UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

CIVIL

Record No.: 2022/118

Donnelly J. **Neutral Citation Number [2022] IECA 207**

Ní Raifeartaigh J.

Binchy J.

D.M.

APPLICANT/RESPONDENT

-AND-

V.K.

(Child Abduction: Acquiescence, Children's Objections)

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered (*via* electronic delivery) on the 26th day of August 2022

Introduction

1. The purpose of the Hague Convention on Child Abduction ("the Hague Convention") is "*to secure the prompt return of the children wrongfully removed to or retained in any Contracting State; and […] to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States*" (Article 1). On the 28th April, 2022, the High Court directed the return to the jurisdiction of the Republic of Hungary of the two children, A and B, who, it is now agreed, were wrongfully removed from Hungary by their mother. The High Court imposed a stay on that order to permit an application to be made to the courts in Hungary for the relocation of the children to Ireland. For reasons that will be set out later, the High Court made no order in respect of child C who had not been wrongfully removed from Hungary.

2. The mother appeals against the order of return; for ease of reference she will be called the respondent in this judgment. The respondent removed her three children from Hungary in March

2019 while the father ("the applicant") was serving a prison sentence. The children first went with their mother to a third Member State of the European Union (the mother being a citizen of that Member State) and three months later they came to Ireland where the respondent's mother lives. In the High Court, the respondent contested that the applicant was exercising his rights of custody but the finding of the trial judge that he was exercising those rights is not being challenged on appeal. The applicant has cross-appealed in relation to certain issues.

3. Six issues were raised in the course of the appeal and cross-appeal:

a) Was there acquiescence by the applicant, and in particular did the trial judge err in the test for acquiescence?

b) Whether the trial judge correctly applied the three-stage test when considering the children's objections to being returned?

c) Whether the lapse of time that took place prior to the hearing of the application in the High Court represented a grave risk to the children to such an extent that the return must be refused?

d) Was the welfare of the youngest child correctly addressed within the proceedings? [This issue was the subject of appeal and cross-appeal]

e) Had the habitual residence of A and B changed between the time of the wrongful removal and the hearing?

f) In circumstances where the judge ordered return, whether the trial judge was entitled to grant a stay until such time as the courts in Hungary ruled on the relocation issue?

Background

4. The relationship between the parties began in May 2007. All the children were born in Hungary: A in 2009, B in 2012 and C in the second half of 2016. In 2014, when the applicant was serving a prison sentence (unrelated to any issue of domestic violence), the respondent

removed A and B to the UK without his consent. The applicant brought proceedings under the Hague Convention and the respondent voluntarily returned to Hungary in November 2015.

5. The relationship resumed and the family unit in Hungary consisted of the parties, children A and B, child C (from date of birth in 2016) and three older children of the applicant from a former relationship. In 2018, the applicant was sentenced to two years imprisonment. In March 2019, the respondent moved to her native country and then to Ireland where her mother lived. As the trial judge records in her judgment, "*[t]he details as to why she first went to, and then left, her native country are in dispute and it is not necessary for the purposes of this case that this dispute is resolved*." There is however no dispute but that the move in March 2019, and subsequent move to Ireland in June 2019, were made without the knowledge or consent of the applicant.

The Hague Convention proceedings

6. The request for return made to the Hungarian Central Authority is signed by the applicant and dated the 6th July, 2019. There is no date stamp on it and no other evidence that it was received by the Hungarian Central Authority at that time. In the request for return the applicant said that he was unaware whether the respondent was in her native country, Ireland (where her mother resided) or the UK (where her brother resided). He named those relatives but was unable to provide addresses.

7. The Hungarian Central Authority sent the request to this jurisdiction on the 29th November, 2019; the reason for the delayed receipt of the application was never established in evidence. Proceedings were commenced on the 26th February, 2020 (just within twelve months of the date of wrongful removal). The respondent's replying affidavit was sent in April 2020, having received legal aid on the 10th March, 2020. This affidavit was not sworn until the 25th February, 2022 because, apparently, of the Covid-19 lockdown and due to oversight. The

applicant's replying affidavit was not served on the respondent until November 2020 some seven months after the unsworn affidavit was received.

8. Further delay was caused by the need to have a DNA test carried out in respect of C. The parties seek to apportion blame to each other for the necessity of that test and for the delay in progressing that test. What is clear is that the respondent contested in her affidavit that the applicant was the father. Both parties then agreed to a DNA process, which, in September 2021, confirmed that the applicant was the father.

9. Another contribution to the delay was the need to clarify Hungarian law as to the existence of parental rights (in respect of child C) where the birth certificate did not record the name of the father and paternity was established at a later date. That necessitated the obtaining of an affidavit of laws in the form of a Certificate of Laws from the Hungarian Minister of Justice dated the 29th November, 2021. There was a delay in seeking such a Certificate and again it is in issue as to who was to blame for that delay.

10. The Hungarian Central Authority had, in the originating letter, dated the 29th November, 2019, to the Central Authority in Ireland stated that "*[t]he father has not yet made an acknowledgement of paternity for the youngest child, [C] and since the child was born out of wedlock the applicant cannot be deemed legally as father of the youngest children. Therefore there is no proof of legal relationship (parentage). Fatherhood in respect of the two other children (and existing parental responsibility) is proved by respective birth certificates.*" The Central Authority in this jurisdiction also received an email from the Central Authority in Hungary in or about January 2020 which stated: "*[p]lease be informed that the applicant has no legal basis for applying for the return of [C] since he has not yet acknowledged paternity. He is, of course, considers himself as her father and committed to maintain the legal paternity, but this matter would need to be directly discussed with the applicant as well as the options he has in this respect in the child abduction proceedings.*"

11. The respondent, referring to the correspondence of the 29th November, said in her replying affidavit that she believed the applicant had no rights of custody in Hungarian law. She said that she was advised and believed that should the applicant claim rights of custody in respect of [C] "*it will be necessary to procure an affidavit of laws from a Hungarian lawyer*." Despite that, the applicant did not seek such a certificate until after the DNA test results. The applicant however submits that this was an issue that affected both sides and that both sides engaged together in drafting the wording of the request to the Hungarian Central Authority.

12. The Certificate of Laws confirmed that the applicant had no custodial rights to C prior to the date his paternity was established. The result of this is that C cannot be subject to the Hague Convention procedure for summary return because her father was not as a matter of Hungarian law exercising custodial rights in respect of her at the time of removal from Hungary; her removal was not "*wrongful*" within the meaning of the Convention.

13. On the 25th November, 2020, the High Court made an order for the assessment of the two older children A and B to afford them the opportunity to express their views and to be heard in the proceedings. A report was obtained on the 13th December, 2020. A year later, given the further delays referred to above, the High Court ordered a second assessment of the children and received a report dated the 22nd December, 2021.

14. The High Court stated that "*[t]he DNA test and the affidavit of laws process combined took an inordinate amount of time*."

15. The proceedings before the High Court commenced on the 3rd March, 2022 and were adjourned to the 24th March, 2022 pending a decision of this Court in *AK v. US* [2022] IECA 65, delivered on the 16th March, 2022. Further legal submissions on that judgment were filed by the parties. Judgment of the High Court was delivered on the 5th April, 2022.

Legal provisions

16. In this jurisdiction, the Hague Convention was given legal force by the Child Abduction and Enforcement of Custody Orders Act, 1991. No provision of the Act is at issue in this case. Of particular relevance to this appeal are the following provisions of the Convention: Article 12 (in so far as it provides for summary return where the application was made within a period of less than one year since the date of the wrongful removal or retention); and Article 13 which provides for "*defences*". The Article 13 issues raised concern where (a) there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation and (b) the judicial discretion not to return where the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the views of the child.

17. In addition to the Hague Convention, this appeal also concerns provisions of EU law, specifically Council Regulation (EC) 2201/2003 ("the Regulation"). Article 10 of the Regulation provides, in relevant part, that the courts of the Member State in which the child was habitually resident prior to the wrongful removal or retention retain their jurisdiction until the child has acquired a habitual residence in another Member State and there has been acquiescence in the removal or retention by *inter alia* the parent with rights of custody. Furthermore, under Article 11 of the Regulation, the courts in the Member State of habitual residence retain a jurisdiction to revisit an order not to return a child.

