the meaning of Article 13(b), arising from the operation of the Swedish custody orders granting primary custody to the father.

17. It was further contended that a summary return of Oscar to the jurisdiction of the courts of Sweden would not be permitted by the fundamental principles of Irish law having regard to Article 20 of the Hague Convention. This argument was framed in the context of the Supreme Court decision in *Nottinghamshire County Council v. K.B. & Ors.* [2013] 4 IR 662; [2011] IESC 48.

18. A number of interlocutory applications were brought on behalf of the mother during the course of the proceedings before the High Court. Firstly, there was an application that a child psychologist be appointed by the High Court to interview Oscar and report to the court. The trial judge refused the application on the grounds that it was inappropriate and without value in circumstances where Oscar was only five years old and had communications and other difficulties as disclosed by the reports exhibited in the proceedings. She considered that an interview would be futile and that Oscar should not be unnecessarily subjected to a further professional encounter at this time in the context of summary Hague proceedings.

19. The second application on behalf of the mother sought the appointment of a guardian *ad litem* to represent his interests. The application was refused. The trial judge was satisfied that the input of the guardian *ad litem* would be confined to making arguments based on the content of reports referenced in the Swedish District Court proceedings and decision, all of which were already available to the trial judge in the first instance.

20. The third application brought on behalf of the mother sought to call an expert to testify and provide opinion evidence as to the risk that Oscar would to be subjected to sexual abuse if returned to the custody of his father in Sweden based on the existing data, reports and materials. The Court granted leave to the mother to call Ms. Whyte, a psychologist, to give evidence in this regard.

The judgment
21. The trial judge identified at para. 26 of her judgment the key issues raised in this case as being whether there was any defence established pursuant to Article 13 of the Hague Convention and whether Article 20 was engaged.

22. With regard to Article 13(b) the trial judge considered the jurisprudence on grave risk.

23. She attached significant weight to the fact that there was in existence a decision of a court of competent jurisdiction in the state of habitual residence of Oscar on the very issues sought to be relied upon by the mother, to ground a defence pursuant to Article 13 against a summary return. She noted that the decision by the Swedish court immediately preceded the mother's removal of Oscar to this jurisdiction. The trial judge was satisfied that the Swedish court had examined the same evidence as had been put before the High Court on the precise issue as to whether there was a risk that the father had sexually abused Oscar, as well as evidence on the more general question of his best interests.

24. The trial judge noted at para. 34 that the mother had failed to appeal the Swedish decision and had failed to seek any stay in respect of it. She noted that the mother was seeking to re-litigate:-

> "…precisely the same issues under the rubric of "grave risks" under Article 13. This striking feature of the case, in my view, distinguishes it from the above-mentioned cases… I am not aware of, nor was my attention drawn to, any authority in which there was such proximity of time and subject matter between the decision in the court of habitual residence, on the one hand, and the Hague Convention proceedings in the court to which the child was removed, on the other."

25. The trial judge observed at para. 35 that:-

"…the Court needs to be vigilant not to be lured into conducting some sort of review of, or appeal from, a decision of the court of habitual residence on this very issue. While there is a tension between the requirement that the court abstain from fact-finding and the duty to consider the risks to the child, as described by the UK Supreme Court in the *Re E.* case above, this tension plays out on the facts of each particular case. The whole basis of the scheme detailed in the Hague Convention and EU Council Regulation 2201/2003 is to leave substantive decisions on issues of custody and access, and related fact-finding, to the court of the place of the habitual residence of the child, while conferring on the court to which the child has been wrongfully removed a much more limited scope for examining the facts and refusing a return based on this examination."

26. She noted in particular the decision of the Supreme Court in *P.L. v. E.C.* [2009] 1 IR 1. In that case the Supreme Court considered the approach to be adopted where identical allegations were being advanced as an Article 13 defence to a summary return under the Hague Convention as were the subject of proceedings before the Australian Court concerning welfare of a child. Quoting extensively from the said judgment, the learned trial judge concluded at para 36:-

> "It seems to me that the remarks of the Supreme Court as to the reluctance of the Irish courts to interfere with the fact-finding role of the court of habitual residence have even greater force where, as in this case, the Swedish court has actually reached final conclusions based on the evidence before it."

27. The defence advanced by the mother pursuant to Article 13 of grave risk centred, *inter alia*, on alleged deficits, as the mother contended, in regard to the investigation of the allegations of the sexual abuse allegations by social workers and the Swedish police.

28. The trial judge at para. 38 noted that:-

> "The criticisms made of the Swedish court's judgment are in my view criticisms typical of what would be raised in an appeal within a domestic system. However, the mother chose not to appeal or seek a stay of some kind upon the order of the 2nd February, 2018. A court within a domestic system is "on the ground" and is much more familiar with how the domestic system operates in terms of investigations of child sexual abuse. Further, it has the opportunity to hear oral evidence from witnesses. In this case, the Swedish court, as appears from the judgment, heard oral evidence from the applicant and respondent. The parties had the opportunity to call witnesses, but apparently neither Dr. Nilsson nor Dr. Freydman were called to give evidence, other than some telephone conversation with Dr. Freydman at an interim hearing of which I have no details. I, on the other hand, have no possibility of hearing evidence from those witnesses or the social workers."

29. The trial judge concluded that there was no evidence to support the mother's claim that the Swedish courts were unwilling or incapable of protecting Oscar, being the test prescribed by the Supreme Court in *P.L. v. C.L(ante)*. Rather, the decisions and orders made by the court with regard to vesting custody in the father was reached on the evidence - evidence with which the mother disagreed.

Evidence of Psychotherapist

30. This witness had experience as a clinical supervisor who had worked *inter alia* as a child psychotherapist and with children believed to have experienced trauma including sexual abuse. She had no particular expertise in determining or evaluating whether a child has in fact been abused when such an allegation was made. "Such credibility assessments are a specialist type of assessment which require a particular skill-set and expertise." (para. 40) The court noted that Ms. Whyte's opinion was necessarily based upon second-hand and indeed third-hand accounts of statements made by Oscar to professionals in Sweden as well as allegations allegedly made by him to his mother.

