Neutral Citation Number: [2009] IEHC 585

THE HIGH COURT

FAMILY LAW

2009 27 HLC

IN THE MATTER OF THE CHILDREN ABDUCTION AND

ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND IN THE MATTER OF THE HAGUE CONVENTION

AND IN THE MATTER OF COUNCIL REGULATION 2201/2003

AND IN THE MATTER OF A.J.LI. AND J.P.LI. (CHILDREN)

BETWEEN:

P. LI.

APPLICANT

AND

E. LA.

RESPONDENT

JUDGMENT of Mr Justice John Edwards delivered on the 18th of December, 2009.

Introduction
This written judgment is supplemental to and in elaboration of a brief ex-tempore judgment delivered in this matter yesterday, the 17th of December, 2009 in consequence of which I made certain orders. I indicated at the time that as the matter had proceeded in the absence of the respondent, and as judgment was being delivered in her absence, that I would make available a detailed written judgment setting out my reasons for making the orders that I have seen fit to make. I now do so.

Background
The applicant is the father and the respondent is the mother of the children named in the title hereto (hereinafter "the children"). They are not married to each other. The applicant is German and the respondent is Polish. The children were both born in Poland and are Polish citizens. Moreover, it is accepted on all sides that the children's place of habitual residence is Poland. The older boy, A.J., was born on the 5th of March 1999 and is now aged 10 ½. The younger boy, J.P., was born on the 15th of November 2002 and is now aged 7.

The applicant is married to a German woman with whom he has two children, a son who is now in his twenties and a daughter now aged 18. The evidence as to how he became involved with the respondent is not at all clear but I am prepared to infer on the limited information that I have that he most likely became estranged from his wife at some point and then took up with the respondent during this estrangement. I am further prepared to infer that both the applicant and the respondent, and the children, lived together as a family unit in Poland for some years, until unhappy differences eventually developed between the applicant and the respondent, in response to which the applicant moved back to Germany where he now lives. It is somewhat unclear as to when precisely he moved back but the Court is under the impression that it was in or about 2006/2007.

If it be the case that the Court, in attempting to understand the distant historical background to this case, has drawn an incorrect inference or inferences, I do not believe that such inaccuracies would have any implications for the substance of my decision in this case as my decision is not based in any way upon the distant historical background but rather upon recent facts which I am satisfied are well established.

At the present time the applicant appears to be reconciled with his wife and is once again living with her. However, he maintains that he has at all times desired to maintain a relationship with his Polish children and to be a part of their lives.

The evidence before me is that as far back as 2006/2007 the applicant and the respondent were experiencing difficulties to such a degree that they were unable to agree on a variety of issues, including basic guardianship issues and in particular custody and access arrangements with respect to their children. Once again, the exact position is a little unclear. However, the Court has gathered from the documentation filed in the case that some sort of a joint custody arrangement may have been in place initially, although one that was evidently not working.

Then in February 2007 the applicant removed the children from Poland and brought them to Germany to live with him there. At approximately the same time both parties, respectively, separately commenced proceedings before the family law courts in Poland, each seeking sole custody of the children and to regulate or limit access by the other party. However, as the respondent was also claiming that the applicant had abducted the children without her consent and removed them to Germany, and as she was invoking the provisions of the Hague Convention to secure their return, all custody proceedings were stayed pending the outcome of her application for relief under the Hague Convention. The respondent was successful in securing the return of the children from Germany to Poland and they were returned on the

4th of August, 2007.

There have also been other disputes between the parties, about maintenance (or "alimony" as it is referred to in the documentation) and alleged intolerable behaviour on both sides. For his part, the applicant contends that the respondent is mentally unstable and an alcoholic. The respondent, in turn, contends that "because of the behaviour of the boys' father, life in Poland became a nightmare for me," (although, apart from alleged failures on the part of the applicant to live up to his financial responsibilities towards the respondent and the children, the exact nature of the nightmarish "behaviour" is otherwise unspecified). The Court merely notes that these disputes exist, or have existed. The Court cannot, however, be expected to resolve them or to decide as between the parties respective contentions on an application such as the present one.