18. The concept of "delay" featured in the course of the submissions of the respondent in both the High Court and this Court. The word "delay" is mentioned briefly in the Hague Convention but it is not a concept that is legally defined therein. There are however a number of factors of relevance in the consideration of the issue of "delay". Under the Convention, the return proceedings are intended to be summary in nature and judicial authorities are directed to act expeditiously in proceedings. Under Article 12, a wider discretion regarding non-return is given where the proceedings were not taken within a year (that is *not* the position in these proceedings

however, as the application was commenced before twelve-month period expired). There is no defence of "delay" *simpliciter* within the Convention. Delay, however, could in certain exceptional circumstances result in a grave risk of harm to the children and must be considered in that context. Moreover, delay must be assessed to see if it is relevant to the tests for acquiescence and, as will be discussed later, may be relevant to the exercise of a discretion if the Court finds that the children's objections to return must be taken into account. It must also be recalled however that the word "delay", itself, can be used in one of two ways: the first is to connote some responsibility for the lapse of time between two periods, while in the second use it simply refers to the lapse of time itself.

The views expressed by the children

19. The two older children were interviewed twice by the assessor, Dr. van Aswegen, one year apart. As directed by the High Court, the assessor did not interview or have contact with either parent. Dr. van Aswegen also gave oral evidence.

20. The trial judge recorded her findings as to the views expressed by the children as follows:

> "*On the facts, the salient features of the case appear to be as follows:*
>
> *(a) The two boys are in school, they are happy, and they do not want to return to Hungary.*
>
> *(b) While initially not fluent in English, both now speak it well, B speaks it fluently.*
>
> *(c) They describe friends and social activities in Ireland and A mentions the third country where they stayed before the latest move to Ireland in more positive terms than he describes Hungary. B can barely remember earlier homes in these countries.*
>
> *(d) The Respondent has facilitated weekly contact between the Applicant and the two boys, she also provides interpretation as the older child's Hungarian is rather weak.*
>
> *(e) A comment in the report suggests that A has heard a narrative, and has an understanding shared within the family about why his sister has a particular injury.*

(f) While A recalls violence on the part of the Applicant, neither boy describes him in particularly negative terms.

(g) The assessor confirmed in evidence that the children appear to have been exposed to domestic violence, which he described as chronic domestic violence and he recommended that they be referred to social services. This view was one that he formed after speaking to the boys but not to either parent.

(h) A wants to continue contact with the Applicant, B is relatively positive about him.

The assessor's evidence about their relationship with their dad is worth referring to. The summary is from my note and, while not verbatim, it conveys the tenor of the evidence:

[In the] second report it struck me that the boys did indeed value contact with their father – even where there were barriers in respect of language, it seems that the barrier was more a barrier of language not contact with dad. If there is disintegration in a relationship, there is usually some level of anxiety and avoidance relating to them feeling that the parent could be angry with them; I did not see that here. They are more inclined, particularly A, to engage with him. B, which one would expect for his age, might expect friends to be more engaging than a call with his father.

Asked to comment on the position of the children if not returned, the assessor responded:

I think we find more and more, where parents live in different countries, we need to find a way of managing the relationship between child and absent parent. It is important, if one is keeping ongoing contact with video, that parents must make it attractive for the children – he may play an online game with child, read a story,

capture the attention weekly. One way that contact needs to be kept alive is physical visitation and that should happen over a weekend.

The assessor concluded that this kind of level of contact is sub-optimal and that A made it very clear that the amount of contact he wishes for is limited, B did not want visits but had a positive view of him and also said that his mum liked it when he talked to his dad. The assessor concluded that supervised access was a good way to build confidence and that, where parents are separated, one cannot achieve optimal scenarios for either parent or the child; the relationship is inevitably fragmented. He also commented on the closeness of these children to their mum in the context of [:]

what this family experienced, a series of significant life events, one is the jailing of their father. Second is move to [a third country], she brought them to England then Ireland, each is significant for adults and children alike.

Asked about whether or not their responses to him constituted objections to returning, the assessor said that in his view, they were indeed. I agree with this conclusion, given the responses of the children to questions about how they would feel about returning to Hungary."

21. The trial judge then gave her views on the legal issues arising as a result of her findings as to the views of the children. These will be addressed below in the section dealing with the objections of the children.

The standard of appellate review

22. Both parties consider the decision of this Court in *AK v. US* (Murray J., Haughton and Barniville JJ. concurring) to be the most helpful authority on the standard of appellate review. In

that case, also concerning the Hague Convention, the Court of Appeal identified three different standards of appellate review.

23. At one end of the spectrum, Murray J. said, lay cases where the appellate court simply forms its own view on matters; the standard applicable to findings of pure law. At the other extreme end is the case where the appellate court only interferes in very limited circumstances. This is where the trial court makes findings of findings of primary fact based on conflicted oral evidence and/or where inferences are drawn by the judge that depend on such findings. Where a reasoned judgment which engages with the relevant evidence is delivered, the appellate court will not upset findings of fact or inferences drawn where those findings are supported by credible evidence.

24. The third category was said to be an intermediate one and was the category most engaged in that case, as, according to Murray J., it will be in most cases of this kind. This standard applies where the court is addressing alleged errors based upon (a) findings made on affidavit or documentary evidence or (b) secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven otherwise by way of oral evidence. In those cases, the burden of demonstrating that the trial judge was incorrect lies on the appellant to establish an error in those findings such as to render the decision untenable.

25. Murray J. went on to say:

> "*It follows that in cases to which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inferences as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible*

evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. … In (sic) is, in particular, the standard to be applied where the issue is whether the combination of a set of primary facts that are either agreed or deduced from affidavit or documentary evidence result in the conclusion that the child is or is not habitually resident in a particular place."

26. Counsel for the respondent, at the opening of the oral hearing, submitted that primarily what was at issue was a question of pure law: that the trial judge had misapplied the law to the facts and that the findings of facts were not being challenged. This was particularly relevant to the issue of acquiescence; to how the issue of substantial delay (albeit not as a stand-alone defence) was dealt with; and whether the loss of habitual residence by a child following an unlawful removal can be relevant to the exercise of discretion. Counsel submitted that while these two latter arguments were raised in the High Court, they were not addressed in the judgment. Counsel also submitted that he was not abandoning any part of his written submissions. Those submissions were to the effect that there were also points in the judgment where the trial judge made findings of fact that were incorrect. Moreover, in the course of the oral hearing, counsel submitted that there were facts in the evidence which ought to have been considered but were not.

27. The applicant submitted that it was not correct to say these were matters of pure law as questions of children's objections and acquiescence involve mixed questions of fact and law. Thus, the intermediary category identified by Murray J. was at issue, where "*limited deference to the decision of the trial court*" must be given and that this Court must begin its analysis on the firm assumption that the trial judge was correct in the findings and inferences made in the

judgment and that an interference with those conclusions could only be where the trial judge had clearly erred in those findings or inferences.

Acquiescence

28. Article 13 of the Hague Convention provides, in terms, that notwithstanding the duty imposed upon a court under Article 12 to return a child wrongfully removed or retained where the relevant conditions have been met, where the party who wrongfully removed the child establishes that the person seeking the return has consented to or subsequently acquiesced in the removal or retention, the trial judge retains a discretion as to whether to return the child or not. In the present case, the trial judge did not find that there had been acquiescence and therefore the question of the exercise of her discretion did not come into play.

29. The respondent's submission before the High Court was that the applicant's acquiescence was established by the evidence of his inactivity before and during the proceedings. The respondent pointed to the applicant's knowledge of the children's removal from Hungary since March 2019 and a lack of evidence that the request for return was sent to the Hungarian Central Authority on the 6th July, 2019. There was an unexplained delay before the request was sent to Ireland (November 2019) and again before proceedings were issued (February 2020). Furthermore, the respondent submitted that there were delays in the prosecution of the proceedings evidenced by the delay in swearing a replying affidavit, the delays in the DNA process and obtaining the Certificate of Laws.

30. The law relating to how a court should treat a claim of acquiescence was set out by the Supreme Court (*per* Denham J.) in *RK v. JK (Child Abduction: Acquiescence)* [2000] 2 IR 416. In her judgment, Denham J. quoted with approval a passage from the speech of Lord Browne-Wilkinson in *In re H (Abduction: Acquiescence)* [1998] AC 72. That passage identified four

bullet points for approaching the issue. In her judgment in this case, the trial judge adopted that passage and paraphrased that law as follows:

> "*the question of whether the wronged parent, the Applicant, has acquiesced in a child's removal depends on his state of mind; it is not a question of examining the abducting parent's perception of his conduct but whether he acquiesced in fact. The burden of proof lies on the abducting parent i.e. the Respondent. In considering this question of fact, a court will be inclined to attach more weight to contemporaneous words and actions than to assertions in evidence of the Applicant's intention. Where words or actions clearly show that the abducting parent was led to believe that the Applicant would not assert his right to summary return, justice requires that he be held to have acquiesced*."