31. Quite apart from this witness's lack of expertise in the area of credibility assessment the trial judge noted that her opinion evidence was based on the proposition that there were a number of issues of concern which, in her view, could not be explained away and therefore she had concluded that same were suggestive of risk to Oscar.

32. The trial judge, having considered the evidence as a whole, was satisfied that there were "in fact alternative explanations for those "red flags"." These included that Oscar may be on the autism spectrum and that his mother may be predisposed to fear sexual abuse of her son and may be innocently influencing his behaviour.

33. The trial judge concluded:-

> "I do not think that the evidence so manifestly and obviously pointed to a risk of child sexual abuse that I would be justified in making a finding of grave risk within the meaning of article 13." (para. 40)

34. The trial judge noted that the High Court was not exercising a fact finding function in the normal sense but was instead operating within the constraints of the Hague Convention's parameters "which is primarily concerned with determining the appropriate forum for decision making" (para. 40). She observed that it would only be in very exceptional circumstances that an Irish court would be entitled to take a differing view of the facts as already found by the court of habitual residence, particularly where the decision of the latter court was both proximate in time and directly related to the issues raised in the Irish court. "Having reviewed the evidence laid before me, and the terms of the Swedish decision, I do not consider the present case to fall within any such exceptional category." (para. 40). She concluded that the defence of grave risk pursuant to Article 13 based on the allegations of sexual abuse had not been established.

35. The second ground of defence involved a contention that compliance with the order of the Swedish courts necessarily entailed Oscar moving to reside with his father and this in and of itself- quite apart from the allegation of sexual abuse- would create a grave risk of an intolerable situation. This move, it was argued, would represent a significant disruption to his life having regard to his personal psychological characteristics and his autism spectrum disorder whereby any changes to his living arrangements, education, change of country and language would be considerably more disruptive to him than to a child without these psychological characteristics. The trial judge rejected these contentions noting that whereas a return to Sweden would undoubtedly involve some short term disruption to Oscar, in the long term a return would be in his best interests insofar as the most likely scenario in which a

relationship with both parents could be maintained for the child's benefit.

36. The trial judge however noted that in the interim, transitional arrangements were desirable to facilitate the process of resettlement of Oscar in Sweden. The father gave a number of undertakings including an agreement to waive his strict legal entitlement to have Oscar reside with him for the initial period following a return to Sweden. There was an offer of assistance in connection with the costs of accommodation and in connection with maintenance.

37. The final ground of defence relied upon in the High Court pertained to Article 20. It was contended that a summary return was not permissible having regard to the fundamental principles in this jurisdiction in relation to the protection of human rights and fundamental freedoms.

38. The trial judge noted that the Supreme Court had considered this issue in *Nottinghamshire County Council v. K.B. & Ors.* [2013] 4 IR 662. The Supreme Court had held that a mere legal difference in regimes is not sufficient to trigger Article 20. The court noted that the appropriate test is whether what is proposed or contemplated in respect of the minor in the requesting state was something that departs so markedly from the scheme and order envisaged by the national constitution and was such a direct consequence of an order of the court that return to the requesting state was impermissible by virtue of the terms of the Irish Constitution. The judge rejected this argument *in limine*. She was satisfied that there was no particular difference between the legal regimes in Ireland and in Sweden with regard to welfare of minors. She noted there was an absence of any affidavit of laws or other evidence suggesting any fundamental difference of importance as between the two legal systems. The trial judge concluded that there had been a wrongful removal of Oscar from Sweden within the meaning of Article 3 of the Hague Convention.

39. The mother appealed the determination and orders directing the summary return of Oscar to the jurisdiction of the courts of Sweden. The father contests the appeal on all grounds.

Grounds of appeal
40. The mother raised nine separate grounds of appeal as follows:

> (i) the trial judge erred in failing to make a determination as to whether there was a grave risk of psychological harm or of Oscar being placed in an intolerable situation if returned to Sweden;
>
> (ii) the trial judge erred in her consideration of whether the father was exercising custody rights within the meaning of Article 13(a) in respect of Oscar at the relevant time;
>
> (iii) the trial judge erred in failing to make provision to have the child's voice heard by the appointment of a child psychologist or of a guardian ad litem or by the admission into evidence of the report of a psychologist treating Oscar in Sweden which was in the process of being translated at the time the application was brought in the High Court for its admission. It was incumbent on the trial judge to ensure that the child's voice was heard when determining what was in his best interests;
>
> (iv) the trial judge misdirected herself in determining that, if the minor stays in Ireland, maintaining a relationship with his father is likely to be problematic;
>
> (v) in considering the Article 13 defence the Court took into account irrelevant considerations and failed to take into account relevant considerations;
>
> (vi) the trial judge erred in finding that there was no grave risk of physical harm to the child if returned to Sweden;
>
> (vii) the Court erred in failing to grant a stay on a return to Sweden "until after the determination in Sweden of an appeal (if possible) or a fresh application for custody and liberty to relocate to Ireland";
>
> (viii) the trial judge erred in failing to consider that the Swedish court, as a court of first instance "may have reached the incorrect decision which was not in the best interests in of the welfare of the child…"; and
>
> (ix) the Court erred in failing to take proper account of the implications for the child of the fact that during the currency of the within proceedings, the Swedish authorities had caused a European Arrest Warrant to be issued against the mother with onerous conditions.

