Neutral Citation Number: [2008] IEHC 176

THE HIGH COURT

FAMILY LAW

RECORD NO. 2007 43 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND

ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND IN THE MATTER OF THE HAGUE CONVENTION

AND IN THE MATTER OF COUNCIL REGULATION 2201.2203

AND IN THE MATTER OF D.W. (A CHILD)

BETWEEN

Z.D.

APPLICANT

AND

K.D.

RESPONDENT

Judgment of Mr. Justice John MacMenamin delivered the 13th day of June 2008.

1. The applicant in these proceedings seeks a declaration that the respondent herein has wrongfully removed the child the subject matter of these proceedings from the place of his habitual residence and into the jurisdiction of the courts of Ireland within the meaning of article 3 of the Convention on the Civil Aspects of International Child Abduction (the Hague Convention). The applicant further seeks an order pursuant to article 12 of the Convention for the return forthwith of the child named in the title hereof to the place of his habitual residence.

2. In order to deal with certain issues, it is necessary to describe the sequence in which the evidence unfolded.

The child

3. D.W. the child named in the title of these proceedings was born on 28th October, 1998. He is, at the time of this application, nine and a half years of age. D. was born in Poland and his place of habitual residence prior to the events described here was at all material times in that State. The respondent and D. arrived in Ireland on 26th September 2006.

The applicant

4. The background to this case is a sad one. The applicant is D's maternal grandfather. The respondent is D.'s mother. The applicant and the respondent are therefore father and daughter. The child's father died in 1999, soon after his birth in 1998. The applicant's case is that, from the time of the child's birth in 1998, D. resided with the applicant and the applicant's former wife, his grandmother. Initially, the respondent also resided with them. However, it is said that in October, 1999, she left the child and moved away from their home town of Poznan.

5. By order of the Poznan Court dated 28th March, 2002, the respondent's rights in respect of the child were restricted on an interim basis. On 2nd March, 2004, care of the child was transferred to the child's *maternal* grandmother. However, the applicant's former wife died in October, 2005, at which time the child and the respondent returned to reside with the applicant.

6. In November, 2005, the respondent removed the child from the care of the applicant but remained in Poland. The applicant therefore instituted fresh proceedings which bore Record No. VIII RNsm 714/05. By order of the Polish Courts dated 13th December, 2005, the child was directed to be placed in the foster care of the applicant. The respondent refused to comply with this order. She removed herself and the child from Poznan and could not be traced.

7. On 21st September, 2006, the District Court in Poznan, Family and Juvenile Division, made an order placing the child in the foster care of the applicant on a permanent basis. The nature of the respondent's further interaction with the Polish court authorities will be dealt with later in this judgment. She appears to have terminated her lawyer's instructions in September 2006, after the hearing which again granted custody to the applicant.

8. The respondent failed to deliver the child into the care of the applicant on foot of the order made on 21st September, 2006. The applicant informed the appropriate authorities in Poznan of the breach of the order. Subsequently, searches were carried out by court authorities and the police but the child's whereabouts were not established at that time.

9. In 2007, a lead suggested that the respondent might have removed the child to Denmark and an application was transmitted to that jurisdiction on 7th July, 2007. However, the Danish authorities confirmed that the child was not residing in that country.

10. It was subsequently established that D. and the respondent was residing in Ireland. Therefore, on 15th October, 2007, the applicant applied to the Irish central authority for the return of the child. The Irish central authority initially returned this application believing that the child was not in this jurisdiction. However, documents submitted by the Polish authorities on 22nd October, 2007, confirmed, after the order of 21st September, 2006, that the respondent and child had indeed travelled to Ireland, first travelling by bus from Poland to London and thereafter from London to Cork.

11. By letter dated 2nd November, 2007, an application for the return of the child was transmitted to the Clondalkin Law Centre to act on behalf of the applicant. By letter of 19th November, 2007, faxed copies of the request for return and other supporting documents were transmitted to that office. However, these documents were not legible and therefore no action could be taken on behalf of the applicant at that time. By letter dated 29th November, 2007, a solicitor acting for the applicant received the original documents and was then in a position to process the application. It was ascertained that the respondent and child were living in an apartment in Cork City. In a replying affidavit the respondent states that the child has at all times been known as K. This was denied by the applicant. There is no evidence that the child habitually used any name other than D. prior to his arrival in Ireland. K. is, however, his second Christian name, his surname is his late father's.

The respondent's case

12. The respondent states that after the child's birth she resided with her parents until October, 1999, when her partner, the child's father, died. She says that she travelled to Krakow to look after her partner's affairs and obtained work there. D. stayed with her mother (his grandmother) and she visited him at weekends and sometimes for longer periods during absence from work. She states that she did not object to her mother obtaining temporary guardianship rights in respect of D. in March, 2004. When the applicant and his wife divorced in or about 2003, D. resided with his maternal grandmother until she died in October, 2005. Thereafter, the respondent stayed with D. in Poznan for a short time until 3rd November, 2005, at which time she moved back to Krakow. In her first replying affidavit, the respondent denied that by order of the Polish courts dated 13th December, 2005, the child had been placed in foster care. She averred that the order only related to the child's place of residence and claimed that there had been a stay placed on the order. This was not so. She accepted that the applicant did issue proceedings on 7th November, 2005 in Poznan, seeking guardianship of D. On 28th October, 2005, she herself issued proceedings seeking to have her full parental rights, which had been restricted in March, 2004, restored. She states that she attempted to have the proceedings transferred from Poznan to Krakow, however, the courts in Krakow referred the matter back to Poznan.