The High Court judgment

31. Having identified the approach, the trial judge turned to their application. The parties agree that she correctly stated the law that the Hague Convention contains no provision permitting refusal of return on the ground of delay *simpliciter*, relying on the Supreme Court in *PL v. EC* [2009] 1 IR 1. The trial judge, again correctly, recited the finding of the High Court (Finlay Geoghegan J.) in *FL v. CL (Child Abduction)* [2007] 2 IR 630 that, "*a parent may be found to have acquiesced within the meaning of article 13 through inactivity*."

32. Having noted that *FL v. CL* was relied upon by the respondent to persuade her there was acquiescence, the trial judge distinguished the factual situation in that case primarily on the ground that the applicant parent had visited the children in this jurisdiction and had other contact including requests for access and an application for a barring order before he made any request for return. In the present case, she held, there was no contact between the parties and the applicant had given no indication that he consented to or acquiesced in the removal of his children.

33. The trial judge rejected the respondent's submission that because the proceedings were not commenced in this jurisdiction until very shortly before the end of the one-year period, which is the basis for a summary order of return, that this in itself amounts to acquiescence and accordingly the circumstances of the children since coming to Ireland may be taken into account. She noted that this alone would not constitute proof of acquiescence and she went on to address the respondent's further reliance on delays.

34. The trial judge referred to the factors pointed to by the respondent: the alleged failure to submit papers to the Central Authority, and to the fact that the replying affidavit was only served in November 2020. The trial judge noted that the applicant knew of the children's removal from Hungary in March 2019 and his request for return, dated the 6th July, 2019, acknowledged that he believed they were in Ireland by that summer. She noted the procedural delays referred to above. She said however that "*there is and was no indication to the Respondent that the Applicant acquiesced during this time*."

35. The trial judge went on to say that "*child A told the Court-appointed assessor, in his first meeting with him in 2020, that his father kept searching for them*" and that this comment "*mitigates against an impression that the family expected to remain, without objection, in Ireland*." The trial judge added however that the child's comment was made in the context of a question about the initial move to Ireland and was unlikely to shed much light on the applicant's views throughout the following year.

36. The trial judge held, as a matter of fact, given the initial date on the applicant's request for return in July 2020 and this comment from his son, that there was sufficient evidence of a consistent attitude of objection on his part. She stated that it was *the applicant's state of mind which was relevant*, absent evidence that the respondent was led to believe that there was acquiescence, which, she noted, was not in issue. She said, in respect of the respondent's averment that the applicant did not appear to have contacted her or tried to do so although he had a contact

number for her, that it did not assist in deciding on his state of mind in circumstances where, while in prison, his partner removed his children from the country for a second time and went to a country peripherally connected with the family.

37. The trial judge noted that neither party had acted with the speed that might be expected after the commencement of the proceedings. She noted the averment of the respondent that she did not accept the applicant as father of child C. She held in relation to the facts that they did not suggest active or passive acceptance of the changed circumstances. Although the facts suggested that the applicant had not moved with great despatch, it was not to the extent that it was inconsistent to allow him to rely on the Convention and to find that he was bound to accept the unilateral move to Ireland.

Submissions on appeal

38. The respondent submitted that the trial judge had erred on a point of law with respect to the final step of the four steps approved by the Supreme Court in *RK v. JK*. The trial judge, arising from a comment child A said in relation to his father searching for them, had, according to the respondent, wrongly incorporated the fourth – and quite distinct – step concerning misleading the parent who removed the children about acquiescence into a requirement that had to be met in order to establish acquiescence. The respondent had expressly admitted that was not a factor in the case. While the respondent accepted that the trial judge had expressly said that it was the state of mind of the applicant that was at stake, the respondent submitted that there was a grave error in her focus.

39. The respondent submitted that the trial judge failed to address the applicant's state of mind with reference to his unexplained inaction both before and after the commencement of the proceedings. The respondent pointed to the various items of delay referred to above.

40. The respondent objected to the trial judge's further conclusion that the request for the return in July 2020 together with the comment from his son amounted to "*sufficient evidence of a consistent attitude of objection on his part*".

41. The respondent refers to how the trial judge distinguished *FL v. CL* on the basis that the applicant there was in regular contact with the respondent and children without mentioning abduction proceedings, but submits that the failure to make contact, including the failure to seek access or the return of children, must amount to more, rather than less, compelling evidence of acquiescence.

42. The applicant submits that the trial judge's finding that he did not acquiesce is unimpeachable. The burden lay on the respondent and she had not satisfied the trial judge that there was acquiescence. The applicant also submits that certain matters complained of by the respondent were self-evident, for example, his inability to conduct real time searches were self-evidently limited by the physical restrictions on his freedom, that the respondent had taken steps to conceal her whereabouts and discourage searches, and that he had signed the request form three months after his last awareness of the respondent's whereabouts. He submits that although the trial judge referred to his belief the children were in Ireland by that summer, it was in fact only one of the countries noted on the request for return. It was submitted that it was inherently unlikely that, having initiated the actions of the Central Authority in July 2019, he acquiesced in the removal until November 2019.

43. The applicant also submitted that it was relevant that the younger boy stated to the assessor that his father kept searching for them. The applicant submitted it would be difficult to conceive that a different conclusion could be drawn from the facts and circumstances which were before the trial judge. The applicant submitted that *FL v. CL* could clearly be distinguished on its facts.

44. It was accepted that there was a period of delay in swearing the replying affidavit and that this also delayed the DNA test. It was submitted that this DNA request was required because of

the respondent's insistence that the applicant was not the father of the child, and the applicant referred to the trial judge's consideration that this was inconsistent with the timeframe of the pregnancy and the manner in which the parties treated the child as that of the applicant. In relation to procurement of the affidavit of laws, the respondent had accepted in her unsworn affidavit that should the applicant claim to enjoy custody rights in respect of the youngest child, it would be necessary to procure an affidavit of laws. The applicant submitted that it made no sense that he would risk an accusation of overall delay on his part and hand a possible defence to the respondent by seeking a superfluous affidavit of laws. He submitted that only the respondent had that incentive. Both sets of lawyers were involved in the drafting of the legal questions that required answers by an expert.

Decision

45. A finding of acquiescence within the meaning of the Hague Convention should be made by a court where, having considered all the relevant circumstances, the court concludes that the wronged parent either actively or passively accepted the changed circumstances such that it is reasonable that he or she be bound by them, and it would be inconsistent for that parent to rely upon his or her rights under the Convention to have the child or children returned summarily (*per* Finlay Geoghegan J. in *FL v. CL*). The correct way to approach the adjudication process was paraphrased by the trial judge and set out in para. 30 above. The respondent accepted that the trial judge identified the correct legal principles but argued that she misapplied them.

46. Murray J. in *AK v. US* accepted that a submission of misapplication of the law by a trial judge incorrectly assuming that a particular thing followed as a matter of law amounted to a submission of pure law. Another example would be when a judge, although correctly identifying the law by, for example, reciting the words of an authoritative judgment, nevertheless misapplies the law through a misunderstanding of the import of the legal principles. That situation raises an issue of pure law because the issue is one which will turn on the meaning of the legal provision

that the trial judge had just described. An appellate court would be entitled to give its view of the law untrammelled by the conclusions of the trial judge. How the appellate court might then proceed to determine the appeal would become a live issue; whether to apply the law to the facts as found or to remit for determination in accordance with the legal clarification given by the appellate court.

47. The respondent's submission that the trial judge misapplied the law because she wrongly had regard to bullet point (4) as set out in *In re H* ("step 4"), concerning a situation where one party leads another party to believe they are acquiescing, is a purely legal matter. While it is correct to say that it would be a purely legal matter if the trial judge wrongly assumed that step 4 had to be proven, I do not accept that the respondent has made out that submission. The trial judge was well aware that it was the "*state of mind [of the Applicant] which is relevant, absent evidence that the Respondent was led to believe that there was acquiescence which is not in issue here.*" I consider that the trial judge made reference to what the child had said because, in her view, whether correctly or not, it was relevant to *the state of mind* of the applicant. I say, correctly or not, because the respondent objects to it having been used at all, as it was a comment by the child without context, that submission is not relevant to this particular issue which is one of law and will be addressed below.

