

**THE HIGH COURT**

**FAMILY LAW**

**[2013/18 HLC]**

**IN THE MATTER OF ARTICLE 11(6) OF COUNCIL REGULATION (E.C.) NO. 2201/2003 AND IN THE MATTER OF THE FOREIGN PROCEEDINGS ENTITLED 'FILE NO. 111 Nsm, 431/11 Oz 80/11, INITIATED BY M. H. A. WITH THE PARTICIPATION OF A. P. FOR THE RETURN OF THE MINOR A. A. UNDER HAGUE CONVENTION BEFORE THE DISTRICT COURT FOR G. W. III FAMILY & YOUTH AND ON APPEAL FILE DOCKET VCa531/121 BEFORE THE REGIONAL COURT OF G. W. V CIVIL APPEAL DIVISION' AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AS AMENDED AND IN THE MATTER OF A. A. (CHILD)**

**BETWEEN**

**M.H.A.**

**APPLICANT**

**AND**

**A. P.**

**RESPONDENT**

**INTERLOCUTORY JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 16th day of December 2013**

1. The present proceedings are before the Court pursuant to Article 11(6) to (8) of Council Regulation EC/2201/2003 ("Regulation 2201/2003"). They concern the child, Alan (not his real name), who is the son of the applicant ("the Father") and the respondent ("the Mother").

2. The Father is, by origin, a Kurdish Iraqi born in Iraq. He left Iraq in 2000 and came to Ireland in 2006. The Mother is a Polish national who came to Ireland to work in 2007.

3. The Father and the Mother met in a town in the south of Ireland in 2007, when both working in the same restaurant. They commenced a relationship. She went with him to a town in the northern part of Ireland, initially living together in a hostel and thereafter in rented accommodation.

4. The Mother became pregnant. On 17th August, 2007, the Father and the Mother married in a civil ceremony in Ireland. Their marriage certificate has been produced to the Court.

5. Their son, Alan, was born on 28th January, 2008, in a hospital in Ireland.

6. The Father has worked in the hairdressing business at different locations in towns in the north-east of Ireland. He has held a PPS Number from the Department of Social and Family Affairs since at least January, 2007. In 2008, he received a "Stamp 4" permitting him to reside in Ireland for five years. However, this does not permit him to travel out of Ireland and he has no travel documents.

7. In the summer of 2010, the Father opened his own business and states that he has been successfully running this business since that time.

8. On 23rd January, 2011, the Mother took Alan with her to Poland. The Father states that the Mother told him that her mother (*i.e.* the grandmother of Alan) had been diagnosed with cancer and was to undergo surgery later that month. He agreed that she could take Alan with her to Poland to visit for one month, bought their plane tickets and gave her money and drove them to the airport. I am aware from reading the Polish decisions referred to below that there may be some dispute between the Father and the Mother as to precisely what was said at that time, but what is not in dispute is that the Father only gave consent to the Mother to take Alan with her to visit in Poland for approximately one month after which they were to return to Ireland.

9. Whilst the Mother was in Poland, she informed the Father that she was not returning to Ireland with Alan.

10. The Father, in February 2011, commenced proceedings in Poland for the return of Alan to Ireland pursuant to the Hague Convention on Child Abduction and Article 11 of Regulation 2201/2003. Regrettably, a decision on that application was not taken until 7th August, 2012, when the Regional Court of G. W. Family & Youth Division made a decision dismissing the Father's application for the return of the child to Ireland. The delay appears to have been caused, at least in part, by the taking of evidence from the Father in Ireland.

11. The Irish Central Authority was notified of the making of that decision in August 2012, and subsequently received the decision and reasons. In October 2012, it was notified of an appeal taken against the decision. In December 2012, the Irish Central Authority was notified by the Polish Central Authority that the appeal had been dismissed. In February 2013, the Irish Central Authority received from the Polish Central Authority the decision dated 16th November, 2012, of the Regional Court of G. W. Civil Appeal Division dismissing the appeal of the Father and the court's reasons, with a translation in English.

