THE HIGH COURT

FAMILY LAW

RECORD No. 2/2024 HLC

[2024] IEHC 654

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991 AND
IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE COURT
AND IN THE MATTER OF A.O.P., A MINOR

BETWEEN:

O.T.

APPLICANT

AND

D.T.

RESPONDENT

Note: Redactions and alterations have been made to protect the identities of all parties

Judgment of Ms. Justice Mary Rose Gearty Delivered on 4th October, 2024

1. Introduction

1.1 The Applicant father lives in Ukraine and claims that the Respondent and he agreed that she would take their son, W, to Poland for 2 months after Russia invaded Ukraine. The Respondent mother says that this move was for the duration of the war, an indefinite period, not for a finite period of two months.

1.2 It is clear from the exhibits that the agreement was probably only for two months and that the Respondent mother then removed W from Poland and did not reveal where she had taken him. The other issues raised are settlement and the views of the child. The defence of grave risk was raised at the hearing, though not pleaded, nor was there any exhibit directly addressing this defence. Despite this, the Court considered the defence as it has an investigative function under the Hague Convention. There is insufficient evidence of settlement in this case. There is no evidence of any risk to W which would be sufficient to allow this defence to supersede the urgent and important imperatives of the Convention, namely the prevention of child abduction and the vindication of the child's right to a relationship with both parents. This issue is linked to the views of the child as he considers that he will be at risk, if returned. However, there is insufficient evidence to substantiate his concerns.

1.3 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most up to date information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

1.4 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in signatory states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective

for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in arranging to move to another state, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

1.5 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of retention. If he establishes these matters, the burden shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence.

2. Agreed Evidence

2.1 These parties married and had a son over ten years ago. Some years later, the marriage ended. The Applicant father continued to have access to his son. They lived in the same region in Ukraine for all of the relevant time. In March of 2022, the Respondent and their son left Ukraine for Poland with a group of mothers and children all of whom had been sheltering in the basement of the Applicant's residential block in Ukraine for 8 days. There were numerous messages between the parties in the subsequent months, many of which are exhibited. In November of 2022, the Respondent brought her son to Ireland. In January of 2024 the Applicant sought assistance from the Central Authority for Ukraine for the return of the child to Ukraine.

2.2 The child was assessed by a psychological expert for the purpose of ascertaining his views in relation to a return to Ukraine. He objects to returning on the basis that it is not safe to live there. It is clear that the child was habitually resident in Ukraine in 2022 at the time of his removal to Poland and it was not suggested that he had ever become habitually resident in Poland. The relevant defences, therefore, are consent, settlement in Ireland since the date of retention and grave risk. The views of the child must also be considered.

3. <u>Consent</u>

3.1 The Respondent argued that the Applicant consented to the initial removal of the child to Poland and that he was informed about the move to Ireland. The Supreme Court set out the relevant principles concerning consent in *R v. R* [2006] IESC 7, and, briefly summarised: the onus is on the Respondent to establish consent; consent to removal or retention of a child need not be in writing, but must be real, positive and unequivocal. Consent must be proved on the balance of probabilities and, while there need not be an express written statement, the fact of consent must be supported by clear and cogent evidence. A court may, in an appropriate case, infer consent from conduct. It need hardly be added that consent to one plan does not necessarily imply consent to another, nor does it establish consent to a variation of the original agreement.

3.2 The Respondent claims that she and their son travelled to Ireland with the Applicant's consent. Insofar as the consent extended to an initial removal to Poland, this is undoubtedly correct. She left Ukraine for Poland with a group of parents and children, though she says that they had no place for her initially but she joined anyway. However, the Respondent must show that this consent extended to staying beyond two months and then moving to Ireland for the duration of the war. It is not sufficient to show that she was entitled to take W from Ukraine. That consent does not extend to the more significant steps taken.

3.3 The Applicant has exhibited exchanges between himself and the organiser of the trip to Poland at Exhibit 4 of his affidavit; see in particular pages 58 to 61 of his affidavit. I will refer to this lady as Maria. There was an objection to this evidence on the basis that the email replies were elicited by written, leading questions and that the Applicant breached the *in camera* rule in the exchanges.