Arguments on behalf of the appellant
41. At the hearing of the appeal and in the submission filed it was emphasised on behalf of the appellant mother that there were two central aspects to her defence pursuant to Article 13(b) of the Hague Convention. Firstly, her concern that Oscar had been subjected to sexual abuse by the father and her fear that this would re-occur. Secondly, that Oscar who had experienced developmental difficulties including behavioural and social difficulties and who required certainty, stability and predictability in his life would, she contended, suffer psychological damage and be placed in an intolerable situation if he were compelled to return to Sweden and to the care of his father. It was argued that no actual determination had been made by the trial judge as to whether the child was at grave risk of psychological harm or would be placed in an intolerable situation if returned to Sweden to the sole care of his father. The appellant emphasised that the Swedish authorities have issued a European Arrest Warrant requesting her surrender for the purposes of conducting a criminal prosecution for the abduction of the child. This arises on foot of a decision made by the District Court at Stockholm on the 2nd February 2018.

42. This Court was advised, that upon conviction, the maximum length of custodial sentence that may be imposed pursuant to Swedish law is four years imprisonment. It was contended that the risk of such an outcome, coupled with the likelihood that she would be remanded in custody without bail pending trial in Sweden, would in itself place Oscar in an intolerable situation within the meaning of Article 13(b) of the Hague Convention. It was also argued that it was incumbent on the trial judge to ensure that there be a psychological report available at the hearing assessing the effect of the Swedish order on the minor, in the event of his return to the care of his father in Sweden.

43. The appellant relied on authorities of the courts of England and Wales including *GP (a child)* [2017] EWCA Civ. 1677 where the English Court of Appeal considered whether the summary return ought to be ordered of an 11-year old daughter of a Latvian mother and Italian father to Italy. In that case the abducting mother had been convicted in Italy in respect of an earlier abduction of the

same child. The Court had found that the facts gave rise to a grave risk that the child would be placed in an intolerable situation in the (likely) event of her mother's imprisonment.

44. The English Court of Appeal in *GP (a child)* had relied on an earlier judgment of the UK supreme court *in Re E.* [2011] UKSC 27 where Baroness Hale and Lord Wilson had emphasised the importance of considering in sufficient detail what is actually likely to happen to a minor on their return to a requesting state, before reaching any conclusion on the question of whether there is a grave risk that a child will be exposed to psychological harm or otherwise placed in an intolerable situation. The Court of Appeal had reversed the High Court decision in *GP (a child)* [2017] EWCA Civ. 1677 and refused to return the child to Italy.

45. Counsel also relied on the leading English decision *in Re M. (Republic of Ireland) (Child Objections)(Joinder of Children as Parties to Appeal)* [2015] EWCA Civ. 26 of Black L.J.. The case concerned three children aged 13, 11 and 6 years. The English Court of Appeal held that the trial judge's finding, that the children had not objected to return, would be set aside and substituted with a finding that all three of them objected within the meaning of Article 13(b). There was strong evidence before the English courts in the *In Re M* case of both physical and psychological abuse of the children and their mother by the father. The Court of Appeal found that the defence of children's objection under Article 13 was made out and the father's application for the children's return to Ireland was dismissed.

Whether adequate provision was made to have the child's voice heard

46. It was argued on behalf of the mother that Oscar's voice ought to have been heard in the course of the proceedings. It was contended on behalf of the mother that in the absence of the child's views being canvassed or his psychological welfare being assessed the trial judge erred in making orders for his summary return which would result in profound changes to his life. It was further argued that Oscar was of sufficient age to have his views canvassed. Reliance was placed on Article 11(2) of the 2003 Regulations which imposes a mandatory obligation on a court to hear the child unless this appears inappropriate having regard to his age or degree of maturity.

47. It was argued that there is no fixed age below which a child's objections will not be taken into account by the Court. Counsel contended that the trial judge erred in refusing to either appoint a child psychologist or a guardian *ad litem*.

48. It was contended that the trial judge erred in not considering the extent of the psychological impact on Oscar that would result from a summary return to Sweden and that omission amounted to a failure to take into account relevant considerations. It was further contended that the trial judge failed to consider whether effective protective measures could be put in place in Sweden.

49. Counsel for the appellant posited that the trial judge failed to take into account that if the minor returns to Sweden without his mother he will have to travel to Ireland for future access with her. On the other hand, if he is returned to Sweden in the care of his mother he is at risk that she will be imprisoned for a substantial period of time. Thus, it was contended the trial judge had erred in finding that there was no grave risk of physical or psychological harm to the child if returned to Sweden.

50. The seventh ground of appeal contended that the trial judge erred in failing to grant a stay until after the determination in Sweden of any appeal. It was contended, on behalf of the mother, that there should be no disruption of Oscar's circumstances until all issues have been determined before the Swedish courts including the determination of any appeal.

New application in Sweden

51. It was contended that a stay should be granted on any order for the return of Oscar to Sweden until after the determination of a fresh application on the part of the mother, which had been instituted in Sweden a few days before the appeal hearing, seeking variation of the existing orders including that the mother be granted custody and liberty to relocate permanently with Oscar to Ireland. This new step before the Swedish courts represents a significant development in the context of welfare.

52. Separately, it was contended that the trial judge erred in failing to consider that the Swedish courts may have reached a decision which was not in the best interests of the minor.

European Arrest Warrant

53. It was argued on behalf of the mother the fact that the Swedish authorities had caused a European Arrest Warrant to issue against her during the currency of the child abduction proceedings required the trial judge to take proper account of the potential implications for the minor and the practical consequences of this development. It was contended that irrespective of the outcome of the European Arrest Warrant application and whether the Irish courts return the mother to Sweden or refuse the application in respect of the European Arrest Warrant, there is an interference with Oscar's right to family life pursuant to Article 8 of the ECHR. It was also argued that were the Irish courts to refuse to return the mother to Sweden on foot of the European Arrest Warrant, the orders as made by the trial judge for summary return of Oscar to Sweden engaged his rights pursuant to Article 20 of the Hague Convention. Counsel contended that should the court direct the summary return of Oscar to Sweden, an order should be made placing a stay on any such return pending the mother pursuing to conclusion, an appeal against the judgment and orders of the Swedish courts made on the 2nd February 2018.