13. The respondent alleged that the applicant is, or was, involved in a relationship with a prosecutor in the Poznan jurisdiction and that she had concerns in relation to any hearing there. She contended that she moved address while in Krakow because she was being harassed by the applicant. No supporting or corroborative evidence whatever has been furnished to the court regarding any alleged relationship between the applicant and any (unnamed) prosecutor. The applicant has no legal background himself. No satisfactory explanation has been furnished as to why the respondent moved address in Krakow other than to avoid the applicant. No detailed evidence of any 'harassment' has been provided despite the fact that the respondent filed a number of affidavits.

14. The respondent states that she was not notified of any hearing dated in September, 2006 in Poznan. She states she had no knowledge of the making of any order in that month until she was served with the court orders. She asserted that an order exhibited, stated that the decision of the District Court in Poznan, made in September, 2006, only became "legally valid on 13.10.2007." This is not so. That date reference is to the validation of the interpretation of the order from Polish to English. It was never conceivable that such a lengthy elapse of time could occur between the making of an order and its coming into effect. The respondent admits that she left Poland on 26th September, 2006, and travelled with D. to Ireland with a view to living here indefinitely. She gave no reason for her departure. One can only conclude it was to avoid the court order of 21st September 2006.

15. In her affidavit, the respondent swore that the applicant did not hold right of custody on 26th September, 2006, nor was he entitled to rights of custody at that time. She states that the consent of the applicant was not necessary for the removal of the child from Poland and that the applicant has not seen the child since 5th October, 2005. None of this was correct.

16. Many of the allegations contained in the respondent's affidavit are denied by her father. He denies that she worked in Krakow in 1999; or that as alleged, she visited D. at weekends or for extended periods during absence from work. He states that she came to visit him at most every two or three months and then only at the insistence of her mother and sister.

Proceedings 2002-2004
17. It is necessary now, to examine the position adopted by the respondent in the various Polish court proceedings. The applicant denies that the respondent consented to her mother having guardianship of D. He states that she actually objected to the orders which were made in Poznan, both on 26th March, 2002 and 2nd March, 2004.

18. In the order of 26th March, 2002, the court limited the respondent's parental authority pending the conclusion of the proceedings and placed D. in the foster care of the respondent's mother and the applicant. The applicant states that the reason for this order was that the respondent was not looking after her son. I have considered the order of the court and I note that the respondent did attend court. The order does not show the matter was dealt with by consent. The court found that since October 1999, the respondent had been away from Poznan, had not been looking after her son, had visited her son only every few months for 3-4 days and did not show any other interest in the child.

19. As recited earlier, in the year 2002, the applicant and his wife had divorced. However, they continued to live together with D. thereafter. When that case came on for final hearing on 2nd March, 2004, the court formally placed D. in the care of his grandmother, J. D., although she continued to live with the applicant. Again, as appears from the order, the respondent was present.

Further proceedings 2005-2006
20. When J. D., the applicant's wife, died in October, 2005, D. remained living with the applicant. At that point, the respondent issued a new motion seeking the restoration of parental authority. The applicant also applied to have D. formally placed in his foster care. The motion came on for hearing on 13th December, 2005, on which date he was granted an interim order placing D. in his foster care. Again, the respondent was in court it does not appear from the order that it was made by consent. That order makes clear that thenceforth D. was to be placed in the applicant's foster care. No stay was placed on the order. It was expressed to have immediate effect. The respondent refused to comply with this order. She has retained custody of D. in breach of this order of 13th December, 2005.

21. The applicant states he is a stranger to any application by the respondent to have the proceedings heard in Krakow rather than Poznan. However, he states that given that the courts had consistently stated that D's residence was in Poznan and that he lived there at all times since his birth in November, 2005, it is logical that the proceedings would be referred there. He denies any connection with any prosecutor or judicial authority.

22. The respondent brought another motion in the Polish courts seeking restoration of parental authority. This came on for hearing on the 26th April, 2006. The applicant also applied for an order directing the respondent to hand over D. to his care. An order was made directing the appointment of a custodian or guardian to compulsorily take D. from the respondent and to hand him into the applicant's care. However, she refused to comply with this order. She apparently went into hiding in Krakow.

23. The applicant denies that the respondent was unaware of the proceedings on the 21st September, 2006. These proceedings had been going on from November, 2005. She was represented in November, 2005 and on the 26th April, 2006. She had been informed at all times that she should notify the court of any change of address but failed to do this. The applicant points out that the order reflects that the respondent (presumably, at least through her lawyer) participated in the case. The applicant denies that there was any stay on the order until the 13th October, 2007. He states that such a stay does not apply to court decisions issued in relation to family matters and therefore the decision of the 21st September, 2006, became enforceable.

The Order of 21st September 2006
24. In fact the order directs that custody was to be handed over by 29th September, 2006. The references to 2007 are to the certification of the copy of the signed order, not to the date on which it was to take effect.

Summary
25. A number of matters are clear. First, at the time of the child's departure from Poland, the respondent did not have parental rights. These rights had been the subject matter of a number of previous court orders (in particular that of 13th December, 2005, granting ongoing rights to the applicant). This was never reversed. Second, the respondent's departure from Poland with D. took place within five days of the making of the order of the 21st September, 2006, and two days before the final date upon which the order confirming custody was to take effect. Third, the respondent apparently gave no notification to the Poznan Court of any change of address. She does not say she did. Fourth, there is no evidence that the respondent furnished any information as to her own whereabouts or those of D. on or after the date of her departure from Poland. Finally, it appears that only as and from the time that the child arrived in Ireland did he use K. as his first name.