Following the return of the children the previously stayed custody proceedings then duly went ahead. It is clear from court records exhibited before me that at an early stage the parties separate proceedings were consolidated or co-joined so as to effectively treat them as a claim and counterclaim respectively. By an order of District Court for Warsaw dated 13th of December 2007 (exhibited before me as exhibit "B" to the affidavit of the applicant sworn on 16th September, 2009, together with a certified translation) the applicant was granted an interim order "during the time of the court proceedings" giving him "the right to personal contact" (i.e. access) with the children on the 1st and 3rd weekends, respectively, of every month from 9 am to 6pm on both Saturdays and Sundays, to take place "at the place of stay of children in the presence of their mother." Further the Court resolved to decline (i.e. it refused) a cross-motion by the respondent seeking the Court's consent for the children to travel to Ireland with her between 19.12.2007 and 03.01.2008.

In furtherance of his application for custody the applicant sought, and, it is understood, was granted an order from the Court (although it is not exhibited) directing an assessment of the children by an appropriate health professional, as he claims to have been extremely concerned about their welfare in the care of the respondent. The applicant has stated that this assessment was due to take place on the 6th October 2008. However, on the 17th September 2008, and before the scheduled assessment could take place, the respondent abducted the children and removed them to Ireland without notice to, or the permission of, either the applicant or of the District Court in Poland.

Shortly after the respondent and the children arrived in Ireland the respondent sent an SMS text message to the applicant saying that she had taken the children to Ireland. However, she did not provide her exact whereabouts, and did not respond to communications from the applicant so that he was initially unable to confirm that she was telling the truth. The applicant later established through the Border Police in Warsaw that the respondent, accompanied by the children, had taken an aeroplane to Dublin on the 17th September 2008. The applicant subsequently, and within the 12 month period specified in Article 12 of the Hague Convention, initiated the present proceedings.

In the meantime, and on the 13th January 2009, the pending custody proceedings came up for hearing before the District Court Judge Dorota Szostak sitting in the District Court in Piaseczno, III Family and Minors Department. The case was called but there was a failure on the part of the respondent to appear. According to the court record (exhibited before me within exhibit "E" to the affidavit of the applicant sworn on the 16th September, 2009, together with a certified translation) the applicant, through his lawyer, applied "to establish the place of stay of the minors to be with their father and to continue the court proceedings despite the absence of the petitioner". The presiding Judge then rose for 15 minutes and upon resumption she announced "the court decision to be suspended", - which this Court takes as meaning that she was reserving or postponing judgment on this application. The record continues: "At that moment Mr M.La. appeared and submitted the power of attorney from his daughter. He also presents a letter from Dublin from the petitioner where it is declared that she has sent a letter to the Court". The accompanying letter, dated 5th of January 2009 and giving only "Dublin" as the respondent's address, has also been exhibited (within exhibit "E" aforesaid, together with a certified translation.) and it, having set forth a plea with respect to the respondent's circumstances, concludes:

> *"Because of the boys' school and my work and the costs I cannot come to Poland. That is why I asked my father Dr M.La. to represent me".*

The court record indicates that, faced with this letter, the presiding judge decided to postpone the trial until the 12th February 2009 and to issue a summons, to be served on the respondent at the address of her proxy (i.e. her father Dr M.La.) to secure the attendance of the respondent before the Court on that date.

Two days before the adjourned hearing, on the 10th of February 2009, the respondent wrote directly to the District Judge. Again this letter is exhibited (within exhibit "E" aforesaid, together with a certified translation.) and it asserts:

> *"I am very sorry but I am not able to appear at the court trial in Piaseczno on 12 February 2009."*

It again contains, for the most part, a plea with respect to the respondent's circumstances. It then concludes:

> *"Once again I apologize and ask for understanding. I cannot leave my work and children the school. Also, I have no one to leave them with. The costs of travel are also a serious problem. As I mentioned I bring up the family on my own, Mr L. explained recently the money was not sent because of the bank mistake. This is going on since September."*

This letter did not offer a specific return address but did offer "contact details" through "Madam Consul General Ewa Sadowska who in a certain way has been looking after me and the boys", care of The Polish Embassy, 5 Ailesbury Road, Dublin 4; alternatively, the Consulate of the Republic of Poland at 4-8 Eden Quay, Dublin 1.