48. Having referred to the child's comment, the trial judge then said that it was a comment made in the context of a question about the initial move and was unlikely to shed much light on the applicant's views throughout the following year, and went on to expressly say that it was the applicant's state of mind that was relevant. The judge was not, I am satisfied, referring to the comment because she thought there was a necessity to establish an indication of acquiescence. As for her reference to the respondent not being led to believe that there was acquiescence, this was again a statement of fact which she clarified later in the judgment as not being in issue in the case. I am satisfied to reject this part of the respondent' challenge to the judgment of the High Court.

49. The remaining part of the submissions of the respondent on acquiescence are not submissions of pure law. The respondent, in submitting that the judge failed to apply those principles to the facts of the case, while also questioning the findings of fact made and, in particular, the inferences drawn therefrom, is invoking the intermediate category identified by Murray J. in *AK v. US*. At para. 53 therein, Murray J. stated that in cases to which the intermediate standard applied, "*the appellate court is free to correct errors of fact as well as law, and mistaken inference as well as erroneous application of principle*." This is the standard to apply to the remaining submissions of the respondent. A limited deference must be given to the trial judge's findings and inferences.

50. At the outset, it is important to say something about the the respondent's reliance on the facts of *FL v. CL*. While the respondent was entitled to rely on the alleged inactivity of the applicant at various stages to seek to persuade the judge that this amounted subjectively to the applicant having acquiesced in the situation, there is a limit to the relevance of a factual comparison with that case. The length of time at issue in *FL v. CL*, being 10 months compared with the 11 months here, before proceedings were issued is not *of itself* a decisive factor. In *FL v. CL*, there was a pattern of behaviour involving attempts to settle and a contested barring order which were relevant factors in the High Court's conclusion that there was acquiescence.

51. No such overt factors were at issue here. What was at issue was inactivity, certain periods of which were unexplained, and which indeed could be described as delay in the sense of incorporating an element of blameworthiness. The respondent also took issue that, at a level of principle, any delay that was her responsibility could not be counted or balanced against the applicant's delay in reaching a conclusion that there was acquiescence.

52. Prior to dealing with the specifics of the respondent's submissions that there was a failure on the part of the trial judge to either identify correct facts or to draw correct inferences, I will say a little more of the nature of the test for acquiescence. The test requires the court to assess the

actual state of mind of the applicant; it is a subjective test of whether an applicant in fact accepted the changed circumstances. Of course, a person's subjective intention can, and most often must, be assessed by looking at what they did or did not do or say, in the absence of an express statement by that party that they were acquiescing. Indeed, this is so where there may be an express assertion by a person that they did not acquiesce. This is why the authorities indicate the necessity to look at all the circumstances of the case. Nonetheless, it is of vital importance to recall that it is the actual state of mind of the applicant, not the state of mind of some notional reasonable person in the shoes of that applicant, that must be assessed.

53. When viewed in that light, the trial judge's rejection of any comparison with the *FL v. CL* decision was entirely correct. The facts in that case were starkly different and were set out in 29 detailed points by Finlay Geoghegan J. in her judgment. At the risk of lessening the importance of any of those facts, it is worth highlighting that there were lengthy talks between those parties about the jurisdiction in which the future living arrangements would be, the applicant had engaged in barring order proceedings in this jurisdiction, and had also on one occasion brought the children back to this jurisdiction after holidays with them. In short, there was plenty of evidence of overt activity of acquiescence to add to the inactivity in the taking of proceedings; it was the combination of the two that led to the conclusion. The factual circumstances were therefore, far from saying that the burden of proof had been satisfied solely because of inactivity or "delay", such that they required a court to draw the inference that the applicant subjectively intended to acquiesce in the sense that he accepted the changed circumstances. That is not to say that it cannot be done in an appropriate case; a person who in effect "sits on their hands" and lets time slip away could be assessed as having accepted the changed circumstances. All will depend on the facts.

54. The trial judge reminded herself that this was a subjective test on a number of occasions. The reference to A's comment that the father kept searching for them was made by the trial judge in connection with the family's expectations of remaining in Ireland without objection and was

followed by a reference to whether it shed light on the applicant's views the following year. Thus, it seems to me, her concern was always with the issue of whether the applicant was subjectively acquiescing.

55. Unfortunately, however, the trial judge took that comment of the child and the fact that the request for return had been dated July 2019 as factual proof of a consistent attitude of objection on his part. That was a significant amount of weight to put on the child's statement and it is important to see if that inference can be justified. In the first report of Dr. van Aswegen, under the general heading of A's responses to direct questions, the following is recorded:

> "*The circumstances in which the children came to Ireland in or about March 2019 A reported as follows: 'I didn't want to live with my father in Hungary, that's why we moved to Ireland…my father kept searching for us, he was in prison so we decided to go to Ireland'*."

56. It must be noted that the previous question had been about the circumstances that the children were living in prior to coming to Ireland and this was answered in relation to the living arrangements in the third country.

57. According to the respondent, she had been required to go to the country of her nationality because she had to gather resources to pay for passports and documents for the purpose of coming to Ireland. She said she came here in June 2019. Therefore, the time period that child A was talking about was in the three-month period prior to coming to Ireland. At most this was an indication from some sources that he picked up that his father was looking for them. Even the applicant, in his request for return, said he had no information about his children since the 8th March, 2019 and that on the 15th June, 2019 he had a call from the respondent threatening him if he launched a search for her. It therefore seems unlikely that the information A obtained had come directly from the applicant. In those circumstances, I do not consider that it had any value in making a positive finding that the applicant's state of mind during that period, as well as any

subsequent period, was that he was not acquiescing. That is not to say that the decision of the trial judge must be overturned on this basis; at most the child's comment was a neutral factor in the consideration of acquiescence.

58. I agree that the reliance by the trial judge on the request for return being signed in July 2019 may not be a matter that is entirely self-justifying, as she had found earlier in the judgment that this was signed three months after he learned of the removal; thus, there was a three-month delay. Moreover, she also had noted that the request had no date stamp and there was no evidence as to when it was received by the Central Authority in Hungary. In circumstances where the respondent had claimed acquiescence in her affidavit and where the law permits a court to conclude that acquiescence had been established through passivity/inactivity, the failure to give an explanation was a factor that had to be taken into account in the proceedings.

59. I turn now to the trial judge's finding that the respondent's averment that the applicant did not appear to have tried to contact her, even though he had her phone numbers, did not assist in deciding on the applicant's state of mind concerning acquiescence. The trial judge said this was so in circumstances where "*while he was in prison, his partner removed his children from the country for a second time and went to a country peripherally connected with the family, through her mother*." It appears that the trial judge was relying on the fact that the applicant was in prison and would have had difficulties in making contact. It is perhaps true in a general sense that prisoners have difficulty in contacting family members, but this applicant averred that he talked to his children every day by phone when in prison. The applicant had known, however, since March 2019 that they had left the home and he does not aver to any efforts to contact them himself. Indeed, the evidence relating to the length of time (and the specific period of time) the applicant was in prison is not as clear as it ought to be. The respondent said that the applicant received a two-year prison sentence in May 2018. The applicant says he was serving a prison sentence of one year and six months and goes on to say he was released six months early. Taking the

applicant's prison sentence as an 18-month one, this meant he was released in May 2019, if he was released six months early. His request for return does not indicate where in Budapest it was signed and does not make reference to his presence in a prison. Even if, however, he was only released in November (having served 18 months of a two-year sentence), he did not give any explanation that there was a difficulty in forwarding the signed request for return to the Hungarian Central Authority. His affidavit is silent on all these issues.

60. For the sake of completeness, it must be said however that the documents received by the Central Authority contained certificates of school attendance and kindergarten for A and B, dated the 28th June, 2019 and the 9th July, 2019 respectively. This certainly indicates that, prior to signing the form, apparently in July 2019, he was obtaining information regarding the children that would be helpful to his Hague proceedings. There is no explanation, however, as to why there was a delay between the signing of the application form in July 2019 and the sending of the form to the Irish Central Authority in November 2019.

61. I would also observe that this was the second time the respondent had fled and this could also be referred to in favour of concluding there was acquiescence, because it demonstrated the familiarity of this applicant with the Hague Convention. Most importantly, however, the applicant never put forward his prison status as a ground for explaining delay.