Respondent father's position

54. The father contested the appeal on all grounds. With regard to the existence of a grave risk, it was contended that the test as laid down in *Friedrich v. Friedrich* 78 F.3d 1060 (6th Cir. 1996), a threshold which has been approved by the Supreme Court in this jurisdiction on many occasions, had not been met by the appellant mother. In particular, reliance was placed on the extract from *Friedrich* which provides:-

> "… grave risk of harm for the purpose 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."

55. The defendant asserted that the defence of grave risk pursuant to Article 13(b) of the Hague Convention requires to be considered in the context of the 2003 Regulations. In this regard reliance was placed on the decision of Finlay Geoghegan J. in *R. v. R.* [2015] IECA 265 which comprehensively analysed the defence of grave risk in the context of the aforesaid EU Regulation. It was contended that the said judgment was particularly apposite in circumstances where the case concerned a parent who was the subject matter of a European Arrest Warrant.

56. Counsel contended that even if a defence of grave risk is made out by the appellant pursuant to Article 13(b) of the Hague

Convention this, at best, gives rise to a discretion on the part of the trial judge and obviates the mandatory obligation for a summary return pursuant to the Convention. There is significant discretion vested in the court. In this regard, reliance was placed on the jurisprudence of the Supreme Court, including the decision of Denham J. (as she then was) in *B. v. B.* [1998] 1 IR 299. In the course of the judgment Denham J. had emphasised that the:-

> "object of the Hague Convention [is] to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting state." (para. 6)

57. That judgment had also emphasised that as regards the matter of undertakings the same were settled law in this jurisdiction under Article 11(4) of the Convention. It will be recalled that Article 11 (4) provides:-

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

58. It was argued that the trial judge had correctly applied the earlier Supreme Court decision of *P.L. v. E.C.* [2009] 1 IR 1 which was binding upon her, and that the Supreme Court jurisprudence emphasised the reluctance of the Irish courts to interfere with the fact-finding role of the court of habitual residence in regard to issues of welfare.

59. Central to the respondent's opposition to the appeal was the contention that the only court with jurisdiction to determine substantive matters concerning Oscar's welfare, being the courts of Sweden, had reached a decision in the exercise of its full welfare jurisdiction that he should be placed in the care of his father with the mother exercising access to him.

60. With regard to the arguments and grounds of appeal that contended the trial judge had erred or had failed to make appropriate provision to hear the voice of the child, reliance was placed on the decision of Finlay Geoghegan J. in *S.R. v. S.R.* [2008] 3 IR 177 for the proposition that it was mandatory in every regulation case to consider specifically whether or not to hear the child rather than it being mandatory to hear the child in such a case. It was submitted that the application of the legal principles by the trial judge was without error and should not be interfered with on appeal.

Findings of this court

Grave risk of an intolerable situation – Article 13

61. The basis for the appellant's appeal based on grave risk to Oscar that the return will expose him to physical or psychological harm or otherwise place him in an intolerable situation stems from two distinct propositions:-

> i. that the orders of the Swedish Courts vesting custody in the father constitute a grave risk to the child particularly given the mother's allegations that he has abused his son and;
>
> ii. that the European Arrest Warrant being issued by Swedish Authorities imperils the child's welfare since it will result in Oscar not being cared for by his mother who is his primary attachment figure.

62. This, it is argued gives rise to an intolerable situation within the meaning of Article 13 (b) of the Hague Convention.

The law

63. A leading authority in this jurisdiction on grave risk is the Supreme Court decision in *A.S. v. P.S.* [1998] 2 I.R. 244 which emphasised in regard to grave risk, at p. 261, that "….the test is a high one. Grave risk is not, of course to be equated with consideration of the paramount welfare of the child."

64. When dealing with the grave risk defence on the context of allegations of sexual abuse, the Supreme Court held in *P.L. v. E.C.* [2009] 1 I.R. 1 at paras. 54 - 55 that:-

> "54. ….Such disputed allegations form the normal material for ruling by the family courts in the jurisdiction of habitual residence....
>
> 55. The correct approach to the treatment of this issue is very well established in the case-law. It is not the purpose of the Hague that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

65. The jurisprudence in this court is well exemplified by the decision in *R. v. R.* [2015] IECA 265 where Finlay Geoghegan J., delivering the judgment of the court, considered the Hague Convention defence of grave risk in the context of the 2003 Regulations as follows:-

> "…the requested court is not required to conduct a full welfare assessment as to what is in the best interests of the child. The best interests of the child must be evaluated in the context of the nature of the application and the exception in the Hague Convention being relied upon. This appears to have been clarified by the European Court of Human Rights following concerns expressed in relation to its earlier judgment in Neulinger in the judgment of the Grand Chamber in *X v Latvia* ….." (para. 43)

Finlay Geoghegan .J emphasised at para. 46 that:-

> "It is important to note that even if the Irish courts decided on this application that they should not make an order for the summary return of the boys to the jurisdiction of the courts of Germany, nevertheless pursuant to Articles 10 and 11(6) – 11(8) of the Regulation, the German courts retain jurisdiction after such an order for non return to decide upon the custody of the boys. Further Article 11(8) expressly permits the German courts to then make an order which includes an order for the return of the boys to Germany which is enforceable in accordance with Section 4 of Chapter III of the

Regulation which excludes any contest on the substance of the order for the return."

66. This view accords with Hague Convention jurisprudence in other jurisdictions. The UK Supreme Court in the case *in Re E. (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 A.C. 144 delivered a judgment in which it set out, in clear terms, the proper approach to a defence pursuant to Article 13(b) of the Hague Convention. It held (at paras. 31 and 52 of the said judgment) that the terms of Article 13(b) were plain, that they needed neither elaboration nor gloss and that, by themselves, they demonstrated the restricted availability of the defence.