Finally the letter announced that:

"My father Dr La. apologises but his health does not allow him to come to the trial."

On the adjourned date the Presiding Judge again adjourned the trial, this time to the 24th of March 2009, and directed service of a further summons on the respondent (this time to be transmitted to her via the "contact details" provided in her letter of the 10th February) to secure her attendance before the Court on that date.

Then by a letter dated the 18th February 2009 from the applicant's proxy (his lawyer, Attorney at Law Marta Seredyñska,) to the District Court in Piaseczno, III Family and Minors Department, it was brought to District Judge Szostak's attention that notwithstanding the protestations in the respondent's letters to the Court that she was unable to travel due to her work, the children's school commitments, financial hardship etc she had in fact travelled to Poland with the children on the 22nd January 2009, remained there for a short stay and then returned to Ireland. It was urged on the District Judge that there was strong circumstantial evidence to suggest that during this same trip she attended in person at the secretariat of the District Court in Piaseczno on the 2nd February 2009 to file documents, and in particular a certificate of permanent residence issued on the 30th January 2009 – also believed to have been applied for personally during this trip). This letter and supporting documentation is also exhibited (as exhibit "G" to the affidavit of the applicant sworn on the 16th September, 2009, together with a certified translation).

Moreover, when the respondent re-entered Poland with the children on the 22nd January 2009 she was stopped by the Border Guards who, seemingly, were aware that the Warsaw District Court had previously ordered that the children should not be removed from Poland, and the respondent was challenged on this. It appears that the respondent falsely represented to the Border Guards that she had had the permission of the Warsaw District Court to take the children to Ireland although she did not have a copy of the Court's Order with her at that time. As the respondent and the children were entering the country rather than leaving it they were allowed to continue but the diligent Director of the Border Crossing Point at Warsaw duly wrote later that day to the Warsaw District Court to report what had occurred. A copy of the letter from the Director of the Border Crossing Point at Warsaw to the District Court in Warsaw, dated 22nd January 2009, (which was obtained by the applicant's Polish lawyer and enclosed with his letter of the 18th of February 2009 to the District Court in Piaseczno) has also been exhibited (as exhibit "D" to the affidavit of the applicant sworn on the 16th September, 2009, together with a certified translation).

Not surprisingly, faced with this evidence, District Judge Szostak was moved to cause her secretariat to immediately write to the respondent, using her supplied contact details, requesting an explanation. By a letter of 21st March 2009 the respondent replied to the Court in these terms:

> *""Your Honour,*
>
> *In reply to the letter I testify that:*
>
> *1. I DO NOT LIE*
>
> *2. I AM NOT CRAZY.*
>
> *I'm very sorry that I was forced to give explanations like that. It is true that on 17 September I flew out of Poland. We did not want to do that but we didn't feel safe there.*
>
> *The boys and I want to come back and we really long. Our place is there and it is our home. It is not true that I lied to anyone at the border. Nobody asked me about anything.*
>
> *It is true that I came to Poland in January 2009. My father, Doctor La. has paid the travel expenses. He needed the signatures and documents.*
>
> *It is not true that Mr Li. seriously thinks to move to Poland (even for a while). He is maintained by his wife. The wife hates Poland and the Poles. She thinks that they are idiots and primitive people.*
>
> *It is not true that I forbid the boys to contact their father. They keep in touch all the time through e-mail (I enclose copies of email printouts).*
>
> *The boys are afraid of their father! When they see an AUDI car in the street they hide behind me. They don't even want to talk to him*
>
> *It is true that Mr Li. does not pay anything for the maintenance of the boys. He even lies that the bank returned his transfer.*
>
> *It is not easy to be a single mother without ant financial assistance. So to make me "crazy" under such circumstances is not fair. It is the oldest way in the world to solve a problem with a woman.*
>
> *Your Honour !*
>
> *I try to do my best, to make things be good. The boys gradually become happy.*
>
> *I cannot be at the court trial. I'm sorry.*
>
> *They have school and I have now second job.*
>
> *With highest regard,*
>
> *E.La."*

The matter duly came on for hearing before the District Court in Piaseczno on the 24th March 2009. On that date the presiding judge, having considered the respondent's letter of 21st March 2009, permitted the case to proceed in her absence. After hearing evidence and submissions on behalf of the applicant the Court reserved judgment until 2nd April 2009.