62. Any delay between the 29th November, 2019 and the issue of proceedings in February 2020 does not appear to be the responsibility of the applicant, as the solicitor for the applicant has sworn that her information is based upon the documentation provided by the Central Authority. Of course, if there had been delay on the part of the applicant, then, as an officer of the court, the solicitor could not have presented a contrary case to the court.

63. The respondent takes issue with the trial judge's apportionment of blame on her for the speed of proceedings and in particular with regard to the time taken for the DNA test. It is correct to say that the delay of the removing parent is not to be balanced against the inactivity of the

wronged parent. The focus when considering acquiescence must remain on the state of mind of the wronged parent. That is not to say that the trial judge was incorrect when she pointed to the respondent's approach. Specifically, she stated that the requirement for the DNA test was because of the averments of the respondent and the trial judge was clear that because of the timeline involved in her return to Hungary and her giving birth nine months and two weeks later, that claim did not hold much weight. That process took almost a year and was, as the trial judge held, not a delay caused by the applicant. Therefore, I consider that the reference to the lack of speed on the part of the respondent is not a matter which amounts to a basis for intervention in the decision of the High Court. It was simply a reference to explain the overall delay.

64. The trial judge also referred to the fact that the requirement to obtain an affidavit of laws as a consequence of the DNA results led to another, albeit shorter, delay. The delays, she held, did not suggest active or passive acceptance of the changed circumstances. In the appeal, the respondent submitted there was insufficient consideration given to the fact that she had on affidavit flagged that the Certificate of Laws was independent of the DNA test and that was apparent from the information in the affidavit grounding the special summons. The applicant submitted that the documentation was unclear and that the respondent had engaged with the questions for the Certificate.

65. The letter of the 29th November, 2019 from the Hungarian Ministry referred to at para. 10 above is not, I believe, as clear as the respondent makes out. While it says there is no proof of paternity, it did not state that there could be no retrospective rights in respect of a child taken from the father at a time when the *legal* relationship had not been established. Indeed, the email from the Hungarian Central Authority referred to at para. 10 above, refers to "*no legal basis for applying for the return…since he has not yet acknowledged paternity*", implying there would be such a basis if paternity was acknowledged. Regardless, while prudence might have dictated attention

with all haste to the matter of proof by certificate, the absence of such despatch is not, of itself, a clear indication of the state of mind of the applicant.

66. The trial judge referred to the delay by the applicant in swearing his affidavit from April 2020 to October 2020. The respondent submits that this was not addressed by the trial judge save to say that the applicant had not acted with the speed that might be expected but neither had the respondent. The applicant, on appeal, accepted that no explanation has been given but submitted this was not enough to oust the determination of the trial judge that there was no acquiescence. This delay is indeed unfortunate and this delay, coupled with the earlier lapses of time in the initiation of proceedings and the later delays regarding the DNA testing and time taken to obtain the Certificate of Laws, will be addressed more fully under the heading as to the objections of the children.

67. The trial judge's assessment of the inference to be drawn from the delays is however entitled to deference, even if of a limited nature. The trial judge's assessment was however affected by her reliance on the comment of A in relation to his father searching for them which did not bear the inference she placed upon it. There was also an apparent equivocation of blameworthy delay by the trial judge in her assessment. These matters of themselves however do not drive a conclusion that the applicant acquiesced. The comment of the child was neutral to that assessment. There was evidence of steps taken by the applicant in June and July 2019 and it cannot be gainsaid that he was in prison at the time. He persisted in seeking to establish his rights under the Hague Convention in relation to C and the delays in obtaining relevant material are not of themselves sufficient evidence of acquiescence. These were matters that on the face of the communications from the Hungarian Central Authority were not self-evident as to meaning; those issues were engaged in by both parties, in the context of seeking the Certificate of Laws, after the DNA test confirmed paternity.

68. The most serious and unexplained delay was the failure to file the replying affidavit. I do not accept however that this period of time (which taking into account the passage of time inherent in obtaining translation, taking instructions and having an affidavit sworn, is more likely in the region of six months) was inactivity of the sort that this Court *must view or ought to view* as demonstrating a subjective state of mind of acquiescence on the part of the applicant in this case. Perhaps in other circumstances of such a delay upon delay, it may be that a court will more easily infer such subjective acquiescence on the part of an applicant, especially where the unprecedented Covid-19 pandemic shutdown of 2020 – even if only mentioned briefly by the trial judge in this case – will no longer provide the backdrop for any consideration of the delay. Certainly, an applicant who engages in that delay is at risk of a court drawing an inference of acquiescence from such inactivity. It must be noted that the applicant, according to his affidavit and this is not disputed by the respondent, was by then in regular contact with the children over Facebook, contact he says was facilitated by the competent authority, and they chatted on good terms. In the first report of Dr. van Aswegan, A reported he was chatting with the applicant at weekends. This is not evidence of acquiescence but evidence that he was actively seeking contact with his children which included engaging the assistance of the Central Authority for the purpose of returning the children to Hungary.

69. In conclusion therefore, while the trial judge may have taken into account a matter that was irrelevant (the child's comment) and did not have appropriate regard to a relevant matter (by equating the applicant's blameworthy delay in swearing the replying affidavit with a lack of speed by the respondent), I am not satisfied, bearing in mind the burden of proof on the respondent, that the evidence before the High Court established that the applicant had acquiesced in the wrongful removal of his children.

70. I am satisfied therefore that there is no basis for interfering with the finding of the trial judge that there was no acquiescence on the part of the applicant.

The objections of the children to return

71. The views of the children, as found by the trial judge, have been set out above at para. 20. The fact that those views amounted to objections and that the age and maturity of the children made it appropriate for the court to take them into account is not in dispute. Those factors are the first two steps in the three-step approach, mandated by the Supreme Court in a number of cases, to approaching the defence of children's objections. If those two factors had not been made out the defence could not have been established. Assuming those factors are established, the third step is whether or not the court should exercise its discretion in favour of retention or return.

72. The three-step approach approved by the Supreme Court had first been identified in the Court of Appeal of England and Wales by Potter P. in *Re M (Abduction: Child's Objections)* [2007] EWCA Civ 260. In the Supreme Court decision of *MS v. AR* [2019] IESC 10, Finlay Geoghegan J. noted that the first two stages are primarily questions of fact or inference from primary facts for decision by a trial judge, but that it is the third question which most often presents a court with complex and difficult issues.

73. The trial judge paraphrased the steps saying that it involved "*ascertaining if the children do in fact object and, if so, what the weight of the objection is given the maturity of the children. Finally, if established, the Court will consider if an objection is sufficient to outweigh the counter-balancing objectives of the Convention.*" Although the respondent submits that the trial judge may have misapplied the second step, an issue addressed below, it is on the third step of the approach that the respondent has placed the greatest focus.

The High Court judgment

74. The trial judge dealt with the views of the child at section 9 of her judgment. Having articulated the three-step approach, the trial judge noted at para 9.3 that, although Article 13 required the court to take account of the views of the child, it did not vest the decision-making

power in the child. The trial judge said "*[n]onetheless, it is very important to consider the views of the child and whether or not they may influence the Court to take the exceptional step of refusing to return the child*." At para. 9.4, she said that the children fell "*into the category of cases where the return is no longer what is envisaged by the Convention or the enabling legislation: it is too late to constitute the kind of emergency remedy required in such cases*."

75. At para. 9.5 the trial judge said that, in an argument related to that of acquiescence, the respondent had submitted that the children have been here so long that, even if a return is otherwise indicated, the court should refuse such an order in the best interests of the child. She said that "*[t]he law does not appear to permit the exercise of that kind of general discretion but the time period and all surrounding facts have a bearing on the interests and views of the children.*" The trial judge went on to consider the decision of *Neulinger and Shuruk v. Switzerland* [2010] ECHR 1053, but in doing so referred to the facts therein as "*stark*".

76. The trial judge also referred to the delays in the case and to the respondent's argument that the children have no family or other support in Hungary and do not speak that language but said that until they moved to Ireland, Hungarian was the language spoken by all three.

77. The relevant passages at paras. 9.8 to 9.10 are set out above at para. 20. In para. 9.12 the trial judge concluded that the responses of the children amounted to objections to return. The trial judge then said that "*[t]he question that must now be addressed is whether these objections are sufficiently weighty as to persuade a Court not to order the summary return of children who should, on every other available defence, be returned forthwith*."