**Irish Proceedings**

12. On 22nd March, 2013, the Minister for Justice and Equality, acting as Central Authority, by an originating notice of motion commenced these proceedings pursuant to Article 11(7) of Council Regulation 2201/2003, and O. 133, r. 11 of the Rules of the Superior Courts and naming as respondents the Father and the Mother. On the same day, on an *ex parte* application, the Court made an order giving directions in relation to the notification and service of the proceedings on the Father and the Mother and certain ancillary directions. Those directions included the service of a notification and the proceedings on the Father and the Mother, inviting

them to make submissions to the High Court of Ireland promptly and in any event within three months of the date of receipt of the notification. The order further provided that any such submissions must be in the form of a notice of motion grounded upon affidavit issued within the present proceedings seeking such relief in relation to the child, Alan, pursuant to the Guardianship of Infants Act 1964, or such other relief as the High Court of Ireland might have jurisdiction to grant in relation to the custody of Alan.

13. The Father was served in Ireland and in response issued a notice of motion dated 27th June, 2013, returnable before the High Court on 7th July, 2013, seeking orders in relation custody and access of Alan. The orders sought were both final and interlocutory in nature. It was grounded on an affidavit of the Father. On 17th July, 2013, the Father issued a further motion seeking interlocutory relief made returnable for 24th July, 2013. The first order sought is an interlocutory order for the return of Alan to Ireland pursuant to Article 11(8) of Regulation 2201/2003.

14. The proceedings of the Central Authority and notification and order of the Court of 22nd March, 2013, were served on the Mother in Poland by registered post sent on 18th April, 2013, and also pursuant to Regulation EC 1393/2007 of the European Parliament and Council on the service in Member States of judicial and extra-judicial documents in civil or commercial matters (service of documents) and repealing Council Regulation EC 1348/2000. Ms. Grainne OMahony, solicitor with the Office of the Chief State Solicitor, in an affidavit of service sworn on 16th July, 2013, deposed that on Thursday 25th April, 2013, she took a call from the Mother who confirmed that she had received the documents. The Mother also enquired "if her husband had made contact". Ms. OMahony states that she confirmed at that stage that he had not, that she explained the process briefly to the Mother and said that if her husband decided to contest, that he had to notify her. Ms. OMahony also told her that if that happened, the Central Authority would remove itself from the proceedings and that she (the Mother) would have to become involved in the proceedings in Ireland. Ms. OMahony asked for an email address, and whilst the Mother said she would send an email address, Ms. OMahony did not receive this.

15. The notice of motion issued by the Father on 27th June, 2013, and made returnable for 17th July, 2013, and the grounding affidavit of the Father and exhibits have also been served on the Mother at her address in Poland. In an affidavit of service of Ms. Elaine Ryan, a law clerk employed by the solicitor for the Father sworn on 16th July, 2013, she deposes to the posting of those documents and the fact that they had not been returned.

16. The Father's further notice of motion seeking interlocutory relief issued on 17th July, 2013, and made returnable for 24th July, 2013, was also sought to be served by registered post on the Mother in Poland. Ms. Dorothy Ware, solicitor acting for the Father, in an affidavit sworn on 15th November, 2013, deposes that those papers were originally returned from Poland on 26th August, 2013, marked "non-reclame".

17. The Mother has commenced divorce proceedings in Poland against the Father. Those proceedings have been served on the Father in Ireland. Ms. Ware received instructions from the Father to make contact with the Mother's lawyers in Poland, and in the course of doing so, sent to the Mother's Polish lawyers all of the papers relating to the two motions of the Father presently before this Court. Those documents were sent on 30th August, 2013, with a covering letter translated into Polish.

18. On 8th October, 2013, the Mother sent the following email to Ms. Dorothy Ware, the solicitor for the Father:

"Dear Ms. Ware,

I am writing to you i the matter of the ongoing cas in Ireland. I have received all the documents through my solicitor. I have received the information that she cannot represent me in Ireland in this case and I am trying to find an another representative in Ireland. Thank you for all the information. I know you are doing the best job that you can even if you are helping my husband to take our son back to Ireland. I am fully aware that i have taken my son to Poland unlawfully as the court in Poland, who have taken the decision to not send Alan back to Ireland, have clearly indicated. I know I have did that just to protect my son, and in a way to protect my own life. I just want you to know that I really love my son and I want him to have the best life possible, which is why I am trying my best to give him everything that he needs and to protect him even form his own father. My son is aware that he has his dad in Ireland but he is sad that he never calls him or does anything to contact him. He loves him very much but he does not remember anything about him, which is sad. If my husband want's the full custody please just ask yourself why my husband never contacts his son or give him a birthday card.. I am sorry but it does make me frustrated. I have send [Alan] to school where he is learning hard. He speaks Polish beutifully but have forgotten English, but we are trying to learn it again. He is very smart and very likable, and you can ask anyone who know him how sweet and happy he is. I do not want to change that. Please have that in mind. I am trully sorry for the way I have ended my relationship with [the Father] but I have always belived in my husbands treaths of losing my son or my life. I hope you can forward a message to my husband: Alan loves you, and no matter what happens please try to contact him. Just send him a card- that is all.