67. However, the facts in *Re E.* contrasts significantly with the instant case, insofar as there is no evidence that the mother of Oscar suffers from a psychological or psychiatric condition. She clings to an intense view that Oscar is at risk of sexual abuse by his father. This is a fear that appears to have had its genesis in her own familial experience. It appears clear that she is hyper-vigilant with regard to the issue although a three-person court adjudicating all the evidence that she elected to adduce came to the conclusion that such a claim of risk was not established and that the best interests and welfare of Oscar required that he placed in the custody of his father.

68. In particular, the mother's fears about the father's possible conduct rests on wholly disputed allegations in the instant case. The Swedish court has decided that Oscar's welfare required that he be removed from the primary care of his mother and placed with his father. When fundamental facts are so fiercely contested one recalls Friedrich Nietzsche proposition that: 'There are no facts, only interpretations". In the context of an application for the summary return of a minor under the 1980 Hague Convention regard must be had to the evidence, the jurisprudence and the spirit and intendment of the Convention. The legislature has determined by ratification of the convention that children require protection from the harmful effects of abduction across international borders. Thus, consideration of the facts, the provisions of the Convention, relevant precedent and jurisprudence rather than mere conjecture or fears is of critical importance.

Appropriate protective measures
69. At para. 36 of its judgment the UK Supreme Court *in Re E. (Children)(Abduction: Custody Appeal)* [2011] UKSC 27 states:-

> "36. There is obviously a 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… The appropriate protective measures and their efficacy will obviously vary from case to case and from country to country… Without such protective measures, the court may have no option but to do the best it can to resolve the disputed issues."

70. It is important that a trial judge look with great circumspection at an assertion of grave concerns where same are not based upon objective and established risk. In such circumstances, given the summary nature of the proceedings, having regard to the spirit and intendment of the Hague Convention, it is important that the court look at the option of undertakings and interim measures whereby such concerns and anxieties can be abated or minimised pending further determinations by the courts of the state of habitual residence.

71. EU Council Regulation 2201/2003 applies in both Sweden and Ireland. As such, therefore, if 'grave risk' is found to exist, Article 11(4) of the EU Council Regulation 2201/2003 applies to the exercise of the discretion by the trial judge. It provides:-

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

72. By virtue of Article 11 of the EU Council Regulation 2201/2003, any refusal on the grounds of a Hague Convention Article 13 defence, such as grave risk, will trigger the mechanisms under Article 11(7) and (8) of the Regulation. The clear intention of Article 11(7) and (8) of the Regulation is that the courts of the State of the child's habitual residence should make the final determination regarding welfare and custody after having heard all the evidence as to the child's welfare and best interests. This supports a conclusion that the "protective measures" envisaged by 11(4) are those put in place by the court of the habitual residence rather than, as the appellant contends, that those orders can of themselves give rise to the grave risk.

73. It will be recalled that Article 10 of the 2003 Regulations provides that, in cases of child abduction, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction – subject to certain exceptions which do not arise in this instance.

74. I am satisfied that the respondent is correct in asserting that Article 21 of the said 2003 Regulations provides for the recognition of the custody order made on the 2nd day of February 2018. The Swedish order can be certified, transmitted and declared recognised and enforceable in this jurisdiction. The only grounds on which the said custody order might not be recognised are those specified in Article 23 of the 2003 Regulations, none of which arise on the facts in the instant case.

75. Article 26 of the 2003 Regulations provides that under no circumstances may a judgment be reviewed as to its substance. The eight ground of the notice of appeal seeks such a review and as such is unstateable.

76. I am satisfied that the trial judge was quite correct in according importance and central consideration to the interim protective measures and concessions offered by the father. To grant such a stay of indefinite or uncertain duration is unwarranted and would in the circumstances of this case be tantamount to a refusal to return in what are summary proceedings.

Intolerable situation
77. As the trial judge correctly pointed out at para. 29, the test for what constitutes an intolerable situation was articulated by the UK Supreme Court in the Re E. decision, at para. 33 where it was stated: -

> "…the risk to the child must be 'grave' … It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm."

78. In essence, one has to conclude, as the trial judge effectively found, that whereas the mother has convinced herself that there is a grave risk that Oscar will be at risk of sexual abuse from his father there is no evidence that a court of competent jurisdiction in Stockholm which heard and determined the welfare issues in relation to Oscar immediately prior his removal from the jurisdiction of Sweden, share that view and indeed all the evidence is consistent with the court having rejected those allegations and having considered it necessary for welfare reasons to vest custody of Oscar with his father. There was no legal basis upon which the trial

judge could have gainsaid the determinations of the Swedish courts. Such an approach is impermissible having regard to Article 26 of the Regulation.

Mother's recent application in Sweden
79. The issue of there being some additional evidence as to welfare to be adduced is a matter for the Swedish courts. It is for the mother to re-enter the proceedings, appeal or take such step as she may consider appropriate to have the matter reheard or determined afresh. The court was told that this step has now been taken by her in Sweden. The options of re-entering the custody proceedings and/or appealing the existing orders appear to be under active consideration. Such a step is to be welcomed.

80. A limb of the appellant's argument is based on a threat that on return to Sweden Oscar will be placed in an intolerable situation. Many Convention/Regulation cases turn on an argument that a return order will mean separation from the custodial parent, thereby creating a grave risk. In this case, the sole court with jurisdiction to decide substantive matters concerning Oscar's custody has decided, in exercise of its full welfare jurisdiction, that he should be placed in the primary care of the father with the appellant mother exercising access to him. To conclude that this order would place Oscar in an intolerable situation in the particular circumstances of this case would be entirely to undermine the functioning of the 2003 Regulations. The proposition is not supported by any cogent evidence.