3.4 As counsel agreed, the suggestion that the answers were suggested to the witness in any case goes to the weight of the evidence and does not affect the admissibility of those answers in this context. The questions to which objection was taken amount to the Applicant effectively stating his contention that the

trip was only planned as a short-term trip and assuming that Maria, the organiser, agreed with this statement. Maria readily agreed, in some cases adding detail to her response. Given that she has no reason to mislead, Maria's responses constitute evidence on which the Court can rely, however weak it may be, and bearing in mind that Maria has not sworn an affidavit to this effect.

3.5 There is a more fundamental reason to rely on this exhibit, however: the exhibit does not only contain an exchange between the Applicant and Maria, it also contains original text messages between the Respondent and Maria, which Maria forwarded to the Applicant. These messages show clearly that the original intention was a trip of two months. Further, in these exchanges, the Respondent ignores questions from Maria as to where she is and does not indicate a location to her, despite Maria asking direct questions to that effect.

3.6 Insofar as there was any breach of the *in camera* rule, the Respondent will readily understand that a potential witness in a case such as this one must understand something of the context in which she is being asked for documentary evidence. This is not a case in which court documents were shared and there is no evidence of the woman being told anything other than the context in which she was asked for confirmation of certain events. I am not inclined to dismiss her evidence on this basis. The *in camera* rule as it currently operates does create problems for parties in these cases. Parties should be careful not to give information about a case beyond that which is essential to discover if a potential witness has relevant and important evidence to offer.

3.7 The original messages exhibited do not, as the Respondent argued, suggest an open-ended trip to Poland and instead, they support the Applicant's case that the trip was for a finite period and that the Respondent was expected to return with her son. They also support the conclusion that she probably did not want anybody, including the organiser, to know where she was; if all was above board, why would the Respondent ignore a friendly question asking where she

was? These messages are strong evidence as they do not derive from either party but from a third party, Maria, and were exchanged before this case began.

3.8 In his affidavit, at Exhibit 6 the Applicant sets out a series of message exchanges in 2022. On the 8th of March he tells the Respondent that Maria is looking for her. This was clearly at a point after the Respondent had left the group with whom she travelled to Poland, and had not done so by agreement as, otherwise, Maria would not be looking for her. Later messages, exhibited by the Applicant and referred to above, bear this out.

3.9 On 9th of March 2022, in Exhibit 6, the Applicant asks where they are, seeking a geo location which he says will make him feel calm. He says that they are "*not always in touch*". He asks can he speak to his son on Wi-Fi and asks what his son is doing. There is a one-word reply: *"eating"*. She deflects his requests for contact details saying there is no need to bother and distract other people.

3.10 On the 16th of March 2022 there is an exchange of messages between the Applicant and the Respondent's mother. The Respondent's mother reassures the Applicant that the Respondent and his son are well but will not reveal where they are and, instead, replies, "*No one's hiding him. You sent them yourself*". While these are the words used, the thrust of the exchange supports the conclusion that they are being hidden. The Respondent's mother also deflects messages in which the Applicant asks, directly, for information and for reassurance. She tells him the school is not far away but will not reveal the town in which the Respondent and child are living.

3.11 In messages exchanged in September 2022, the Applicant asks the Respondent to come home, referring to their son's loss of his academic skills but she replies that they will talk about it when the war is over. Thus, by September, it becomes clear that the Respondent is not returning. In a message on 16th September 2022, she states that she will not return "*as long as there's danger to the baby, that's obvious*" (this is the English translation of this message).

3.12 The Applicant asks, in a message dated 28th October 2022 in Exhibit 7, when are you returning? The Applicant says in another message that he couldn't get through to his son on 15 occasions. He offers to get the child and says he is ready to come to the border of Ukraine and meet his son, if needs be.

3.13 These exhibited messages establish that, in late 2022, while they may have been in contact, the Applicant was given no information about where his son was located. In the same exhibit, the Applicant expresses hope that the Respondent would tell him where she is and where W was studying. There are repeated messages asking when they are coming home and where they are.