Thank you very much.

I hope I can find a representative in time for the Court case.

Best regards

A. P."

19. On the above facts, the Court is satisfied that the Mother has been served with each of the motions issued on behalf of the Father seeking orders, including interlocutory ones seeking an order for the return of Alan to Ireland pursuant to Article 11(8) of Regulation 2201/2203 and in relation to custody of and access to Alan.

20. Ms. Ware has deposed that she subsequently spoke by telephone with the Mother. On 16th October, 2013, at a hearing before the Court. The Court was informed by counsel for the Father that the Mother was trying to arrange legal representation for her in the proceedings in Ireland. On that day, the Court adjourned the matter for a further period of two weeks to allow the Mother arrange legal representation in Ireland and directed that she should file a replying affidavit to the two affidavits of the Father and deliver same prior to 30th October, 2013. The Mother was notified by Ms. Ware by email of the orders made by the Court on 16th October, 2013. Ms. Ware also furnished, on the same date, the name of a lawyer in Ireland who might be in a position to represent the Mother.

21. On 16th October, 2013, the Court also made an order excusing the Central Authority from further participation in the proceeding and amending the title to that which appears on this judgment.

22. When the matter came before the Court on 30th October, 2013, the Court was informed that whilst the Mother had made contact

with the Irish solicitor whose name she had been given, there was no representation yet arranged for the Mother in Ireland. On 30th October, 2013, the Court adjourned the matter for one final time prior to the hearing of the interlocutory application to give the Mother a final opportunity of arranging representation in Ireland and preparing and delivering a replying affidavit if she so wished. The Court directed that any affidavit must be delivered by 12th November, 2013, and that she must either appear in person or have a lawyer in Ireland represent her at the hearing on 20th November, 2013. The Court also set down the Father's interlocutory application for hearing on 20th November, 2013.

23. The Court also requested the solicitor for the Father to make enquiries in relation to cross-border legal aid and to forward to the Mother by email the relevant forms. The solicitor for the Mother, by email of 1st November, 2013, sent a copy of Commission decision of 9th November, 2004 (2004/844/EC) in relation to legal aid for cross-border disputes and the relevant forms.

24. Despite all the efforts made to give the Mother an opportunity to be represented before and be heard by the Irish High Court prior to the hearing of the Father's interlocutory application, there was still no appearance by or on behalf of the Mother before the High Court at the hearing of the interlocutory application on 20th November, 2013. It was necessary in the interests of the fair administration of justice to make progress in the determination of the proceedings and in the interests of the child and to hear the Father's interlocutory application. Counsel for the Father prepared written legal submissions and supplemented those with oral submissions. The facts relied upon are those in the affidavits before the Court. There was no oral evidence. At the end of the hearing, the Court asked counsel for the Father to get instructions as to whether the Father would agree to certain matters to facilitate a visit by the Mother and Alan to Ireland. The Court adjourned the hearing to 27th November, 2013, when counsel confirmed the Father's agreement to the matters set out below. The Court then reserved its decision and this judgment is the decision on the Father's interlocutory application.

#### **Jurisdiction of the Court**

25. These proceedings come before the Court pursuant to Article 11(7) of Regulation 2201/2003. Regulation 2201/2003 governs the respective jurisdictions of the Irish and Polish courts in relation to disputes between the Father and the Mother in relation to Alan. The matters upon which the Court is being asked to make orders in the Father's applications are "matters of parental responsibility" within the meaning of Regulation 2201/2003. Article 2 defines the term 'parental responsibility' as meaning "all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access".

26. Article 8 is the starting point for a consideration of jurisdiction. It provides:

#### **"Article 8**

##### **General jurisdiction**

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."