Affidavits of law
26. An affidavit of law has been sworn in these proceedings by a Polish lawyer, Ms. Ewa Fzelchauz. She is a lawyer in Warsaw and not in Poznan or Krakow. There is no suggestion she is not independent.

27. She states that by virtue of the decision made in the District Court in Poznan on the 13th December, 2005, and brought in injunctive proceedings, the applicant was appointed the minor's foster family.

28. She states that the order of the 21st September, 2006, ended the proceedings in the matter and:-

> (a) Dismissed the motion filed by the respondent for the restoration of full parental authority to her,
>
> (b) Restricted her parental authority over her minor son by placing him in the foster family, being the grandfather of the minor,
>
> (c) Determined that the minor should live with his foster family,
>
> (d) Appointed the foster father to have the rights solely to manage the property of the minor and to represent him, thus restricting the parental authority of the mother of the minor.

29. It is stated that the legal basis for this decision was on the basis of the child's welfare. Thus, it confirms the rights of a foster parent further accrued to the applicant by virtue of the order of the 21st September, 2006. Therefore, both by virtue of this and previous orders, at the time of the child's removal from Poland, the applicant was entitled to enjoy the rights of foster parent thereby having the right to decide on his place of residence. Furthermore, the consent of the applicant as a foster parent was necessary under Polish law to bring the child outside Poland on the 26th September, 2006. In the event of any refusal to grant consent the child's mother would have been in a position where she would have had to apply for such consent.

30. In a corrective affidavit, it is pointed out that in fact at the date D. and the respondent departed from Poland, the applicant's rights to custody were then based on the order of 13th December 2005, which then remained in effect, the appeal thereto having been dismissed. The order of 21st September, 2006, was to take effect on the 29th September, 2006.

31. The sequence of events is relevant to the determination of precisely the circumstances which obtained when the respondent departed from Poland with her son. In fact as a matter of Polish law, the matter was clear cut at all times. The respondent had no right of custody of D. at all after the court order of 2005.

Concessions
32. When the matter came on before this Court, counsel for the respondent accepted that the applicant did have rights of custody and had exercised such rights. This was late in the day. Thus, two of the defences which she had previously relied on were no longer operative. But this was the first occasion these two issues had been formally conceded, and only in the face of clear cut evidence. Accordingly, there were for determination by this Court three factual and legal issues, that is to say:-

> (1) Whether the child objects to being returned to Poland and has attained an age and degree of maturity where it would be appropriate to take his views into account.
>
> (2) Whether the child had become settled in his new environment.
>
> (3) Whether there was a grave risk that the return of the child would be to expose him to psychological harm or otherwise place him in an intolerable situation.

33. The legal issues will be dealt with in greater detail below. It is now necessary to deal with other evidence which relates to these and other questions.

Psychiatric Report
34. The special summons having been issued in this matter on the 8th December, 2007, Finlay Geoghegan J. directed that an assessment be carried out, not only on the child but on the respondent. By order dated the 12th March, 2008, that judge redacted such portions of the report as dealt directly with the assessment of the respondent, and the relationship between the respondent and the child, matters not material to these proceedings. Thus, the report before me from Dr. Colm O'Connor, Child Psychologist, dealt with the three issues earlier identified and:-

> (4) Any other matters which the child wished to be brought to the attention of the Court in relation to;-
>
> > (a) The circumstances in which he was living prior to coming to Ireland in September, 2006,
> >
> > (b) The circumstances in which he came to Ireland in that month,
> >
> > (c) His wishes in relation to his future care and living arrangements,
> >
> > (d) Any other relevant facts as to the extent of settlement in Ireland.
>
> (5) Dr. O'Connor's own views on the extent to which the child is or is not settled in Ireland and the reasons for such views.

35. Dr. O'Connor carried out a one hour interview with the child on the 8th February, 2008. He also spent a one hour period observing him in interview with his mother. He also had conversations with the school teachers in the primary school in which the child was attending in Cork, including the school principal, his class teacher and his special English language teacher.

36. The child's English diction is poor and he has a heavy accent. Consequentially, Dr. O'Connor needed to use an interpreter throughout his interview. The consequence was to make conversation less fluent than would normally be the case. He had no access to any files or reports regarding the child's mother. Furthermore, it was not in the remit of the report to conduct a psychological assessment of any of the parties nor was it part of such remit to carry out an assessment of family history.

37. Dr. O'Connor stated that overall D. appeared to display immature social and emotional behaviour but nonetheless appeared to have made considerable progress since his arrival in Ireland and attendance at school. He is presently repeating second class and is also attending a language support teacher. It is stated that the progress he has made is relative to what was the very poor educational and social development he had when he first attended school here, presumably in 2006. He had previously been in contact with psychological services in Poland, a fact reflected by a report from a psychologist, of June 2005.

38. Dr. O'Connor states that when the child arrived at the school, he appeared to have poor social skills, little sense of personal boundaries and was at sea in knowing how to deal with the various social situations in school. This created the impression that due to his deficient social skills, he had not attended school before and had no preschool experience. He stated that this is consistent with the remarks in the reports that he had been withheld from normal schooling.

39. D. turned out to be more intelligent than had been first thought and learned at a rapid rate. His language support teacher stated that when he first attended school, his language was at level zero but he had now developed an English reading level of 7.2 years, a remarkable progression. His teachers concluded that he did not actually qualify for a special education at that point given his progress. However, Dr. O'Connor noted that the child had an ability to 'shut down' and decide not to co-operate and that on occasion he was stubborn and disengaged, although this situation had improved. He often gets into trouble in class for irritating other children. During his first year in school his attendance was very poor. He missed forty eight out of one hundred and sixty days. He frequently came in late. This had been addressed with the child's mother and there had been an improvement.