78. I will interrupt the recital of what is contained in the High Court judgment to deal with one particular aspect of the respondent's submissions. The respondent submitted that it is a misdirection to ask *in the second question*: "*[i]f so, what the weight of the objection is given the maturity of the children*". The respondent submits that, at this stage of the analysis, the Court is not concerned with the weight that ought to be given to the child's objection. What it merely must

decide, at this stage, according to the respondent, is whether the child objects and is of such an age and degree of maturity that it is appropriate to take account of the objections.

79. I agree with the submissions of the applicant that it is difficult to see the relevance of this point being made. The respondent's submissions go on to accept that: "*[i]n this case, the Trial Judge did make a finding of fact that the children objected to returning to live in Hungary, and that in terms of their age and maturity it was appropriate to take their objections into account. Having made such findings, the defence was made out, and the Court was obliged to move to the exercise of discretion at which point the weight to be given to the objections becomes relevant*."

80. That is precisely what the trial judge did when she stated:

> "*It is clear that both A and B have objected to returning to live in Hungary. In terms of their age and maturity, I am satisfied that it is appropriate to take their objections into account and I do so. Their objections appear to have been independently formed and are based, in part, on their unwillingness to be separated from their mother and in part on their enjoyment of life in Ireland, including friends, activities and current family life with their sister and the Respondent's partner, who has resided with them since they came to Ireland, according to A.*"

81. To return to the central feature of the appeal on this issue, which is how the trial judge interpreted and applied the final limb of the test, at para. 9.14 she characterised it as a test "*to decide what weight to place on the objections and whether or not the objections outweigh all the other factors in favour of return.*" As the respondent claims that the trial judge was incorrectly setting the test as a balance between the children's objections and the general Convention considerations, it is important therefore to quote extensively from para. 9.15 onwards. These paragraphs reflect the trial judge's findings on her discretion:

> "*Using the test set out by Finlay Geoghegan J. in C.A. v C.A. (otherwise CMcC) [2010] 2 IR 162, the objection of A is relatively strongly voiced in terms of his*

preference for Ireland albeit it is partly based on wanting to be with his mum. B has also objected but is much younger and the weight of this objection is less, particularly given the lack of context or comparison made; this child could not recall residing in Hungary. The objections coincide with the stability of the family here in Ireland, but they are at odds with general Convention considerations, in particular, the objections are at odds with the principle that abducted children be swiftly returned, with the deterrence of abduction and with respect for the judicial processes of other member states of the European Union and signatory states of the Convention. It is a matter of great concern that this Respondent has, not once but twice, removed her children from the care of their father.

Having carefully considered the views of the children as set out in the reports, they do not outweigh the aims of the international agreements, which mandate a return. The objection of the older child carries more weight in that he recalls his life in Hungary and is older and better able to form and articulate a logical view. While definite in their statement that they do not wish to return, there is no strong objection to their dad, to being with him or to the prospect of living in Hungary such that their return with their mum should not be ordered in line with the imperative policy considerations underlying the Convention." (emphasis added)

82. The trial judge rejected any comparison with the facts in *MU v. NR* [2017] IEHC 828, in particular by saying that the children in that case did not want any contact with their father. The trial judge said "*[i]nsofar as this case resembles the facts in C.A., the factors which weigh against these children's views are significant indeed. Children of this age cannot be expected to consider the importance of their relationship with the abandoned parent, despite the fact*

that disruption to that relationship is likely to have a significant effect on their futures. It does not appear to be appropriate to refuse to return the children on the basis of their objections."

Submissions

83. The respondent claimed that there were errors in the approach of the trial judge in relation to the defence of the children's objections. These were summarised as follows:

a) failing to apply legal principles contained in the authorities;

b) failing to identify the factors which she took into account in exercising her discretion;

c) giving inappropriate weight to the Convention principles;

d) failing to take into account factors relevant to the circumstances of the children, as identified by the authorities;

e) applying legal authorities and principles relevant to the defence of grave risk to the exercise of discretion in child objection cases;

f) taking into account irrelevant factors which led to the discretion losing the essential characteristic of being child-centred;

g) failing to reduce the weight to be given to the Convention principles by virtue, in particular, to the length of time the children were in Ireland; and,

h) failing to take into account the reality of the situation that would face the children on return to Hungary.

84. I will address in more detail the relevant submissions on those aspects in under the sub-heading as to the decision below.

85. The respondent submits, relying on the classification set out in *AK v. US*, that if this Court accepts that the trial judge failed to take into account, or assign sufficient weight to, factors relevant to the exercise of discretion in child objection cases, or that she took into account factors not relevant to the exercise of such discretion, these are matters of law. Therefore, this Court is entitled to form its own view as to the correct legal principles and outcome. In so far as the trial

judge made findings of fact about the children's objections based on the reports, this Court is also entitled to rely on its own judgment as to whether her conclusions were correct. In so far as she based her conclusions on the oral evidence of Dr. van Aswegen, the respondent submitted she failed to consider some of the salient facts including the desire of the children to have minimal contact with their father.

86. The applicant reminded the Court that in considering a child's objection on the exercise of its discretion, there is no question of the vesting the decision-making power in the child; what is required is to take into account those views (relying on *Health Service Executive v. CB (A Minor)* [2010] IEHC 322).

87. The applicant categorised the respondent's approach as a complaint that the trial judge did not quote parts of the evidence which the respondent viewed as being more significant than the trial judge clearly felt to be representative of the evidence from the assessor. The applicant submitted that the relevant part of the judgment reflects the overall tenor of the contents of the assessor's evidence. There was nothing wrong in the approach of the High Court in not quoting every line.

88. The applicant submitted that the High Court was not conducting a welfare assessment. This is central to the approach to be taken by a judge under the Convention. The applicant submits that the respondent's "*individual circumstances*" bring to mind some of the factors enunciated in s. 31 of the Guardianship of Infants Act, 1964 which must be taken into account in determining the best interests of a child under that Act. They are not in any authority and in any event, it is significant that the respondent's list makes no reference to the children's relationship with their father as a relevant circumstance.

89. The applicant submitted that in seeking to establish error on the part of the trial judge, the respondent was reaching beyond the words of the judgment. The applicant emphasised that the Supreme Court (*per* Finlay Geoghegan J.) in *MS v. AR*, relying on the earlier decision of the

Supreme Court (*per* Denham C.J.) in *AU v. TNU (Child Abduction)* [2011] IESC 39, in the exercise of its discretion under the Convention the court was *bound* to take into account the policies of the Convention and not merely *entitled* to do so. The applicant submits that the trial judge considered the "*totality of the evidence*" and the "*best interests of the children*" in the context of the "*policies of the Convention which favour return*" which were the requirements of the decision in *MS v. AR*.

90. The applicant submitted that the elapse of time was at the forefront of the trial court's consideration, but to consider it further and to import it into the matrix of discretion risks the Court engaging in a *de facto* welfare examination, which is prohibited.

91. With respect to the respondent's criticism of the trial judge's rejection of the children's objections on the grounds of wishing to remain with their mother and their enjoyment of Ireland, the applicant submits that it is particularly significant that the assessor observed that the strength of the relationship between mother and children was not related to the country of residence. It was not an objection to return properly so called. The younger child had little recall of where he lived prior to Ireland and expressed his wish to remain in Ireland with his mother and that she was able to buy him things (emphasis that of the applicant). It was not clear that either child had an objection to Hungary *per se*. The applicant took issue with the attempt to distinguish *CA v. CA* [2010] 2 IR 162 on its facts as the children's evidence was based upon their preferences for Ireland. Contrary to the submission of the respondent, the applicant submitted that the objections of the children were considerably stronger in *MU v. NR* than in this case. In that case, there was no effort by that applicant to enlist the power of the English courts to have access to his children or to find them. There was little in the way of "*meaningful relationship*" in that case.

Decision

92. The complex and difficult issues that must be considered in the third step of the test to be applied to child objections have been addressed authoritatively in this jurisdiction by the Supreme

Court in *AU v. TNU*. In *MS v. AR*, Finlay Geoghegan J. quoted extensively from the decision in *AU v. TNU*.

93. In *AU v. TNU*, the Supreme Court, (*per* Denham C.J.) expressly agreed with the analysis of Baroness Hale in *In re M (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 AC 1288 at para. 46 that:

> "*In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and a degree of maturity at which it is appropriate to take account of her views. These days, especially in light of Article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that these views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances*."