On the 2nd April 2009 the District Court in Piaseczno gave its decision and ruled in favour of the applicant. The court record, which is exhibited (as exhibit "H" to the affidavit of the applicant sworn on 6th of September, 2009, together with a certified translation) states:

[The Court] "hereby resolves:

1. that the place of stay of the minors A.J.Li. born on 5 March 1999 and J.P.Li. born on 15 November 2002 shall be each and every place of the residence of the father – P.J.Li..

2. to dismiss the petition for establishing the contacts

3. not to incur on E.K.La. the duty of reimbursement of the legal costs to P.J.Li.."

I interpret this order for the purposes of the present proceedings as being (i) an order in the applicant's proceedings granting sole custody of the children to the applicant, with no access to the respondent (presumably as she did not appear and seek access), (ii) a dismissal of the respondent's proceedings claiming sole custody for herself and to regulate the applicant's future access to the children, and (iii) no order as to costs in either set of proceedings.

The present proceedings were commenced by Special Summons on 16th September 2009 and at a vacation sitting of the High Court on 23rd September 2009 I granted an injunction restraining the respondent and any persons having notice of the making of the order from removing the children from the jurisdiction of this court pending the trial of these proceedings. On the 5th October 2009 the respondent entered an appearance in person at the Central Office of the High Court giving her address as Castleknock, Dublin 15.

Thereafter, and from time to time, the matter appeared in the Hague & Luxembourg Convention list in relation to different procedural aspects of the matter and the Court has been informed that on a number of occasions the respondent was present in Court and answered questions put to her by the presiding High Court Judge. It is understood that on more than one occasion she was urged to seek the assistance of a Solicitor. On 25th November 2009 The Honourable Ms Justice Finlay Geoghegan, in the presence of the respondent, made on order pursuant to Article 11(2) of Regulation 2001/2003 EC directing that a suitably qualified person should interview the children in relation to various matters specified in the order of that date and report to the Court on the interview on or before 16th December 2009 for the purposes of ensuring that the children were given an opportunity to express their views and be heard in the proceedings. The matter was again listed for mention on 2nd December 2009 for the purpose of fixing a trial date. The respondent did not attend on that date. Ms Justice Finlay Geoghegan proceeded to fix 17th December 2009 as the trial date and enjoined the solicitor for the applicant to notify the respondent both of the hearing date and of the making of the Order, and to do so in writing by ordinary prepaid post addressed to her at Castleknock, Dublin 15, on or before Friday 4th December, 2009.

The matter came on for hearing yesterday before the Court sitting in Court No 1 in the Distillery Building at 11.00 am. There was no appearance by the respondent in Court and the Court was advised that there was no sign of her anywhere in the Distillery Building. The Court then conducted preliminary enquiries to ascertain if Ms Justice Finlay Geoghegan's Order 2nd December 2009 had been complied with and was assured that it had. An affidavit of Service of Anne McCloon, Clerical Officer, of the Law Centre, Tallaght sworn on the 9th December 2009 was produced to the Court, and this affidavit exhibited a letter from the applicant's Solicitor addressed to the respondent and dated 4th December 2009 advising her of the fixing of the Trial Date and that the trial was fixed "for Thursday17th December 2009 in the High Court, Four Courts, Dublin 7 at 10.00am" and stating that she should be in attendance on that day. The letter further enclosed copies of Ms Justice Finlay Geoghegan's Orders of 26th November 2009 and 2nd December, 2009.

The Court also addressed Counsel for the applicant and voiced a concern that the letter had specified 10.00 am in the Four Courts rather than 11.00 am in the Distillery Building. Counsel assured the Court that her instructing Solicitor, who is familiar with the respondent, had been in attendance in the Four Courts from 9.30am and had not seen the respondent. Further, the same Solicitor had been both in the precincts of, and actually in, Court No 14 in the Four Courts, in which courtroom the Hague & Luxembourg Convention list is routinely managed, and which was the courtroom in which the respondent had appeared in person on previous occasions. However, there was no sign of the respondent.