40. Dr. O'Connor felt that the child tended to be slightly edgy, had an overactive personality, "a childlike cooperativeness", a willingness to please and indistinct speech. He was sensitive to disapproval; however, he was a likeable child. The doctor had regard to two previous Polish psychologists' reports, dated June, 2005 and June, 2006, indicating an impaired intellectual and psychical development. D. appeared to have made significant progress since he commenced attending school in Cork. It was the doctors' view that he is capable of functioning and performing in the normal range and has revealed intelligence.

The questions identified by the Court

41. The child very specifically stated that he did not wish to return to Poland and his grandfather. He described him as being "a bad man", as someone who shouted, was angry and locked him into a room with spiders. He stated that he liked his grandmother and was very sad when she died.

42. His references to life with his grandfather were negative. While his memory of events would be suspect and his explanations of certain things unclear, Dr. O'Connor concluded that emotional association with his grandfather's home was negative. He concluded that his objection to returning to Poland was related to his objection to living with his grandfather and his desire to stay in Ireland with his mother, who he said loved him and was very good to him. D. stated that he felt happy in Ireland and when he thinks of going back to Poland, it makes him feel sad. He recalled his grandfather shouting and fighting and an argument downstairs between his grandfather and his own mother.

43. His happiest memory from his life in Poland was from the time he went to Krakow with his mother. His saddest or worst memory of Poland was when his mother's sister threw him out of a room and hit him. His saddest time was when his grandmother died and his sense that his grandfather had treated her badly.

44. Dr. O'Connor commented that it is impossible for a nine year old child, who had been through considerable distress throughout his life, to form his views entirely independently given the degree of dependency he invariably feels upon his mother. He concluded that there was little doubt that his view of his life had been superimposed on his mother's because he seemed very attached to her. He did not get the impression that he was rehearsing his answers however. He seemed to speak honestly and frankly, was not cautious in his replies and did not have to check if he was giving the correct answers to questions. While his mother naturally influenced him, he was open and frank and there was no evidence of his being coerced or fearful. The child's favourite memories of Poland appeared to be at the time when he was living with his mother after the death of his grandmother.

45. Dr. O'Connor concluded that it is very clear that D. imagines and wishes for his future to be with his mother. As an immature nine year old he does not think beyond that. He considers that the child appears to have settled well in Ireland in his home and in his relationship with his mother. Dr. O'Connor stated that given the somewhat traumatic history he had endured up to his departure to Ireland he was concerned about the effects on his educational and psychological development if another change were initiated that would cause major disruption to his life. He stated that notwithstanding the legal issues affecting his case and the rights of any person involved, the child's educational, emotional, social and psychological development should be considered very seriously particularly given the degree to which it appears to have been neglected in the past.

The respondent's employment position

46. The respondent states that she obtained employment immediately on arriving in Ireland and worked for a cleaning company. She has been in receipt of job-seekers allowance since October, 2007, and states that she is about to commence a six month FAS course in sign writing on 23rd June, 2008.

Possible consequences of an order for return

47. The respondent states that should D. be returned to Poland (unless steps are taken on this issue) he would immediately be taken from his mother without any inquiry into his welfare and that in the event of this Court ordering his return, the only mechanism for securing safeguards for K.'s welfare and such return would be founded upon a "grave risk" defence being established by the respondent - namely that there is a grave risk to the child of psychological harm at being placed in an intolerable situation.

48. She states that there is a grave risk that the return of the minor to the jurisdiction of the courts in Poland would expose him to such psychological harm.

49. I would observe that clearly any traumatic parting of the respondent and D. would be detrimental to his welfare.

European Arrest Warrant
50. A further troubling aspect of the case is that apparently a European arrest warrant has been issued in respect of the respondent. This is an issue currently pending in the High Court Extradition list.

51. The decision upon which the warrant is based is that of the Polish Regional Court made on 14th December, 2006, amending a previous order of that court of 30th November of that year. It would appear to permit or direct the preliminary detention of the respondent for a period of thirty days from the date of arrest.

52. The warrant relates to two offences, (i) that in the period between 3rd November, 2005, to the date of issue she had abducted the minor the subject matter of these proceedings; (ii) that in the same period she had failed to comply with an order whereby her own parental rights were restricted and that the child should be placed in foster care. The maximum sentence for the offence is three years.

53. The order states that this decision was rendered *in absentia*, and that pursuant to Article 254.1 of the Polish Penal Procedure Code, the accused may file an application for annulment or amendment of the preventive measures. The decision on this application is to be made, at the latest, within three days by a prosecutor or after the filing of an indictment to the court by the court before which the case is pending. This order was made on 17th December, 2007. The court has not received any information as to the background circumstances of its issuance.

54. The court has, however, seen correspondence to the effect that the respondent would be entitled to apply for "safe conduct". This might be made by an application by the respondent herself, or her legal representative. This information was provided in a letter dated 16th May, 2008, from Ms. Weronika Skiba-Wojciechowska, on behalf of Judge Biernacka of the Polish central authority relating to the Hague Convention in the Ministry of Justice in Poland. The court has no further information as to precisely what would occur to the respondent on her return to Poland, nor as to the elapse of the time which would occur between her return to Poland and a resumed court hearing. The court has been informed that it is not possible to obtain any information with regard to an undertaking from the Polish prosecuting authorities.