Bail in Sweden
81. Insofar as it was contended that if she is returned to Sweden on foot of the European Arrest Warrant the mother faces a long period in custody without bail pending trial, that does not appear to reflect an inevitable outcome before the Swedish courts. The issue was considered in an important decision of this Court delivered by Edwards J. in *The Minister for Justice & Equality v. W.B.* [2016] IECA 347 where he concluded:-

> "72. The appellant's contention that the Swedish system de-facto involves a presumption against liberty is perhaps, at first glance, potentially his strongest point. However, I agree with the High Court judge that the reality is more nuanced and that in truth there is no such presumption. It may be the case that very cogent and compelling evidence requires to be produced by an accused in Sweden in order to persuade a Court that detention is unnecessary, having regard to the weighting that is afforded in that jurisdiction to what they regard as the inherent risks of flight and of interference with witnesses that may arise where there is a reasonable suspicion that a person has committed a serious offence. However, that is not the same thing as saying that the necessity for detention is presumed to be obvious. There is no presumption of necessity for detention, in the sense of an inference recognised by law which stands until the contrary is proved. Evidence of risk is still required to be adduced by the applicant for a pre-trial detention order in every case and the court is obliged to conduct a weighing of the competing interests… for all practical intents and purposes a person who seeks to resist pre-trial detention will be required adduce evidence of even greater weight for placement on the other side of the notional scales. The High Court judge was therefore right in characterising the Swedish rule as operating to place a high evidential burden on a person who is reasonably suspected of a serious offence and who desires to be allowed to remain at liberty."

82. Accordingly, it is entirely a matter for the appellant to take advice and engage with the relevant authorities in Sweden in regard to any terms of bail, should a prosecution for child abduction ever proceed against her there.

83. I am satisfied that although it is not stated explicitly in the judgment, the trial judge was satisfied that there was no grave risk of Oscar being placed in an intolerable situation consequent upon a summary return. At all events orders for return are made to the jurisdiction of another state and not to any named individual under the Hague Convention.

84. As is clear from the jurisprudence, the establishment by an appellant of a grave risk within Article 13(b) confers upon the court merely a discretion not to order the child's summary return. The assessment as to the level of risk which is required to be made by Article 13(b) is a judgment which falls to be made by the trial judge.

85. Such a determination should not be overturned by this court on appeal unless, having due regard to the law or to the evidence, it was not open to her to make that order in the first instance. *Re F (Children)* [2016] EWCA 546, where Sir James Munby P emphasised at para. 22 that:-

> "The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable."

86. In this case it is clear from the judgment that had such a risk been proven to exist, in the exercise of her discretion the trial judge would nevertheless have ordered a return. She had already correctly set out the legal principles that apply, "the best interests of the child" being the crucial starting point; she determined that even if Oscar could potentially be in an intolerable situation, in the light of a further change in his living arrangements, that this was overborne by other considerations. I am satisfied that the trial judge correctly identified the new issues and applied correct legal principles to those issues and reached findings of fact and conclusions as to the applicable law are not impeachable.

Voice of the child
87. Although the notice of appeal refers to the failure of the trial judge to hear the voice of the child, the appellant did not appeal the refusal by the High Court of the application have the child interviewed - which application was refused on the 14th May 2018 - and did not appeal the refusal to appoint a guardian *ad litem*. That is a relevant consideration.

88. There appears to have been no evidence adduced and no arguments made that Oscar objected to being returned to Sweden. The argument appears to be that his voice should have been heard. It is clear from the evidence of the appellant and her affidavits and relevant exhibits that here we are dealing with a vulnerable, fragile child who is experiencing serious behavioural issues and communication challenges. He appears to find change and different surroundings especially challenging. The material before the High Court, in addition to the affidavits and exhibits filed on behalf of the parties, showed that the child's plight and concerns were very clearly deliberated upon and considered in the proceedings before the court in Sweden. There were investigations into repeated allegations of sexual abuse. The Swedish court conducted a detailed custody and access hearing and records Oscar's happiness at access with his father.

89. The trial judge adopted a child centred approach. She was mindful of the fact that the boy had communication and possible other difficulties. He is possibly in the autism spectrum. The trial judge was quite correct in her evaluation. Given his age and psychological

fragility there was a clear risk that drawing him into the process would be disproportionately stressful and potentially traumatic for this vulnerable boy.

90. There is no evidence that Oscar has, of his own accord, expressed any wish or opinion - still less objections – to his mother regarding these proceedings and his return to Sweden. Neither is there any evidence that he even has the capacity to do so. The High Court had before it a recent report from Oscar's teacher Ms. Denise Hooper. In the circumstances, that was sufficient to enable the court understand and be informed as to his position as at the date of trial. I am satisfied that the trial judge exercised her discretion correctly in all the circumstances of the case.

91. In *M.N. v. R.N. (Child Abduction)* [2008] IEHC 382 Finlay Geoghegan J. stated; "It appears to me unavoidable that a judge making such a decision must rely on his or her own general experience and common sense…". In the instant case, it is clear from p. 4 of Ní Raifeartaigh J.'s judgment that she directed her mind to the question of whether it was appropriate to hear the views of the child in light of his age and degree of maturity".

92. In *R.P. v. S.D.* [2012] IEHC 188 Finlay Geoghegan J. summarised the legal approach thus:-

> "…..the primary consideration of the Court in determining whether or not a child should be given an opportunity to be heard is whether on the evidence before the Court, the child appears *prima facie* to be of an age or level of maturity at which he or she is probably capable of forming his or her own views on matters of relevance to them in their ordinary everyday life.
>
> c. In addition to the specific evidence before the Court in the case, a judge must inevitably rely on his or her own general experience and common sense in determining the age at which prima facie a child is capable of forming his or her own view about matters of direct relevance to them in their ordinary everyday life.
>
> d. In construing Article 11(2), the Court must also take into account the other subparagraphs of Article 11 including the requirement for expedition in Article 11(3)." (para. 16)

93. The Court went on, at para. 31, to analyse the wording of Article 11 of the Regulation:-

> "The disjunctive criteria were not the subject of express consideration in *M.N. v. R.N.*, or by the Supreme Court in Bu v. Be. Whilst I remain of the view that the primary consideration should be that set out in *M.N. v. R.N.*, it does appear that as Article 11(2) envisages a court determining whether it would be inappropriate to give a child an opportunity to be heard by age alone, it may intend that a court exercise its judgment on a wider basis as to the appropriateness of directly involving a young child in proceedings between his or her parents (or others) by giving him or her an opportunity to be heard notwithstanding that he or she may be the subject of the dispute…"