27. Article 10 applies to jurisdiction in cases of a wrongful removal or retention of a child between Member States. It is not in dispute on the facts herein that the Mother wrongfully retained Alan in Poland in February 2011, within the meaning of Regulation 2201/2003. The District Court in G. W. also so decided. Article 10 provides:

#### **"Article 10**

##### **Jurisdiction in cases of child abduction**

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

(ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."

28. As appears from the above, on the facts herein, the Irish courts retain their jurisdiction in matters of parental responsibility in respect of Alan until he has acquired a habitual residence in Poland and one of the conditions in Article 10(b) have been met. In my judgment, on the evidence before this Court, none of the conditions in Article 10(b)(i) to (iv) inclusive have yet occurred.

29. Accordingly, the Irish courts retain jurisdiction in respect of the child, Alan, in matters of parental responsibility pursuant to the

combined provisions of Articles 8 and 10 of Regulation 2201/2003. Further, it would appear that the Polish courts do not have jurisdiction in matters of parental responsibility in relation to the child, Alan, notwithstanding that he may now be considered as habitually resident in Poland. The general jurisdiction given by Article 8.1 is expressly made subject to the provisions, *inter alia*, of Article 10 and for the reasons stated, the courts of Ireland retain jurisdiction pursuant to Article 10. This retention of jurisdiction by the court of original habitual residence of the child *i.e.* Ireland, on the facts herein, is part of the procedural scheme envisaged by Articles 11(6) to (8) of Regulation 2201/2003. These provide:

## **"Article 11**

### **Return of the child**

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."

30. The scheme of Article 11, following the making of an order of non-return, pursuant to Article 13 of the Hague Convention, is that, firstly, pursuant to Article 11(6), the Court which made such order (in this case Poland) must immediately, either directly or through its Central Authority, transmit a copy of the order of non-return and the relevant documents, and in particular, a transcript of the hearings to the Court with jurisdiction or Central Authority in the Member State where the child was habitually resident immediately before the wrongful retention (in this case Ireland). Article 11(7) then requires a notification to the parties and an invitation to them to make submissions to the court of original habitual residence (Ireland) "so that the court can examine the question of custody of the child". This was done by these proceedings and directions given therein.

31. Article 11 prescribes neither the procedure to be followed nor the substantive law to be applied by the court of original habitual residence when examining the question of custody pursuant to Article 11(7). The nature of the jurisdiction retained by the courts of Ireland and the procedure to be applied was considered by this Court in some detail in an interim ruling delivered on 28th January, 2011, in *A.O-K. v. M.K.* [2011] IEHC 82, [2011] 2 I.R. 498. It is not proposed to repeat the discussion and full reasoning set out therein, but rather set out in summary the conclusions and approach to be followed by the Court in hearing the Father's interlocutory and substantive application herein consistent.

32. First, the final or substantive decision which must be taken by the High Court pursuant to Article 11(7) on the Father's application is a decision on the custody of the child.

33. Second, both the substantive law to be applied and the procedure to be followed are the applicable Irish law and procedure. The Irish procedure must comply with the minimum procedural requirements stipulated, in particular by the requirements of Article 42 of Regulation 2201/2003.

34. Third, in Ireland, the High Court, in proceedings relating to the custody of a child, has jurisdiction pursuant to the Guardianship of Infants Act 1964 (as amended) and its inherent jurisdiction to make interim or interlocutory orders, intended to last until the full hearing of the custody proceedings, including where a child should live without a prior full welfare examination. All such decisions are decisions which must be taken in the best interests of the child.

35. Fourth, it follows from the judgment of the European Court of Justice ("the ECJ") in *Povse v. Alpago (Case C-211/10 PPU)* [2010] E.C.R. I-06673 that a decision on the return of the child to Ireland, enforceable in accordance with Article 11(8), may be an interim or interlocutory decision made in proceedings before the Court pursuant to Article 11(7) before a final decision is made therein on the question of custody.

36. The judgment of the ECJ in *Povse* was on a reference for a preliminary ruling from an Austrian court where the issue before that court was the enforceability of an order made by an Italian court pursuant to Article 11(8) of Regulation 2201/2003 for the return of the child from Austria to Italy in pending custody proceedings in Italy. In the terms I have used in this judgment, it was an interim or interlocutory order made by the Italian court for the return of the child to Italy. The return order was made by the Italian court "on the ground that it was desirable to re-establish contact between the child and her father, which had been broken because of the mother's attitude". The Italian court also issued a certificate under Article 42 of the Regulation.