3.14 In November of 2022, the Respondent arrived in Ireland, having driven through France. The Respondent avers that she told the Applicant father about this move. She also states that there are no records of the many communications, via Viber, between father and son and that she deleted them to make space on her devices. In her affidavit, she claims that she and the Applicant were in regular contact and at paragraph 8 she avers that because of a rumour that Russia might invade Poland, it was decided that they would move again and that "*Ireland was chosen*". She states expressly that that the Applicant was informed of her plans before she left Poland. There is no exhibit and no indication as to who told him this or how he was told.

3.15 On 21st and 31st March 2023 and in August of 2023, the Respondent sent photos of the child, with messages asking why the father does not call, and saying they are in touch 24/7. The Applicant is told that his son is in a local school and improving his English. She suggests that the father knows the school is in Ireland but there is no message confirming this, showing the address or any indication as to where they are, let alone messages that he has consented. Instead, the Respondent exhibits messages repeatedly confirming that their phones are still working.

3.16 By way of contrast with these messages and with the Respondent's averments, Exhibit 5 in the Applicant's affidavit consists of texts from the

Applicant's son, undated but clearly sent in late 2022 just before the move to Ireland. There is a reference to driving to France, which is how the Respondent travelled here. The child refers to being on the German border at the time when the messages are sent. Here, he impresses on the recipient, his friend, (page 76 of the pdf affidavit) that the friend must not reveal his whereabouts to his father, the Applicant. He tells his friend, a former neighbour, that he is going to France but says not to tell any parents, saying that this friend's dad will tell the Applicant if he knows where the child is. There is no date on these messages but the context suggests their timing. The accompanying message about sleeping arrangements is not relevant.

3.17 In March of 2023, when the Respondent asks the Applicant why he is not calling, he replies on 3rd April 2023 saying that she shouted at him, ending the call on 8th Feb 2023, making demands and ordering the child not to talk to him. Since then, he concludes, "*no matter how much I wrote and offered to talk he has not called me back*".

3.18 On the last page of Exhibit 7 is a text from W, asking the Applicant for a Christmas gift and dated December 2023, to which the Applicant replies, that he has been writing: "*So I asked you to tell me where you live so that I could send a gift*." There is no response to this request exhibited by either party. There are numerous messages from the Applicant to the child, but no answer appears to be received, at least none is available in exhibits from either party. In December the Applicant tries to call his son, who will not call him back on the basis that he has not called since September, which appears to have been the case, and because he is watching a film.

3.19 There is no evidence of consent on the part of the Applicant. The messages, set out above and below, suggest that he was never told exactly where they were in Poland and they do not establish any consent, express or implied, to a move to Ireland. The Respondent bears the burden of proving consent. All she has proven is that there was consent to a short stay in Poland,

indeed, this is an agreed fact. This does not prove his consent to her removing W to a third country nor does it establish consent to W remaining in Ireland for the duration of the war. It is not correct to submit that permission to leave Ukraine is sufficient to prove consent generally. Consent is not given in a vacuum and here the affidavits and exhibits provide details of the limits of the consent given. Those limits were breached by the removal of W to Ireland and by remaining away from home beyond the 2-month period that was agreed.

3.20 The averment at paragraph 10 of the Respondent's first affidavit, that she never prevented her son giving the Applicant information about where they were staying is probably untrue: the texts demonstrating that the Applicant was not given this information have been exhibited and are described. W's own texts to the effect that he could not share that information has also been referred to above: Exhibit 5 in the Applicant's first affidavit.

3.21 This Respondent cannot demonstrate consent on the part of the Applicant. The law requires that consent to the W's retention in Ireland be unequivocal consent, in other words, that she prove his consent to retain the child for longer than two months and to take the child to Ireland. While the Respondent refers to cases in which there may have been agreement to a retention until some specified event, that does not arise here. There is no evidence of agreement that W could remain here until the end of the war. On the contrary, the evidence all suggests a limited consent: to a stay of two months in Poland. In this case, the limited consent of the Applicant is insufficient to establish consent, as required by the Convention, to any retention of this child away from his home for a period longer than two months or in any location other than in the neighbouring country of Poland.