94. Denham C.J. went on to say that the trial judge "*was entitled to have regard to the children's stability and contentment in determining what policy of the Convention should prevail. The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual*

residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views" (emphasis added). It was, Denham C.J. held, for the trial judge to determine the weight to be applied to the objections of the child.

95. Denham C.J. went on to say that:

> "*The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.*
>
> *It is also the case that in interpreting and applying Article 13 of the Convention that courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the Court has discretion pursuant to Article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. The circumstances in which children would not be returned are exceptional. As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in the case of [In re M. (Abduction: Rights of custody)] the extent to which*

the child's objections 'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant."

96. Denham C.J. also said that the balance between the policy of summary return and the operation of the exception may alter with time and she expressly endorsed the acknowledgment of Baroness Hale in *In Re M (Abduction: Rights of custody)* where she states at paragraph 43:

> "*'But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'*
>
> *A court should at all times seek to expedite cases arising under the Hague Convention, but circumstances such as have arisen in this case are the exception*."

97. The primary submission of the respondent is that the trial judge misdirected herself in finding that the child's objections alone, without other considerations, must be sufficient to outweigh the objectives of the Convention and that the exercise of the discretion must amount to an "*exceptional step*". The respondent submitted that the trial judge failed to engage with other facts such as the children's lack of facility in the Hungarian language, the bullying they had received there, how well they were doing now and the delay in dealing with this application. The applicant submitted that the trial judge correctly identified and applied the tests and that from a reading of the totality of the judgment the Court can see that the trial judge took the relevant matters into account. The respondent, according to the applicant, is seeking not only to cherry pick facts not referred to by the trial judge but also to import a welfare test into the exercise of discretion. The applicant agrees that passage of time fits into the exercise of discretion but contends that it was not a significant issue in the case and fell to be dealt with within the discretion of the trial judge who took all matters into account.

98. An analysis of the judgment of the High Court must start with an acknowledgment that it addressed the law and the facts in a concise, structured manner in a case which, despite the

lapse of time since the wrongful removal of the children, required to be dealt with expeditiously. Indeed, the manner in which this case was approached required the trial judge to deal with a huge number of legal issues, some of them novel, in a very short period of time. An issue that took careful consideration was the contention that there was no wrongful removal as there was no exercise of custody rights; an issue that was correctly abandoned on appeal. All those factors would however contribute to the difficulty of any trial judge in identifying correctly the relevant law and applying it to the relevant facts.

99. There is no doubt but that the trial judge was conscious of the entreaty from the Supreme Court that a court, in exercising a discretion under Article 13, was bound to have regard to the Convention policies which favour return. Unfortunately, the trial judge through her pronouncement as italicised in the quotes from paras. 9.14 and 9.16 above articulated a view of the law that was somewhat at odds with the approach to the exercise of discretion as set out by the Supreme Court in *AU v. TNU* and *MS v. AR*.

100. Finlay Geoghegan J. in *MS v. AR* helpfully summarised the principles according to which an application for the return of children wrongfully removed should be determined in this jurisdiction. It is neither necessary nor appropriate to repeat all of them but para. 63 is particularly relevant. Finlay Geoghegan J. said as follows:

> "*There are no presumptions pertaining to the exercise of discretion under Article 13 of the Convention where a child's objections are made out and he or she is of an age and degree of maturity where it is appropriate to take account of the views. The child's views or objections are not determinative or even presumptively so. The court must exercise its discretion on all the evidence before it, having regard to the particular facts and circumstances of the application and the child in question. The discretion must be exercised in the best interests of the child in the context of the application. The court is not permitted to conduct a full welfare assessment of the purposes of deciding whether an*

order for return or an order to refuse return is in the best interests of the child. That is made clear by Articles 16 and 19 of the Convention. It is a more limited appraisal of the actual circumstances of the child at the date the court is asked to exercise its discretion, based on all the evidence."

101. Finlay Geoghegan J. said that the older the child the greater the weight to be given to the objection. She stated at para. 65 that a court "*must be careful to weigh in the balance the general policy considerations of the Convention which favour return and the individual circumstances of the child who objects to return, in order to determine what is, in the limited sense used, in the bests interests of that child at that moment*." Finlay Geoghegan J. stated that "*the further one is from a prompt return, the less weighty the general Convention policies will be*." She also held that "*[i]n applications to which the Regulation applies, regard should be had to Articles 11(6) - (8) and the practical consequences of a refusal to return for the resolution of continuing custody disputes.*"

102. It is of significance that Finlay Geoghegan J., at para. 48 of her judgment, when explaining the context of the decision of Denham C.J. in *AU v. TNU*, referred with apparent approval to the following passage of Baroness Hale in *In Re M (Abduction: Rights of custody)* that "*…I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under The Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention*." I am not persuaded that the trial judge in the instant case was inserting a test of exceptionality as such into a requirement for the exercise of the discretion to refuse return. She was merely pointing out that a refusal is an exception to the general rule that children who are wrongfully removed must be summarily returned to the country of their habitual residence; she was not adding an "*additional gloss*", to use the language of Baroness Hale.

103. The trial judge held that the objection of A was relatively strongly voiced in terms of his preference for Ireland and that B's objection as a younger child had less weight as he could not remember living in Hungary. She held that the objections coincided with the stability of the family in Ireland she said they were at odds with general Convention considerations, in particular with the principle that "*abducted children be swiftly returned*", although she had earlier acknowledged at para. 9.4 of her judgment that the type of emergency remedy the Convention envisages could not now be achieved in any event. Unfortunately, while the trial judge referenced that this was the second occasion on which the respondent had removed the children from the care of their father, she did not thereafter place on the balancing scales, for the purpose of the third part of the test relating to the children's objections, the fact that in the individual circumstances of this case it could not be said that there would be a *swift* return of the children. Without assigning any blame to either party, the reality was that any order for the children's return would take place more than three years since they were wrongfully removed from Hungary (and almost three years since they arrived in Ireland). That lapse of time was a matter that ought expressly to have been addressed by the trial judge and it was not. Moreover, it was a factor which had to be considered from the perspective of the best interests of the children and not from the perspective of attributing blame to one or other parent.

104. The applicant's submission that this Court ought to view the totality of the judgment and take the view that the trial judge had appropriate regard to the issue of lapse of time by her references to the *Neulinger* case in both section 9 and in the separate section 10 headed "*Neulinger: The Best Interests of the Children*" is one I do not accept. The relevant parts of section 9 dealing with that case do not address the role of delay/lapse of time in the weight to be accorded to the Convention policies, although it must be acknowledged that, while the trial judge said there was no general discretion to refuse because of time lapse, she said "*the time period and all surrounding facts have a bearing on the interests and views of the children*." It is of significance

that when dealing with *Neulinger* in section 10, the trial judge said "*[t]he many moves, which appear to have led the assessor to a view that this period of relative stability should be prolonged, arose due to the unilateral decisions of the Respondent and the length of their stay in Ireland is partly as a result of her decision to dispute the Applicant's paternity*." Even if such a conclusion had been reached when dealing with discretion concerning the children's objections, this would amount to a misapplication of how to treat the issue of lapse of time when weighed against the general Convention considerations. Most importantly, however, the concluding paragraphs of section 9 in which the trial judge gave her reasons for the exercise of her discretion to order return do not address this issue of lapse of time and its impact on the best interests of the children. The lapse of time was a factor which had to be dealt with expressly by the trial judge in this case given the very significant period of time that had elapsed. The authorities are clear that that may affect the weight to be attached to the general Convention policies.

105. Furthermore, the trial judge, in dealing with the children's objections, did not express that she had regard to Article 11(6)-(8) of the Regulation; she did refer to them in a later section of her judgment when dealing with the issue of distinction between the siblings. These provisions provide that an Irish court when refusing to return must notify the courts of the Member State of habitual residence; the courts of that Member State retain jurisdiction to decide upon custody notwithstanding any refusal to return and to make an order, which includes an order for return. Those provisions were of relevance in this case as a refusal to return because of the children's objections would not preclude a future return order following a decision in the courts of habitual residence. Those provisions would allow for a full welfare consideration in the courts of habitual residence, if an application is made in that regard by the applicant.