37. The second question referred by the Austrian court in proceedings before it to enforce the Italian return order was "does a return order fall within the scope of Article 11(8) of the Regulation, only where the court orders return on the basis of a judgment on custody delivered by that court?" The answer of the ECJ to that question at para. 67 was:

"67. Consequently, the answer to the second question is that Article 11(8) of the regulation must be interpreted as meaning that a judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child."

## **Interlocutory Orders Sought**

38. The Father, in his interlocutory motion, seeks a number of orders. The terms "interim and interlocutory" is used in this judgment to mean an order made by the Court intended to last either until the decision on custody is made by the Court following a full custody hearing or a further interlocutory order is made by the Court. The interlocutory orders sought on behalf of the Father in the order in which I propose dealing with them in this judgment are:

- (i) an order granting the Father custody of Alan jointly with the Mother;
- (ii) an order pursuant to Article 11(8) of Regulation 2201/2003 for the return of the child to Ireland;
- (iii) an order for access by the Father to the child in Ireland and/or Poland;
- (iv) an order for the interview and assessment of the Father, the Mother and Alan pursuant to s. 47 of the Family Law Act 1995.

#### **Article 42 of Regulation 2201/2003**

39. If the Court now makes an order pursuant to Article 11(8) of Regulation 2201/2003 for the return of the child to Ireland, such an order is, for the purposes of Article 40(1)(b) of Regulation 2201/2003, "a judgment given pursuant to Article 11(8)". If it is to be enforceable in Poland in accordance with Article 42(1), it must be certified by the Court in Ireland in accordance with Article 42(2). Article 42 provides:

#### **"Article 42**

##### **Return of the child**

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:

- (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
- (b) the parties were given an opportunity to be heard; and
- (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)). The certificate shall be completed in the language of the judgment."

40. The Court has considered whether Alan should be given an opportunity to be heard on this application and has concluded that a hearing of Alan on this application is inappropriate, having regard to his age. Alan is not yet six years old. The Court does not have at its disposal the means of arranging for a child of under six years, resident in Poland in the care of his Mother (who has not appeared or been represented before the Court) to be given an opportunity to be heard in a manner appropriate to his age. Accordingly, the Court has concluded that a hearing is inappropriate, having regard to his age on this interlocutory application.

41. The Court is satisfied that each of the Father and the Mother were given an opportunity to be heard. The Father is represented by solicitor and counsel and has put evidence on affidavit before the Court. The Mother has been served with the proceedings and has been given, on repeated occasions, opportunities of both filing affidavit evidence and arranging representation in the proceedings. She has not yet done so.

42. The Court has taken into account in reaching the decisions made in this judgment, the evidence underlying the orders made by the District Court for G. W. Family & Youth, and the Regional Court of G. W. Civil Appeal Division and the reasons given by those courts.

43. There is no evidence before the Court which requires the making or any order to ensure the protection of Alan after his return to Ireland.

#### **Joint Custody**

44. As the Father and the Mother were married to each other when Alan was born, they are, pursuant to s. 6(1) of the Guardianship of Infants Act 1964, jointly guardians of the child. As guardian of the child, they each are entitled, as against everyone other than each other, to the custody of Alan pursuant to s. 10(2)(a) of the Act of 1964. There is no evidence at present before the Court which would justify depriving the Father of his right to joint custody with the Mother of their son, Alan.

45. It is in the best interests of the welfare of Alan that there be an interlocutory order granting the Father joint custody of Alan with the Mother. One of the fundamental rights of a child is to maintain on a regular basis a personal relationship and direct contact with both parents. It is also in the best interests of a child that he be facilitated and enabled to do so unless there are objective reasons

for which contact with either parent would be damaging for the child. There is no such evidence before the Court in relation to the Father.

46. Nevertheless, the Court must take into consideration the fact that Alan is now living in Poland with the Mother and has not lived with his Father or had face-to-face contact with him for almost three years. It appears from the evidence before the Polish court that Alan has very little recollection of his Father. In such factual circumstances, it could not be considered to be in the best interests of Alan to make a change to the person in whose care he is to live.