55. There is no evidence that the respondent has made any application for a "safe conduct" to facilitate the situation if an order is made by this Court on the issue or the extradition application.

Findings
56. To summarise, I am satisfied (1) that the respondent did abduct the child the subject matter of the proceedings from Poland; (2) that the desire of the minor is to remain in the custody of his mother and in Ireland; (3) that there is outstanding a European arrest warrant as against the child's mother, (4) the implementation mechanism potential effects and timing of this order is unclear; (5) there has been no evidence of impropriety on the part of the prosecuting or judicial authorities in Poland. Such evidence as there was from the respondent consisted of a bare allegation and no more. The respondent had ample opportunity to provide further information on this issue by affidavit if she so wished; (6) the applicant has not had actual custody of the minor since 2005, although efforts were made to initiate proceedings in Denmark within a twelve month period of his removal from Poland in 2006; (7) the minor has made significant progress in Ireland in his education; (8) there is, however, no other evidence in relation to his having formed relationships or associations in a broader sense. He is aged nine and a half years and clearly in a situation where his mother's views will predictably affect his own outlook having been with her since 2005. His willingness to please and his close attachment to this mother are remarked on in Dr. O'Connor's report to the court; (9) as a matter of probability a traumatic or sudden alteration or change in custody would probably have a detrimental effect on his wellbeing.

Issues conceded
57. The respondent has now conceded the issue of right of custody and that the applicant was lawfully exercising his rights.

58. It falls next to consider the child's objection for returning to Poland. In this context it is to be noted that while the applicant is entitled to immediate custody of the child in the event of his return to Poland he has undertaken to this Court to forebear from enforcing that right pending the determination of a full welfare hearing in the Polish courts. Therefore the return of the child to Poland does not necessarily mean his immediate return to the care of the applicant. This is of course subject to the effect of the European Arrest Warrant.

Article 13 of the Hague Convention
59. Article 13 of the Convention provides that the court may refuse to order the return of a child if it finds that the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." This provision of Article 13 of the Convention has been enhanced and strengthened by Article 2 of the Brussels II R Regulation (Council Regulation 2201/2003). This regulation mandates this Court to hear a child unless it is inappropriate having regard to the child's age or degree of maturity. However, both under the Regulation and the Convention, once the child has been given an opportunity to be heard this obligation is satisfied. For reasons outlined later, the level of obligation in this case is in accord with the terms of article 13 of the Convention only.

The Evidence in the light of the Convention
60. The views of the child are not synonymous with an obligation to bow to the child's wishes; these have been been fully assessed by Dr. O'Connor and outlined in this judgment.

61. In this case, the child is nine and a half years of age with some acknowledged learning difficulties. He cannot be said to be particularly mature for a child of his years. A psychologist's report of 8th June, 2006, (made while he was still in Poland) stated that his intellectual development falls into the lower level of intelligence than average. This is borne out by an earlier report of 2nd June, 2005. Both reports, together with that of Dr. O'Connor, show that he displays immature social and emotional behaviour, although he has made considerable progress since his arrival in Ireland and his attendance at school.

62. It is also necessary for the respondent to establish that the child's views have been independently formed without influence from his mother. It is to be noted as indicated earlier Dr. O'Connor concluded there is little doubt that his view of this life has been superimposed on his mother because he seems very attached to her. There is no evidence of coaching or coercion.

63. While I am prepared to attach significant weight to the views of the child, I regret I am not convinced that these views are in law so compelling as to justify an order refusing the return of the child.

64. In *D.C. v. L.C.* (Unreported, High Court, 13th January, 1995), Morris J. stated:-

> "I am of the view that in the exercise of my discretion under Article 13 of the Convention to refuse to return the child to its country of origin if the child objects, that objection must be one which is advanced for "mature and cogent reasons. I accept the foregoing as the proper test and it is the test adopted by Ewbank J. and the Court of Appeal in England in *S. v. S*. Vol. 2 F.L.R. 492 1992."

65. In *S. v. S.* (Child Abduction) (Child's Views) [1992] 2 F.L.R. 492, the English Court of Appeal held that the nature of a child's objection must be to returning immediately to the country of habitual residence and to the care of the person with the rights of custody. To 'open the door', to this defence, a court must establish (a) (i) whether the child objects to being returned and (ii) has attained a level of maturity at which it is appropriate to take account of such views and; (b) whether the objections to being returned derive from a wish to remain with the abducting parent who also avers she has no wish to return; *S v. S* holds there is no age below which a child is to be considered as not having attained sufficient maturity for his views to be taken into account.

66. In this case, the child's objection appears, on balance, to be more to return into the care of the applicant than the risk of being separated from his mother. It is difficult to distinguish. But he is not a mature independent nine year old.

67. In conjunction with the fact that the child has not attained a sufficient degree of maturity that would trigger the possibility of fully relying on the defence, I consider that, in any case on balance, the child's objections cannot be a determinative factor to be taken into account. In *S. v. S*. cited above, a nine year old child was considered to have achieved the required level of maturity to have regard to her views. However, that court specifically considered her intellectual ability and fluency. These were determining factors. Also, her reasons for objecting were considered cogent and mature, and not solely related to a desire to remain with a particular parent. I consider that, on balance, the evidence in the instant case falls short of these tests.

68. In *T.M. v. M.D.* [2000] 1 I.R. 149, the Supreme Court adopted the reasoning and approach outlined in *S. v. S*. and quoted from that judgment with approval at pp. 161-162:

> "It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion."