106. The omission of consideration to these factors in the analysis by the trial judge was a misapplication of the approach to judicial discretion when a child's objections to return have been made out. They were necessary to any proper exercise of the discretion which vests in a judge

when the children's objections have been made out. The trial judge appeared to approach the question of her discretion as one which primarily came down to whether the objections themselves outweighed the Convention policy considerations which themselves were directed towards swift return. As Denham C.J. stated in *AU v. TNU*: "*The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children*" (emphasis added). It was a misapplication of the exercise of her discretion by the trial judge when she failed to give due consideration to the totality of the facts and to view the policy in the best interests of the children. It is appropriate therefore for this Court to intervene and, in light of the urgency of the matter, to come to its own conclusion as to how the discretion ought to be exercised having regard to all relevant factors.

107. The trial judge had identified many of the relevant factors and she also included the importance of the relationship with their father. While the latter is an important aspect of the best interests of the child, it must be noted that a refusal to return a child summarily is not a sundering of that relationship; the father has the opportunity to continue a relationship with the children which, while less than ideal, is a balancing factor. In a case such as this where the Regulation applies, full consideration to that aspect of the welfare of the children can be given by the Hungarian courts if and when an application is made in that jurisdiction in the event of a refusal.

108. The facts of this case establish that the best interests of the children, for the purpose of a Convention application, are that they ought not to be returned to Hungary pursuant to Convention proceedings. This is because of the long time that they have been in Ireland and the links they have established here. An important factor is the very limited ties they have to Hungary including the fact that their Hungarian language skills are not strong, whereas their English language skills are quite strong.

109. Given A's age and strength of objection to return as found by the trial judge, his younger sibling's objection, the significant length of time they had been away from Hungary and in

particular the length of time they had been in Ireland, where on the facts as found they have stability, the fact that the courts in Hungary would retain jurisdiction as to care orders, their present ability in English (B speaking it fluently), A's weakness in the Hungarian language, the fact that the children have no real connections (apart from their father) in Hungary, the totality of the evidence and the circumstances demonstrate that the balance that must be struck between the children's objections and the policies of the Convention, having regard to the best interests of the children, is that the court should refuse to order their summary return to Hungary. The appeal of the respondent should therefore be allowed on this ground.

110. Before moving on to the remaining issues it is necessary to recount that, at the hearing of the appeal, counsel on behalf of the applicant raised some open correspondence that has passed between the parties. This was to the effect that the applicant had asked the respondent to address whether she was planning to marry her current partner and move to her native country, to which the respondent replied that she had no plan to relocate until current proceedings have been disposed of. This reply is somewhat surprising in light of the case made by the respondent that the children are settled in this jurisdiction and that it would be detrimental to their welfare to be uprooted again. I do not consider however that this surprising reply affects the issue which this court has to decide; the question of summary return to Hungary. It may or may not be a relevant consideration for the courts in Hungary who retain jurisdiction to decide on the issue of relocation.

Grave risk: delay

111. In the High Court, the respondent, relying on Article 13(b) of the Hague Convention, submitted that there was a grave risk that the children would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. In so far as that claim was made on the basis of alleged domestic violence against the respondent, the trial judge rejected that the claim of grave risk had been made out on the evidence, thanks in part to the undertakings to

be given by the applicant. The respondent does not contest the appeal on that basis but submits that the trial judge failed to address the argument that ordering the return of the child after an extended period of time may give rise to a grave risk of psychological harm or an intolerable situation. It was in the context of this defence that the respondent cited two cases, *Re: D (A Child) (Abduction: Rights of Custody)* [2006] 3 WLR 989 and *Neulinger*. The trial judge referred to those two cases but did so in the portion of the judgment as to the "*Views of the Child*", section 9.

112. Given the decision I have reached in relation to the children's objections I do not consider it necessary to go on to decide the issue of delay giving rise to a grave risk but it is appropriate to note that the Court of Appeal has already stated in *C v. G* [2020] IECA 233 "*that it could only be in highly exceptional and very specific circumstances that a case might be made that the level of distress or uprooting caused solely by length of stay would be sufficient, in itself, to reach the threshold of grave risk.*"

Welfare of the youngest child

113. Although the parties agreed, and the trial judge found, that the youngest child, child C, was *not* subject to the Hague Convention and an order could not therefore be made for her return under the Convention, there was a dispute over how C's welfare ought to have been assessed. Given the decision that I have made in respect of the A and B's objections to return any further consideration of this issue is unnecessary.

Change of habitual residence post-removal

114. The respondent submitted in the High Court and again at the appeal, that the older children's habitual residence, while Hungarian at the time of the removal, had changed to Ireland by the time of the hearing. According to the respondent, the habitual residence of their sibling, C, was a very significant factor and the respondent also pointed to the very firm connection with

Ireland. The respondent relied upon the findings of this Court in *AK v. US*, although the trial judge distinguished the above from the instant case, on the basis that the children in *AK v. US* were in Ireland with the consent of both parties. The respondent accepted that consent is certainly a factor in the change of habitual residence, (a concession necessitated by the decision of the Court of Appeal (Finlay Geoghegan J., Kelly and Hogan JJ. concurring) in *DE v. EB* [2015] IECA 104, which applies the relevant decisions of the Court of Justice of the European Union), but submitted it was incorrect to say that a child's habitual residence can never change in the absence of consent.

115. The respondent accepted in this Court and in the High Court that, even if established, the change of habitual residence of A and B does not affect the jurisdiction of the Court in respect of the application for their return. The thrust of the respondent's submissions on the issue of habitual residence appears to be as follows:

a) that a finding of a change of habitual residence could affect the exercise of discretion if any of the defences are made out *e.g*. the children's objections to return; and,

b) that if there is a change of habitual residence and if acquiescence has been made out, the Hungarian courts will have lost jurisdiction pursuant to Article 10 of the Regulation.

116. The first submission made by the respondent is accepted by her to be a novel point not considered in any of the authorities. As I have already accepted that the trial judge erred in the exercise of the discretion concerning the return of A and B in light of their objections, it is neither necessary nor appropriate to consider the issue of habitual residence any further and the effect, if any, it would have on the exercise of discretion where a child's objections are made out.

117. In relation to the second submission, the defence of acquiescence has not been made out and therefore the loss of jurisdiction under Article 10 of the Regulation does not arise, a finding which, as a matter of law, the respondent accepts is correct.

The stay

118. In light of the findings I have made, it is unnecessary to deal with the issue of whether the High Court was entitled to place a stay on the order of return pending application to the Hungarian courts in respect of the return of the children. I would note however that this was an unusual stay. Stays on orders of return in Convention cases are usually of short duration for the purpose of enabling the practicalities of return to be addressed.

Conclusion

119. The trial judge's conclusion that the applicant did not acquiesce in the wrongful removal of his two older children has been upheld for the reasons set out above. The respondent's appeal on this ground is therefore rejected.

120. Having determined that the children objected to their return and that they were of an age and maturity to take those objections into account, the trial judge erred in not having regard to the full range of matters which ought to be considered in the exercise of her discretion as to whether to order the return of the children. The considerable lapse of time since the children first arrived in Ireland lessened the applicable force of the Convention policies directed at summary return. Given the age and maturity of the older child, his objection carried a particular weight in all the circumstances of this case. Other factors that require to be placed in the balance are the findings of the High Court that the family had achieved stability in Ireland, the children spoke English (the younger one was fluent) and that the older boy was no longer fluent in Hungarian. All of those factors demonstrate that the correct balance to be struck between the children's objections and the policies of the Convention in the individual circumstances of this case and in the best interests of the children is to refuse to order the summary return of these children. The considerable lapse of time since the wrongful removal has allowed the ties in Ireland to develop and stabilise and those

with Hungary to diminish. Overall, the lapse of time has lessened the weight of the Convention policy considerations.

121. It is unnecessary to decide if the return would amount to a grave risk of harm to the children because of the delay in the proceedings or if there has been a change in the habitual residence of the children. The issue of the impact of orders of return on the youngest child, C, (to whom the Convention does not apply), is therefore unnecessary to address, as is the cross-appeal on the question of a stay on the order of return.

122. Neither party sought an order for costs in their notices of appeal and therefore the Court does not propose to make any order for costs. Should either party wish to contend otherwise they should notify the Registrar within 10 days of the date hereof of their intention to do so. The Registrar will then organise an early date for the hearing of that costs application.

As this judgment is being delivered electronically, Ní Raifeartaigh and Binchy JJ. have authorised me to indicate their agreement with the judgment.