Mindful of the possibility that the respondent might nevertheless be somewhere in the Four Courts complex the Court indicated that it would rise for 30 minutes to enable enquiries to be made via the information desk in the main Four Courts building to see if anybody answering the respondent's description had been making enquiries there at any point during the morning.. When the Court sat again at 12.00 noon the Court was informed that enquiries had been made as directed and that a Courts Service staff member at the information desk had assured Counsel that no one answering the respondent's description had been making enquiries there at any point during the morning. In the circumstances, being satisfied that the respondent was aware of Ms Justice Finlay Geoghegan's Order of 2nd December, 2009 and that she had been duly written to in compliance with that order, being further satisfied that the respondent had been able to find her way around the Four Courts complex on previous occasions successfully locating both Court No 14 and the Central Office, being further satisfied that she had not been seen in the Four Courts at any time from 10.00am onwards, and having regard to her previous non appearances both before the Irish High Court, and the District Court in Piaseczno, I considered that in all the circumstances it was appropriate to proceed with the case in her absence.

In the first instance the Court heard sworn evidence from Ms Pauline Corcoran, Solicitor for the applicant, confirming what had earlier been represented to the Court on her behalf by Counsel. Turning then to the substantive issues in the case, the Court then heard brief evidence from the applicant. Although the essential facts of the case were to be ascertained from the affidavit of the applicant sworn on 16th September, 2009 and the exhibits thereto, the Court had a number of concerns arising out of the assessment of the children carried out pursuant to Ms Justice Finlay Geoghegan's order of 26th November, 2009. The Court had received, and had read, reports from Ms Anne O'Connell, Consultant Clinical Psychologist, on both of the children respectively. Ms O'Connell had found both children to be pleasant and co-operative. Further, she had detected no evidence of coaching or coercion in either case. The results of the interviews are that in both cases the children have said that they do not want to return to Germany to live with their father. The older boy A. stated that he does not get on with his father's German family. Tellingly he also stated that his father loves him and his brother but that he is uncomfortable around him. He also stated that his father has a bad temper, shouts and curses a lot, and frightens his mother, putting her under lots of pressure. A. also recounted an incident where his father hit him in the face following a football match, giving him a black eye. He stated that he wanted to live with his mother as that way he would have a normal life. There is nothing in the interview with the younger boy, J., to suggest ill treatment. However, when asked why he does not want to live with his father in Germany he said:

"One Christmas he stole me to Germany and I don't like him"

He added that his father was fighting with his mother at the time.

The Court was concerned to hear evidence from the applicant concerning (i) the suggestion that the children are in fear of him arising out of his shouting, cursing, and in the case of A., physical violence. The applicant gave evidence before me and I found him to be an impressive witness. He denied emphatically that he had ever struck A. or that he had behaved in any inappropriate manner towards them. He said (transcript, pages 12 and 13):

"I have a general situation with the mother of the kids so I left here. Since this time we have the problem that she is trying to punish me through my boys. For example she said in general in the Polish court that I was beating her for eight years but also wasn't true how it showed afterwards and also this assessment which happened now you have to also see that I didn't see my sons for nearly two years. So I had only once contact with them now for some hours in this hotel in Dublin. That was all of my contact which I had the whole time. So I for my own I know the influence very strongly from the mother especially A., A. is already in the age where he is a little understanding of what is going on and he feels very strongly responsible for his mother and his mother is really able to show him or to show that she is very unhappy and she is very not safe and A. then tries of course to protect her. In the case of J., J., I think he doesn't even remember any more what was in Germany because J., was at this time four years old. So this is what I can say to this case and I didn't beat A. on to the head that he had a blue eye. It is not true. It is a lie. You have to see I have been living Germany I am living there with my wife. I still have two bigger kids, a daughter who is 21 years and a son 18 years. We are all living in one community together but also my two boys from Poland they lived there with us for more than one year what else I can say. I can say only that the mother is really trying the whole time everything to make everything that I don't get contact with my boys and so on. She is now since I have been fighting since three years through all courts to get my rights. We also had the situation especially in Poland because A. went there to the first class from a German school in Warsaw and he couldn't pass the class because his mother didn't bring him to school for nearly four months. There is also the background to it why all this has happened. The mother has a problem with alcohol. We have now also the situation because I just spoke to the school yesterday here in Dublin the kids have been out again for more than three weeks out of school. Nobody knows what is going on, what is happening."