94. The case of *K.G. v N.G.* [2013] IEHC 637 also considered the question, which proceedings, as with the present case, concerned a 5 year old child. One of the matters the Court should consider, according to the judgment, was 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" (para. 5) which in that case included a number of reports regarding the child, that had been prepared in French proceedings, which occurred prior to the abduction. The Court expressed a view that "the child has been interviewed on so many occasions already from a young age, that a court of trial would have major difficulty attributing any weight to a further report and assessment." (para. 17)

95. In the instant case the trial judge did not merely rely on the chronological age of the child in finding that an assessment was inappropriate. There was evidence before the court that Oscar does not have a maturity in excess of his nominal age. He has significant developmental problems with both parents accepting he is likely on the autistic spectrum. The approach of the trial judge accords with the established jurisprudence and should not be disturbed.

Expert evidence

96. Hague Convention proceedings are summary in nature. Generally, it would not be feasible or indeed appropriate for the parties to adduce expert testimony, particularly where it might add significantly to the delay in the disposition of the proceedings.

97. To be constituted an expert, the witness must demonstrate specialist knowledge entitling her or him to give opinion evidence which would not be receivable from a lay witness.

98. In the area of child abduction expert evidence should be deployed with care and be excluded by the trial judge save in circumstances where the judge is satisfied that it is necessary to address a specific issue central to the determination to be made.

99. In the Australian case *R. v. Bonython* (1984) 38 SASR 45 at p. 46 King C.J. of South Australia set out a three-fold test in evaluating whether to permit expert testimony to be adduced at a hearing. Firstly, the question to be asked is does the court need expert evidence to reach an informed conclusion on a specific issue. It is pre-eminently for the trial judge to answer this question and to evaluate whether the subject matter of the proposed expert opinion is such that a person without expertise in the particular area of knowledge would not be able to form a sound judgment on the matter without the assistance of a witness possessing special knowledge or experience in the field.

100. The second step is for the court to evaluate whether there is a reliable body of specialised knowledge in the first place in respect of which the proposed expert is being tendered as a witness.

101. The third crucial issue is that it is incumbent on the court to evaluate whether the particular witness is in fact an expert in the particular field in question.

102. In my view, the trial judge by her probing of the witness Ms. Whyte, established that she was not an expert witness in the field of credibility assessment. She had no specialist expertise in determining whether the child had been abused or to evaluate the allegations being advanced by the mother. The trial judge correctly noted at para. 40 that "such credibility assessments are a specialist type of assessment which require a particular skill set and expertise."

103. There was no evidence that the witness had acquired by study or experience any, or indeed any adequate knowledge of the subject to render her opinion of value in resolving the issue before the court as to whether a summary return would expose Oscar to a grave risk of sexual abuse or otherwise place him in an intolerable situation.

104. At its height, she was at a position to read reports which were already available to the court and had been perused and considered by the trial judge ahead of the hearing. Accordingly, she was not in a position to discharge the function of an expert and in particular to assist the trial judge in making her determination. She lacked the necessary professional expertise to enable her to furnish to the trial judge the necessary scientific criteria for stress testing the accuracy of her conclusions, so as to enable the trial judge to form her own independent judgment by the application of the said criteria to the facts proven in evidence.

105. It is noteworthy that the Australian decision in *R. v. Bonython* referred to above has been followed by the UK Supreme Court in *Kennedy v. Cordia* [2016] UKSC 6. That court suggested that there were four considerations which govern the admissibility of expert evidence;

> (i) whether the proposed expert evidence will assist the court in its task;
>
> (ii) whether the witness has the necessary knowledge and expertise;
>
> (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
>
> (iv) whether there is a reliable body of knowledge and experience to underpin the expert's evidence.

106. I am satisfied that the trial judge was quite correct in her treatment of the evidence of Ms. Whyte.

Abating grave risk of an intolerable situation for the child in the event of a return by protective measures
107. The mother sought to rely on the fact that summary return necessarily will result in Oscar residing in the sole custody of his father, which she contended would create a grave risk of an intolerable situation due to the huge disruption to his life this would entail, by reason of his unique psychological characteristics and his language, attention deficit difficulties and autism spectrum condition.

108. By its very terms, Article 13(b) of the Hague Convention is of restricted application. The burden of proof lies upon the "person, institution or other body" who opposes the child's return to adduce evidence to substantiate one of the exceptions identified in the Article 13(b). The standard of proof is the ordinary balance of probabilities. In evaluating the evidence, the trial judge must be mindful of the limitations involved in the summary nature of Hague Convention proceedings as demonstrably Ní Raifeartaigh J. was. Neither the core allegations nor their rebuttal were tested in cross examination nor could they have been. The issues of welfare had been comprehensively dealt with before the courts of the requesting state immediately prior to the abduction.

109. It is noteworthy that the words "physical or psychological harm" in Article 13(b) are not qualified. As the jurisprudence has pointed out, that language does gain colour from the alternative "or otherwise" placed "in an intolerable situation". As was stated by the House of Lords in *Re D. (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51; [2007] 1 A.C. 619 which was cited in detail by the trial judge at para. 44 of her judgment, "intolerable" is a strong word but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate".

110. It must be borne in mind that Article 13(b) is focused and directed towards the future. It encompasses and governs the situation as it will obtain in the event that the child is returned forthwith to his home country. A summary return under the Convention is not the same as being returned to the person, institution or other body who has sought the return in the first instance.

111. It is clear in the instant case that certain significant undertakings were made by the father and her powers were exercised by the trial judge to ensure that protective measures were put in place to ensure that Oscar would not face an intolerable situation upon his return home to Sweden pending determination of any appeal or other application by the mother to the Swedish courts.