69. This consideration is applicable here. But these views cannot be determinative. I am unable to find that the level of maturity of the child in this case should (as was submitted), be seen as that of an eight year old. There was no evidence to that effect. Such evidence that there is as to the degree of his development places D.'s reading development in English as being that of a child aged 7.2 years. Thus I do not find there is evidence to show that D.'s views are those of a mature nine year old capable of forming his views maturely. The evidence falls short of this.

70. In *Re K. (Abduction: Child's Objection)*, [1995] 2 G.L.R. 977, the child in question was seven and a half years of age and claimed to be terrified of her father and stated she wanted nothing to do with him and did not want to go back to the country in which she lived. Wall J. ordered the child's return and stated at p.996:-

> "First of all, I have to say that I am not satisfied that P. has indeed reached an age and degree of maturity at which it is appropriate to take account of her view."

71. While the English authorities are persuasive, the authority of *T.M. v. M.D.*. is binding on this court.

72. Furthermore, I conclude that even if I were satisfied that the child had reached the necessary degree of maturity and that the objections complied with the requirements of the Convention this would not end the matter. The views of the child are to be balanced against the overall countervailing objectives of the Convention when deciding whether they should prevail. [*Re T. (Abduction: Child's Objections to Return)* [2000] 2 F.L.R. 192.

73. In *Vigreux v. Michel* [2006] 2. F.L.R. 1180, the Court of Appeal ordered the return of a fourteen year old boy to France. The respondent had taken the child out of the jurisdiction in breach of a court order and pending an appeal. At first instance, the trial judge nonetheless exercised discretion in favour of refusing the order for return. But here he was partly influenced by educational and welfare considerations. His conclusions were criticised by Thorpe L.J.:-

> "These welfare considerations are precisely the sort of considerations that Art. 11(3) of Brussels II Revised is designed to eliminate from the account… Furthermore, these considerations are dwarfed by the very profound concerns for the child's welfare arising out of the very issue identified by the order of 7 December 2005 namely - the particular conflicting background between both parents and the writings of the father…" [at para. 33].

74. He added:

> "Therefore, in my view, this was not a case in which peripheral welfare considerations could be introduced into the discretionary conclusions. On the application for return the judge had to weigh only the nature and strengths of [the child's] objection against the policy of Brussels II Revised and the fact that the essential welfare investigations and decisions must be taken in France" [para. 35].

75. The point of principle is equally applicable to the Hague convention.

New Environment

76. The second paragraph of Article 12 of the Convention provides:-

> "The judicial or administrative authority even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

77. I am satisfied that in this case relevant dates are 26th September, 2006, when the abduction took place and the date of the commencement of the proceedings namely the 12th December, 2007.

78. However, the following matters should be taken into account. First, the respondent removed the child from his habitual residence surreptitiously and (I am satisfied) placed him in a country where he had no probable connection. Second, the applicant applied in July, 2007, (well within the twelve month time limit) to the Danish Central Authority for the return of the child. And third, his

additional application to the Irish Central Authority in these proceedings was on 8th October, 2007, just over two weeks outside the twelve month period. The expiry of more than twelve months from the date of the order of 26th September 2006 is by no means determinative. It is, however, necessary to consider the issue of 'settlement' in a new environment.

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

80. In this case, the evidence does not point to any particular attachment to Ireland but rather an attachment to the mother and an anxiety to remain in her care. In none of the affidavits, nor in the report of Dr. O'Connor has there been any reference to the child having established a significant 'settlement' (i.e. to place, home, school, people, friends activities and opportunities) in Ireland or to his having become particularly involved in the social fabric of the community in which he lives. In fact Dr. O'Connor stated that the child's English remained relatively poor. He stated that the child appeared to have settled well in Ireland at school, in his home and in his relationship with his mother. But, this in itself does not denote the level of settlement in the environment envisaged by *Re N*.

Settlement and Subterfuge
81. In A*.K. v. A.K. (Child abduction)* [2007] I.R. 283, Gilligan J. accepted there was evidence that the older of two children had become fully integrated with her classmates and friends in a local community. But he also held that an absence of concealment or subterfuge was relevant to the fact that the family had become settled (para. 25).

82. In *Cannon v. Cannon* [2004] E.W.C.A. Civ.1330 (also reported at [2005] 1 W.L.R.32), Thorpe L.J. in the Court of Appeal had found that each such case should be considered on its own facts but that:-

> ". . . It will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return". (para. 52).

83. That judge added:-

> "I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay." (para. 53).

84. Both *Re N.* and *Cannon* above were quoted with approval by the Supreme Court in *P.L. v. E.C.* [2008] IEHC 19. In that case, the court distinguished the earlier case *of P. v. B.* (No.2) [1999] 4 I.R. 185 on the basis that the applicant in the latter case (*P. v. B.*) delayed without any attempt to make contact for twenty months. In *P.L. v. E.C.* the Supreme Court also approved of the judgment of Dunne J. in the High Court where she stated that there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts and that this factor "must also be put in the balance when considering the issue of settlement".

85. I consider that there is significant evidence of subterfuge here. The respondent in this case had no family in Ireland (she apparently had some connections in England). The applicant had no starting point in trying to trace her. She departed from Poland without notice. This was two days before the date which the latest order took effect. She did not inform the court in Poland as to her whereabouts. There is no evidence she informed any official of her whereabouts afterwards. Subterfuge can, of course, be more complex involving the creation of false identities on false passports. But there is sufficient evidence here for such finding.