Asked by the Court whether it was in the children's particular interests that his rights should be vindicated, he said:

"In my eyes [it is] in the children's interests because children in my eyes need some stability. They need some order in their life. They need a certain education, a school and so on. All this is important for their whole future. I have there a brother and sister from A. and J.. My wife also wish to care, she is very good about the boys, especially J. he had an amazing contact with her, so all this is there to make sure that they can have a normal life because this, what they had up to now, is in my eyes a disaster. They have a mother who is trying to influence them against me. They are not going to school regularly. They are changing countries. So there is no stability, nothing in their life, nothing."

Decision
Having considered all of the papers and the oral evidence given to me in this case, I am satisfied that it is appropriate to grant the applicant relief and what I propose to do is to make an order restoring the children to their place of habitual residence, namely, Poland. In doing so I am conscious that the applicant has an order from the District Court in Piaseczno, III Family and Minors Department, for their custody which may entitle him to then take the children to live with him in Germany. However, I think that it is appropriate that they should go to Poland in the first instance. What may happen after they are returned to their place of habitual residence will depend on Polish Law.

I am making this order being satisfied that their place of habitual residence is Poland; being further satisfied that the applicant had "rights of custody" within the meaning of the Hague Convention at the time the children were removed from Poland; being further satisfied that those rights were being exercised as a matter of fact at the time that the children were removed from Poland by the respondent and that they would have continued to be exercised but for the removal; being further satisfied that the respondent has unlawfully taken the children from their place of habitual residence and removed them to Ireland, being further satisfied that the proceedings herein have been commenced within the 12 month period of the first removal of the children specified in the Convention; and being further satisfied on balance that it is in the interests of the welfare of the children that they should be returned at this time.

The Court has had regard to two important issues. First, whether or not there is a grave risk to the children in the event of them being returned in the light of what is contained in the assessment reports. Secondly, the fact that both of the children have expressed the view through the psychologist retained in accordance with Ms Justice Finlay Geoghegan's Order that they do not want to be reunited with their father and specifically do not want to be returned to Germany.

With regard to the first issue, in N v D [2008] IEHC 51 I reviewed the jurisprudence in this area and stated:

"I have found the following cases to be of particular assistance, namely, In re A (A Minor) (Abduction) [1988] 1 F.L.R. 365; C.K. v. C.K. [1994] 1 I.R. 250; R.K. v. J.K. [2000] 2 I.R. 416 and M.S.H. v. L.H. [2000] 3 I.R. 390.

In C.K. v. C.K. Denham J, then a judge of the High Court, adopted as reasonable the test propounded by Nourse LJ in In re A (A Minor) (Abduction)[1988] 1 F.L.R. 365 at 372 when he stated:

"I agree with Mr. Singer, who appears for the father, that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'. It is unnecessary to speculate whether the eiusdem generis rule ought to be applied to the wording of an international convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored

in deciding the degree of psychological harm which is in view."

McGuinness J, giving judgment in the Supreme Court in M.S.H. v. L.H. confirmed that the phrase "grave risk" applies to both parts of Article 13(b) and it is not to be read disjunctively. Referring to the quotation from the judgment of Nourse L.J. adopted by Denham J in C.K., McGuinness J states (at page 404 of the report):

"Denham J. states that this is a reasonable test and she adopts it. In that case, of course, Nourse L.J. was discussing the first half of the test - the risk of physical or psychological harm - but nevertheless his emphasis that the risk must be a weighty one and must be substantial and not trivial would apply also to the "intolerable situation" test."