112. The 2003 Regulations contemplates that adequate measures be established in a requesting state to ensure enforcement of interim protective measures made by a judge who is directing the summary return of a minor under that regulation. However, given the principle of the comity of courts and the long, positive and constructive relationship that subsists between this state and the Kingdom of Sweden there is no reason to doubt but that undertakings given in good faith by the respondent father in the context of seeking summary return of Oscar to the jurisdiction of the courts of Sweden will be honoured having regard to the crucial importance that the recognition and effective enforcement of such protective measures has in ensuring the effective operation of the Hague Convention.

113. Accordingly, I am satisfied that the learned trial judge was quite correct in providing for interim or transitional arrangements to ameliorate any risk or intolerable situation arising consequent upon the summary return of Oscar to the jurisdiction of the courts of Sweden.

Article 20
114. Notwithstanding that the appellant makes no explicit reference to Article 20 in the notice of appeal, counsel asserted at the hearing of this appeal that Article 20 grounds of defence had not been abandoned, particularly in the context of the implications for Oscar were the European Arrest Warrant to be enforced. However, I am satisfied that the threshold for an Article 20 defence has not been met in this case.

115. As was pointed out by O'Donnell J. in *Nottinghamshire County Council v. B. & Anor.* [2011] IESC 48 the general range and scope of rights and protections enshrined in our constitution and the rights derived therefrom are, with one important exception, to be seen generally as operating intra-territorially. The Supreme Court held in that case that the Constitution does not, in general, attribute legal significance to events occurring outside the State. As O'Donnell J. observed in the context of an application in that case pursuant to the Hague Convention "… the true question for an Irish Court is whether what is done within *this* jurisdiction can be said to be contrary to the Constitution. This is why Article 20, [of the Hague Convention] can be seen to precisely focus attention on the issue. That is whether the return … would itself be a breach of the Irish Constitution." (para. 61). O'Donnell J. emphasised that it was clear that "the Constitution expects the legal systems of friendly nations will differ from that of Ireland". (para. 66)

116. There was no evidence before the High Court of any fundamental defects in the justice system in Sweden concerning assessments of the welfare and best interests of children such as Oscar.

117. It will be recalled that Article 20 of the Hague Convention provides:-

> "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

118. As Murray J. rightly pointed out in *Nottinghamshire County Council v. B. & Ors.* [2013] 4 I.R. 662; [2011] IESC 48 that the Hague Convention is concerned with the question of jurisdiction and not the rights of children or the family as such. It is concerned with where such issues should be decided and not how they are to be determined.

119. Article 20 must be construed in the light of Article 16 of the Hague Convention, which prohibits the requested state from deciding "on the merits of the rights of custody" unless the return of the minor is refused. Sight must never be lost of the two core objectives underpinning the Hague Convention as provided in Article 1, namely to secure the prompt return of children wrongfully removed from their state of habitual residence and to ensure that the country to which the child has been removed respects the rights of custody and of access pursuant to the laws of the requesting country from which the child was removed.

120. The abducted child is returned to the environment and state where custody and access issues are properly to be determined by its own domestic laws.

121. I am satisfied that the appellant has failed to make out any stateable case pursuant to Article 20 nor has the very high standard been achieved on the evidence that would engage Article 20 which offers an unusual and rarely exercised exception to the summary return of a wrongfully abducted child to his home country. The exception identified in Article 20 is to be strictly interpreted. As O'Donnell J. held in *Nottinghamshire* at para. 163:-

> "Article 20 does not so much create an exception as recognise one. If in any given case a court were to determine that the return of the child was not permitted by the Constitution of that State, then the court could not order the return, whatever the terms of the Convention. Article 20 provides a mechanism whereby the necessary flexibility is built into the Convention to avoid a conflict between the international obligations imposed by the Convention, and the dictates of the domestic constitution. The issue in any given case therefore is not simply the interpretation of the language of Article 20 *per se*, but is also, the interpretation of the domestic Constitution."

122. As the *travaux préparatoires* to the Hague Convention and the report of Dr. Eliza Pérez Vera makes clear, Article 20 is quite narrow and confined to circumstances in which the return of the child ought not to be permitted.

123. As O'Donnell J. pointed out at para. 197 of the *Nottinghamshire* judgment, in applying the test pursuant to Article 20 it is important to bear in mind that that article was not drafted with the Irish Constitution alone in mind:-

> "on the contrary, it applies equally to all jurisdictions. It is therefore entirely possible in theory at least, that a national constitution may contain express prohibitions against the "return" of persons in certain circumstances. The test posed by Article 20 must therefore be whether the return is prohibited either by the express provisions of the Constitution or by necessary implication."

124. I am satisfied that the trial judge correctly concluded that the arguments advanced on behalf of the mother relating to Article 20 of the Hague Convention "did not … get out of the starting blocks". (para. 54)

Undertakings and Effective protective measures
125. In *K. v. K.* (Unreported, Supreme Court, 6th May, 1998) Denham stated, of the issue of "grave risk":-

> "Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.
>
> The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the Court Orders in the requesting country then the policy of the Convention to return children to the Country of their habitual residence will be met. Also, the particular children affected by the Convention in a case will have their interest protected."

126. I am satisfied that the undertakings given on behalf of the father and embodied in the orders of the trial judge were comprehensive and addressed all reasonable issues pertaining to the child's welfare at the date of making of the said orders. In light of the mother's prudent conduct in taking steps to re-enter proceedings and seek further orders of the Swedish courts regarding the child's welfare further undertakings of relatively short duration to minimise any adverse impact for the child pending his return to the Kingdom of Sweden.

Conclusions
127. None of the grounds of appeal relied upon have been established. Neither has the threshold for an Article 20 defence been met in this appeal.

128. The parties will be heard regarding the precise terms of undertakings required to facilitate an early return of the minor to the jurisdiction of the Courts of Sweden.