47. Hence, the Court will make an interlocutory order pending final determination of the proceedings granting the Father and the Mother joint custody of their son, Alan, and granting to the Mother the day-to-day care and control of Alan subject to such rights of access for the Father as may be agreed between the Father and the Mother or ordered by this Court.

#### **Article 11(8) Order for Return**

48. The primary consideration of the Court in determining whether or not to make an order for the return of the child to Ireland pending the full custody hearing and decision on the question of custody must be what is now in the best interests of the child, Alan. In considering this question, the Court must have regard to his right as expressed in Article 24(3) of the Charter of Fundamental Rights of the European Union:

"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both of his or her parents, unless that is contrary to his or her interests."

As these are proceedings before the Court pursuant to Article 11(7) of Regulation 2201/2003, and the Court is considering the exercise of a jurisdiction for the purposes of making an order enforceable pursuant to Article 11(8), the provisions of the Charter apply pursuant to Article 51 thereof.

49. There is no evidence before the Court that it is contrary to the interests of Alan to be able to maintain on a regular basis a personal relationship and direct contact with both his parents. He has not had any personal relationship or direct contact with his Father for almost three years. The reason for this is what is admitted to be the wrongful retention of the child in Poland in February, 2011.

50. It is imperative in the best interests of Alan that he is now able to recommence establishing a personal relationship and direct contact with his Father. Given his age, the period for which he has had no contact, and also what appear to be potential language difficulties, this will have to be done on a step-by-step basis and with a careful approach. Nevertheless, face-to-face contact between Alan and his Father is an essential first step.

51. A relevant consideration as to where this first step should occur is that the Father is presently unable to travel to Poland. The status of the Father in Ireland and the restrictions on his ability to travel must have been known to the Mother when she commenced a relationship with the Father and when she became pregnant by him with Alan and married him. She also knew this when she decided to remain in Poland with Alan in February, 2011.

52. There is a further relevant consideration to this aspect of the interlocutory application. The Irish High Court is bound, pursuant to Article 11(7) of Regulation 2201/2003, for the reasons already set out, ultimately to make a decision on the custody of Alan. If the long-term intention of the Mother is to remain living in Poland, and the father in Ireland, then the Court will be faced with a particularly difficult decision to take in the best interests of Alan. It is essential that the Court has the benefit of an assessment made by an appropriate expert, following face-to-face interviews with each of the Mother, the Father and Alan, of the relevant factors which would contribute to a decision as to what is in the best interests of Alan. The one expert should conduct all three interviews and assessment. It is also desirable that such person has the opportunity of observing Alan with each of his parents. In practical terms, such interviews and assessment can only be conducted in Ireland and are essential for the full and proper determination of the custody proceedings.

53. The Court has noted from the reasoned decisions of each of the Polish courts that they appear to have accepted without questioning, the appropriateness or relevance to their decisions on the application for return and the appeal, the Mother's declared intention not to return to live in Ireland. On the evidence before those courts, there does not appear to be any objective obstacle preventing the Mother from returning to Ireland at least for a limited period of time as would be required pursuant to any interlocutory order for the return of the child pursuant to Article 11(8). This Court has the evidence of the email written by the Mother to Ms. Ware, the solicitor for the Father. That email demonstrates that the Mother loves her son and wants to do what is best for her son. This Court is entitled to presume if it makes an interlocutory order for the return of Alan to Ireland pending the full hearing and determination of these proceedings, that the Mother will, in the interests of her son, travel with Alan to Ireland. As already indicated in this judgment, whilst the Court is making an order for joint custody, it is also making an order pending the full determination of the proceedings, that the Mother have the day-to-day care and control of Alan subject to access by the Father. The intention of the Court is that even in Ireland, Alan would continue to live with the Mother pending the full custody hearing.

54. Provided the Mother and Alan travel to Ireland before 1st February, 2014, the Court should be in a position to hold the full custody hearing on a day or days during the two weeks commencing Monday 31st March, 2014.

55. The Court has concluded that it should now make an order pursuant to Article 11(8) of Regulation 2201/2003 that the child, Alan, be returned to Ireland pending the full custody hearing and the decision of the Court on the custody of Alan.