86. Moreover, even if settlement had been established there is nonetheless a discretion which must be exercised by the court in deciding whether to order the child's return. In *Canon v. Canon* above Thorpe L.J. stated at p.50:-

> "Even if settlement is established on the facts the court retains a residual discretion to order a return under the Convention. The discretion is specifically conferred by article 18. But for article 18 I would have been inclined to infer the existence of a discretion under Article 12, although I recognise the power of the contrary arguments."

87. In *P.v. B.* the Supreme Court refused to order the return of the child because of the special circumstances of this case which arose largely because of inappropriate delay in commencing the proceedings. In *A.K. v. A.K.*, Gilligan J. also exercised discretion under Article 18 of the Convention, in the absence of a finding that there had been any concealment or subterfuge. However, he ordered the return of the children notwithstanding that they had become settled in Ireland, exercising his discretion in the following terms at para. 46:-

> "Notwithstanding that I have come to the conclusion that the children are settled in their new environment I take the view that I have discretion to order a return pursuant to Article 18 of the Convention. I am satisfied that this discretion must be exercised in the context of the approach of the Convention bearing in mind the best interests of the children."

88. Here, on the basis of the findings, there is not even conclusive evidence of settlement. But there is sufficient evidence of subterfuge. The balance falls against the Respondent.

Grave risk
89. I now turn to the third facet of this case that is the case of grave risk. Article 13(b) of the Convention provides that the requested state is not bound to order the return of the child if the respondent establishes that there is grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. I consider that this is a factor which is of particular relevance in the instant case.

90. In the leading case of *A.S. v.P.S.* [1998] 2 I.R. 244, the Supreme Court ordered the return of the children to England and Wales, notwithstanding an issue that the father had abused one of the children. The court found that while there was a grave risk of danger to the children if they were returned to the care of their father, there was no such risk in returning them to the jurisdiction of England and Wales, where there are well developed protective mechanisms. The test for grave risk is an extremely high one. Denham J. observed at p.259:-

> "The law on 'grave risk' is based on Art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. This exception to the requirement to return children to the jurisdiction of their

> habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access".

91. In *R.K. v. J.K.* [2000] 2 I.R. 416, Barron J. quoted with approval at p.451, the following passage from *Friedrick v. Friedrick* (1996) 78F 3d 1060:-

> "Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist, in only two situations. First there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection. This is a very high threshold."

92. In this case, the respondent did not plead grave risk until a late stage in the case. It is stated that her reasoning was that she believed that she had a full defence under the heading "Rights of Custody". The reliance on "grave risk" must be seen in this light. Such State reliance mist be seen as part acknowledgement of the evidence that the respondent has not met the extremely high threshold required for this defence.

Undertakings

93. The respondent has also suggested that the defence must be pleaded in order to secure undertakings from the applicant to ease the transition back to Poland if an order is made. Such undertakings may be sought and accepted by the court to protect against any perceived risk to the child in the event of an order for the return. As can be seen from the applicant's affidavit he has undertaken not to enforce his custody order pending a full hearing in the Polish courts. He has also undertaken not to prompt or initiate a prosecution against the respondent. However, I am informed it is not possible for him to influence the prosecution authorities in Poland.

Prosecution

94. In *S.R. v. M.M.R.* [2006] IESC 7, the Supreme Court considered the question of whether undertakings of such nature can be given. In that case the applicant had undertaken not to pursue or facilitate a prosecution against the respondent in the USA or anywhere. The Supreme Court simply amended the undertaking to provide that without prejudice to the powers of the prosecution authorities in the parties' home State, the applicant would not make a formal complaint or initiate a prosecution against the mother.

95. Therefore it is not possible for the applicant in this case to give any undertaking that would go beyond what is suggested in *S.R. v. M.M.R.*.

96. Furthermore the respondent asserts a) that there is a risk of psychological rather than physical harm and b) a risk of an intolerable situation. While the applicant does not accept that such risk exists, it is clear that the respondent claims that this risk will only arise in the event that the child is separated from her. But she has not adduced clear and cogent evidence that return to Poland per se gives rise to any such risk, merely that the possibility of her being arrested on foot of an international arrest warrant, or the child being otherwise taken from her custody, will put the child's psychological wellbeing in danger.

97. The respondents' contention that the courts in Poland may not adequately be in a position to protect the welfare of the child, was based on an allegation against the prosecuting authorities. No cogent evidence whatsoever has been adduced to this effect. The allegations have been denied by the applicant. One would have thought that in the circumstances that if this was a clearly defined fear, clear specific evidence would have been adduced by the respondent.

98. In fact, the Polish courts have had a number of hearings and applications in this case over a number of years. They must, therefore, be best placed to make the most appropriate order concerning the child's care.

Philosophy behind the Convention

99. The philosophy of the Convention is based on the general trust or comity between contracting States in the knowledge that the appropriate mechanisms exist in the requesting States to secure the welfare of the child. I do not consider it is sufficient for the respondent to plead that she has no guarantee from the Polish authorities that she will retain custody of the child following return to Poland. The evidence would have to go further.

100. A similar argument was put forward unsuccessfully in *L. v. C.* [2008] IESC 19, where the respondent claimed that an Australian court had prejudged the question of access. She believed that the applicant should have no access because of alleged sexual abuse but that the Australian court was inclined to order access before the court reaches a conclusion. On behalf of the Supreme Court, Fennelly J. stated at para. 55:

> "The correct approach to the treatment of this issue is very well established in the case-law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence . . . a court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

101. In the *Minister for Justice (E.M) v. J.M.* [2003] 3 I.R. 178, Denham J. for the Supreme Court concluded as follows at p.191:

> "Ultimately it may be that the judicial determination of the issue of custody is that the welfare of the children is best met by them being in the care of the respondent in Ireland. Issues such as their care and education will be matters for such a court in addressing the issues of custody and access. However, that is not for this court on this application."