R.K. v. J.K. is a decision of the Supreme Court. In her judgment in that case Denham J. stated:

"The grave risk contemplated in the Hague Convention is that of a serious risk. In Thomson v. Thomson [1994] 3 S.C.R. 551, La Forest J. of the Supreme Court of Canada stated at p. 596:-

'In brief, although the word 'grave' modifies 'risk' and not 'harm', this must be read in conjunction with the clause ' or otherwise place the child in an intolerable situation'. The use of the word 'otherwise' points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of article 13(b) is harm to a degree that also amounts to an intolerable situation.'

Thus, whereas any movement of children from one country to another and from one physical home to another is upsetting and may involve some harm, that is not the level of risk anticipated in the Hague Convention.

The grave risk or intolerable situation envisaged may arise because of the relationship, or lack of it, between parents. If the conflict can be abated and undertakings and circumstances created to protect the children prior to the court orders in the requesting country then the policy of the Hague Convention to return children to the country of their habitual residence will be met. Also, the particular children affected by the Hague Convention in a case will have their interest protected."

Giving judgment in the same case, Barron J. stated:

"In my view the words "intolerable situation" relate to both physical or psychological harm to which the children must not be exposed as well as to other cases where they might be harmed.

Prima facie the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.

In my opinion the following passage from Friedrick v. Friedrick (1996) 78F 3d 1060, sets out the basis upon which the defence of grave risk might succeed. The passage is as follows:-

"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."

Applying the law as stated I do not consider the children in this case to be at grave risk. I take on board the concern articulated by A. to the psychologist in relation to having been the victim of physical abuse at the hands of his father but I do not regard that allegation as being next or near proven. While I accept at face value Ms O'Connell's view, formed on the basis of a relatively brief assessment of the children, that they weren't speaking to her under any form of coercion or having been coached in any way, I nevertheless take the view that the evidence with regard to physical abuse is so thin that I cannot act upon it. There is nothing in the paperwork that I have seen arising from the proceedings in the Polish courts to support the specific allegation made. There is a bald assertion in a letter that was written by the respondent to the Polish court that the children are in fear of their father but there is no evidence to put flesh on the bones of that very skeletal assertion. There is no description of any specific incident. There is no suggestion the children have ever suffered any physical injury other than the child's own assertion that he got a black eye. If that happened it is a very serious matter but there isn't any medical evidence of it. Indeed other than the child's say so there is no first hand evidence of it whatever. I have to have regard to the possibility that the child is acting under the influence of his mother. All I have is hearsay evidence of the child communicated through a psychologist who was told this in the course of a very brief assessment of the child for the purposes of determining the child's wishes with regard to possibly being returned to his country of habitual residence. I just don't regard it as enough to go on having regard to the high level at which the bar has been set in the jurisprudence to which I have alluded, in terms of the evidence needed to justify the non-return of a child on the grounds of grave risk.

As regards the second issue, I do take on board the children's views but they are not the sole determining factor. I also take on board that it has been pointed out in a number of judgments, and I think fairly recently by Mr Justice Sheehan in a case of M.N. v. R.N. [2009] I.E.H.C. 213, a judgment delivered on the 1st May 2009, that it is important for the formation of a child, and particularly a male child, that he should have society with his father if at all possible. At paragraph 32 of his judgment in that case Mr Justice Sheehan says:

"*While it is clearly important to take the objections of the child into account, one has to be careful when considering the views of a young male child who has expressed a preference for his mother. The importance of a father's role in a child's upbringing may not be sufficiently appreciated by a young person, and is something that this Court is obliged to acknowledge. Indeed, this seems to be implicit in Article 24(3) of the Charter of Fundamental Rights of the European Union which states:*

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

Now I am not satisfied on the evidence that is before me at the present time that it is contrary either to A.'s interests or the interests of his younger brother J., that these respective children should have society with their father. I think it is to their overall benefit that they should have contact with him. Of course, if I thought for a minute that there was substance to the suggestion that they had been subject to physical abuse, and in particular the type of physical abuse which involves a striking around the head which could very easily give rise to a devastating head injury, I might have taken a different view but having heard the evidence of Mr Li., and also having regard to the absence of evidence from the respondent who I believe would have attended Court, or at least have put in an affidavit, if there was any substance to this, I am inclined to the view that there is in fact no substance to this suggestion at all. Certainly, there is insufficient evidence to justify me in not returning the children at this time.