56. Notwithstanding the conclusion that the Court should now, in the interests of Alan, make an order for return of Alan to Ireland pending the full custody hearing and decision on custody, the Court recognises the potential disruption to the lives of the Mother and Alan, particularly if the Mother's long-term plans are to remain living in Poland. It also remains the Court's preference that the Mother would participate in these proceedings, arrange, if feasible, legal representation in Ireland, and voluntarily engage in both facilitating face-to-face access between Alan and his Father in Ireland and assist in enabling Alan be interviewed and assessed for the purposes of the full custody hearing in Ireland and participate herself in such an assessment. Hence, the Court proposes placing a stay on the order for Alan's return to Ireland, in the first instance, until 15th January, 2014, and if the Mother provides to the Court the undertakings and evidence set out below prior to 13th January, 2014, a further stay on the order will be placed. The effect of the Court placing a stay on the order means it does not come into effect. If the Mother does not provide the undertakings and evidence next outlined, then the order for the return of Alan to Ireland will come into effect and be immediately enforceable on 15th January, 2014.

57. The Father, through his counsel, his willingness to undertake to the Court that if the Mother voluntarily travels to Ireland with

Alan for a minimum period of two weeks on or before 1st February, 2014:

- (i) he will pay for accommodation for the Mother and Alan to stay in an identified guest house in A for a period of two weeks; and
- (ii) he will not apply to any Court to seek any order restraining the Mother from returning to Poland with Alan at the end of the two week period; and
- (iii) he will comply with any conditions imposed by the Court in relation to access with Alan during his visit to Ireland.

58. The Court is relying on such undertakings in reaching its decisions therein. The Court considers it to be a reasonable apportionment of the costs of travel and accommodation that the Father pay the full accommodation costs for the Mother and Alan for two weeks and that the Mother bear the travel costs for herself and Alan for the first visit to Ireland. In practical terms, this makes more sense than a sharing of travel and accommodation costs. The Mother will have to make the flight bookings and flight arrangements. The Father is able to arrange the accommodation in Ireland.

59. The undertakings which are required by the Court of the Mother in writing and to be delivered to the Solicitor for the Father on or before 13th January 2014, are:

- (i) an undertaking to travel with Alan to Ireland so as to arrive in Ireland on or before 31st January, 2014, and to remain in Ireland for a minimum period of two weeks. This undertaking must be supported by the evidence of confirmed flight bookings or other confirmed travel arrangements for the Mother and Alan;
- (ii) an undertaking to facilitate and support Alan in having access with his Father while in Ireland by means of daily contact;
- (iii) an undertaking to participate with Alan in such interviews and assessments as the Court may direct to be conducted whilst in Ireland for the purposes of preparation of a report pursuant to s.47 of the Family Law Act 1995;
- (iv) an undertaking to return to Ireland with Alan for the purposes of the full custody hearing at least three days in advance of the date fixed by the Court for the start of the custody hearing. The present estimate is that such hearing could take place during the two weeks commencing 31st March, 2014, provided the Mother and Alan travel to Ireland on or before 1st February, 2014, for a two-week period and participate in the assessment process; and
- (v) an undertaking that upon the Mother's return to Poland with Alan after his visit to Ireland to facilitate continuing telephone or Skype access between Alan and the Father as may be ordered by this Court pending the full custody hearing.

60. In the event that the Mother furnishes such undertakings in writing and evidence on or before 13th January, 2014, it would be the intention of the Court, on 15th January, 2014, to make an order that in the event that the Mother complies with the undertakings at paras. (i) to (iii) above that she be permitted to take Alan back to Poland at the end of the initial minimum two-week visit to Ireland. In addition, a further stay will be placed upon the order for return of Alan to Ireland pursuant to Article 11(8) of Regulation 2201/2003.

61. As the Mother has not yet appeared before the Irish courts, it appears appropriate to draw her attention expressly to the potential importance of the opportunity now being given to her by the decisions in this judgment to voluntarily bring Alan to Ireland for the purpose of face-to-face access with his Father for a two week period as a first step to re-establishing a relationship between Alan and his Father. If it remains the long-term plan of the Mother not to return to live in Ireland and the Court, on the full custody hearing, has to take a decision in relation to the custody of Alan in circumstances where, as a matter of probability, his Father and his Mother will continue to live in two different countries, the view which the Court forms as to the extent to which each parent is willing to assist and support Alan in maintaining and fostering his relationship with the other parent will be highly relevant to the decision to be taken. The actions of the Mother in retaining Alan in Poland without the consent of the Father, and the evidence recorded from her and the psychologist before the Polish courts, indicate some lack of understanding by her of the importance to Alan of maintaining a relationship with his Father. However, the email sent by the Mother to Ms. Ware on 8th October, 2013, indicates some better understanding on her part. The decision now to be made by the Mother as to whether she takes up the opportunity being given to her by the Court in this judgment to bring Alan voluntarily to Ireland for a period of two weeks, the primary purpose of which is to meet with the Father, will be an important evidential matter at the full custody hearing.