102. I consider that a similar approach should be taken in this case concerning the long term educational, psychological and care needs of this young child who, despite his stay in Ireland, is nonetheless a native Polish speaker. If his welfare is actually best met in the care of his mother, doubtless, the Polish authorities will reach such a conclusion. I consider it would be inappropriate to usurp the function of the authorities in the child's habitual residence by this court substituting its judgment on such welfare issues for those of the Polish courts. [See *Re. L.* (Abduction: Pending Criminal Proceedings) [1999] 1 F.L.R. 433].

Separation and criminal sanction against abducting spouse

103. A number of authorities are relevant in relation to the question of the return of the child bringing about a separation for the primary care giver. In *Re. L*. previously referred to, Wilson J, in the High Court of England, having considered the possibility of arrest and imprisonment, observed at p.440:

> "Many Contracting States, including England and Wales, buttress the provisions of the Convention with criminal sanctions against parental kidnapping of children out of their jurisdiction. Following the mother's second abduction and prolonged disappearance, it was entirely predictable that criminal proceedings would be launched in Florida; indeed, it seems to have been the warrant for arrest pursuant thereto which triggered the international police activity that led to the location of the mother and children in England. There is no reason to think that, in deciding whether to continue with the prosecution following any return of the mother and children, the state prosecutor would exclude consideration of the interests of the children; nor that, in deciding whether to grant bail, or, in the event of conviction, whether to sentence the mother to any term of imprisonment, the Floridan judge would fail to pay significant regard to their interests."

104. A similar approach was taken in *Re. C*. (Abduction: Grave Risk of Psychological Harm) [1999] 1 F.L.R. 114S and *Re. K*. (Abduction: Psychological Harm) [1995] 2 F.L.R. 550.

105. There is no reason to conclude n this case that the courts in Poland have not had recourse to the psychological services. Quite clearly, the contrary is the case and these again can be put in place to safeguard the child. I do not consider that the respondent has adduced any evidence to the contrary and has not specified any arrangement that she requires the Polish authorities to put in place. She has taken no steps in relation to a 'safe conduct' provision.

Discretion

106. If any of the defences had been made out, it is accepted by the respondent that the court would, nonetheless, not be bound to return the child. However, the court must still exercise discretion having regard at all times to the overall policies of the Convention. It has been said repeatedly that wrongdoers should not be rewarded for their behaviour and that the purpose of the Convention will be defeated if respondents are successful in resisting applications for return. The discretion arises in a number of areas in the Convention, including Article 12 (2) return of a child after one year unless "it is demonstrated that the child is now settled in its new environment"; Article 13 (if one of the defences set out in sub-paragraph a. or b. of Article 13 is established or if the child objects to being returned and has attained an age of degree of maturity) or pursuant to Article 18 which provides the provisions of this chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

107. I consider that Articles 12 and 13 provide discretion for the court based on these defences. In addition, Article 18 provides further more general discretion to order the child's return. But the burden upon the respondent to satisfy the court that not only has a defence been made out but the discretion should be exercised in favour of not returning the child is a high one, having regard to the policies the Convention has set out in Articles 1 and 2.

108. In *B. v. B.* (Child Abduction) [1998] 1 I.R. 299, the Supreme Court considered the exercise of discretion in the context of a case where the defence of consent (not arising here) was made out. However, I consider that the principles of that case are applicable in general to cases where any one of the defences is made out. Denham J. stated at p.310 that the exercise of discretion is in keeping with the Convention for the following reasons:-

> "(a) the Convention stresses that the interests of the children are paramount;
>
> (b) the Convention desires to secure protection for rights of custody and access;
>
> (c) the objects of the Convention set out in art. 1 are to secure the prompt return of children wrongfully removed to, or retained in any contracting state, and to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states;
>
> (d) in considering the circumstances referred to in art. 13 *i.e* the consent to the removal, the judicial authority shall take into account the information relating to the social background of the child provided by the central authority or other competent authority of the child's habitual residence: see art. 13, final paragraph."

109. I find that the habitual residence of the child at the time of his removal was Poland. That is highly relevant to his custody and access arrangements. I consider that the policy of the Convention and its objective is to secure protection of access and to ensure that the rights of custody and of access under the law of one contracting State are effectively respected in other contracting States. The courts of Poland are best positioned to consider the circumstances of the child. There is no evidence of any consent to the removal of the child or a waiver the position too is to be seen in the context of the undertakings given. It is not irrelevant that the Polish courts have, on a number of occasions, considered in detail the child's welfare and made orders on that basis. The case remained active before the Polish courts and the respondent left Poland I consider in disregard of court orders made there. The discretion of this court must therefore be exercised in favour of a return to Poland.

Non Application of Brussels II R

110. The applicant has accepted that Article 28 of that Regulation requires that an order be served on a respondent before it can be declared enforceable. It is accepted that in this case the order was not served on the respondent prior to the commencement of the proceedings and it now appears that it will not be served. Therefore, the applicant does not rely on the provisions of Brussels II R for the purpose of these proceedings.

Conclusion

111. On balancing the factors in this sad case, I consider that the applicant has successfully made out that he is entitled to the relief claimed, that is to say the declaration that the respondent has wrongfully removed the child from the place of his habitual residence and into this jurisdiction within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction. He is entitled too, to an order for the return of the child named in the title hereof to the place of his habitual residence. I will hear counsel in relation to any other ancillary issues.