62. If the Mother does not furnish such undertakings in writing to this Court with the evidence of the travel arrangements made, then, on 15th January, 2014, the order for the return of Alan to Ireland pursuant to Article 11(8) of Regulation 2201/2003 shall come into immediate effect and be enforceable. The Court will issue the certificate required by Article 42(2) of Regulation 2201/2003. Thereafter the Order of this Court will be enforceable in Poland.

#### **Orders for Access**

63. There must be access between the Father and Alan face-to-face as soon as Alan comes to Ireland. In the event that the Mother decides, as the Court hopes, to voluntarily travel to Ireland with Alan, it is to be expected that the parties, with the assistance of their lawyers if necessary, can reach agreement as to the appropriate access for the Father. The Court will further consider the detail of any access orders required from the Court on 15th January, 2014. In the event the Mother gives the undertakings identified above, she is also at liberty to make submissions to the Court as to the appropriate access between Alan and his Father in Ireland.

#### **Order for Interview and Assessment**

64. There will be an order for interview and assessment of the Father, the Mother and Alan pursuant to s. 47 of the Family Law Act 1995. The Court will defer making the formal order until 15th January, 2014. The solicitor for the Father should identify and propose an appropriate assessor to the Mother in advance of 15th January, 2014. It is presumed that arrangements to be made will also require the presence of a Polish interpreter for both the Mother and the child.

#### **Reliefs**

The Court will now make the following interlocutory orders pending further order or the determination of these proceedings in the High Court:

- (i) an order pursuant to s. 11 of the Guardianship of Infants Act 1964 (as amended) granting the Father and the Mother

joint custody of Alan and granting to the Mother the day-to-day care and control of Alan subject to such rights of access for the Father as may be agreed between the Father and the Mother or ordered by this Court;

(ii) an order pursuant to Articles 11(7) and (8) of Regulation 2201/2003 that the Mother return Alan to Ireland;

(iii) a stay will be placed on the order at para. (ii) above until 15th January, 2014. On that date, a further stay will be placed on that order provided that on or before 13th January, 2014, the Mother has delivered to the Solicitor for the Father an undertaking in writing with the evidence of travel arrangements in the following terms:

(a) an undertaking to the Court to travel with Alan to Ireland so as to arrive in Ireland on or before 31st January, 2014, and to remain in Ireland for a minimum period of two weeks. This undertaking must be supported by the evidence of confirmed flight bookings or other confirmed travel arrangements for the Mother and Alan;

(b) an undertaking to the Court to facilitate and support Alan in having access with his Father while in Ireland by means of daily contact;

(c) an undertaking to the Court to participate with Alan in such interviews and assessments as the Court may direct to be conducted whilst in Ireland for the purposes of preparation of a report pursuant to s. 47 of the Family Law Act 1995;

(d) an undertaking to the Court to return to Ireland with Alan for the purposes of the full custody hearing at least three days in advance of the date fixed by the Court for the start of the custody hearing. The present estimate is that such hearing could take place during the two weeks commencing 31st March, 2014, provided the Mother and Alan travel to Ireland on or before 1st February, 2014, for a two-week period and participation in the assessment process;

(e) an undertaking to the Court that upon the Mother's return to Poland with Alan after the visit to Ireland to facilitate continuing telephone or Skype access between Alan and the Father as may be ordered by this Court pending the full custody hearing.

(iv) The undertakings to be furnished by the Mother must be in writing signed by the Mother and may be sent initially by emailing a scanned copy to the solicitor for the Father to be followed by sending the original by post.

(v) There will also be a direction to the solicitor for the Father to immediately furnish by email a copy of this judgment to the Mother. The Order of the Court should be served on the mother initially by email to be followed by service by prepaid post.

The Court will adjourn the making of further orders pursuant to this judgment until 15th January, 2014.