3.22 The decision of Morris J. in *NK v JK* [1994] 3 IR 483, a case about refusal to allow access after granting consent to a removal, is irrelevant as there was no evidence of consent to the removal to Ireland or to any arrangement beyond an initial two months in Poland.

3.23 The issue of subterfuge arises in the messages set out in this section and is also relevant to settlement, discussed below. The exhibits described make it clear that the Respondent thwarted the Applicant's attempts to find out where his son was, including impressing upon her son that he was not to reveal his location to anyone lest his father discover it. She also enlisted her own mother in her efforts to conceal their location. This militates strongly against a finding that the Applicant consented to the child's removal to and retention in Ireland.

3.24 I am satisfied that this child was wrongfully retained in May of 2022 and that his location was deliberately concealed from the Applicant thereafter.

4. Acquiescence

4.1 The issue of acquiescence was raised though not pressed with great force in oral argument. The same messages were relied upon, together with what was described as culpable delay in issuing these proceedings.

4.2 The test in respect of acquiescence was adopted by Denham J. in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 IR 416, as set out in *re H (Abduction: Acquiescence)* [1998] A.C. 72, by Lord Browne-Wilkinson. Acquiescence arises after the fact and is subjective, in other words, the Respondent who raises the issue must show that the Applicant actually accepted the new arrangement (not that she thought he had done so) or that his words or acts, in the words of Browne-Wilkinson L.J.: "*clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return*."

4.3 The Respondent has provided no specific example of acquiescence on the part of the Applicant and the exchanges between the parties, as set out above, rebut this suggestion. The Applicant's repeated position was that they should return and he sought to maintain contact with his son. Nothing in these messages suggests that he would not seek the return of W in the courts or could form the

basis of a view that he was resigned to the situation or consenting, after the fact of removal, to W remaining in Ireland.

5. Delay and Settlement

5.1 While the objective of the Convention is to achieve a swift return of abducted children, as Donnelly J. noted in *D.M. v V.K.* [2022] IECA 207, there is no defence of delay simpliciter within the Convention. Under Article 12, while a summary return is mandatory if the application is made within 12 months, even if made over a year after the wrongful removal or retention, a child should nevertheless be returned unless it is demonstrated that the child is now settled in his new environment.

5.2 The Respondent argues that the child is settled in Ireland. While the proceedings were initiated outside the one-year period from the date of the wrongful retention this means only that the Court may consider the issue of whether the child is well settled and the onus is on the Respondent to establish this. "*Settlement*" denotes more than adjustment to surroundings. In *P v. B (No. 2)* [1999] 4 IR 185 Denham J. followed Bracewell J. in *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413. Applying the principles in *Re N.*, Denham J held:

"The relevant facts commence with the length of time which the child has lived in this environment – without any application for her removal. This has several elements; (a) the physical presence of the child in the town and all its consequences, and (b) the absence of contact from the plaintiff requesting her return; (c) the emotional element."

5.3 The Supreme Court later held, in *P.L. v. E.C.* [2008] IESC 19:

"Settlement must be assessed according to all the circumstances. It is ultimately a matter of appreciation of all the facts. The Court must make a careful and balanced judgment. There is a physical and emotional element. Family, home and school come into it, as does the absence, to the extent that it is relevant, of contact with the applicant parent…"

5.4 Subterfuge is clearly a factor which this Court must consider in assessing this defence and has a direct bearing on the issue identified by Denham J., above, in that the Court must consider the repeated requests for return made by the Applicant. In *P.L. v. E.C.*, the Supreme Court quoted Thorp LJ. in *Cannon v. Cannon* [2005] 1 WLR 32, at paragraph 53, who stated:

"A broad and purposive construction of what amounts to 'settled in his 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. There are two factors that I wish to emphasize. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement."

5.5 In *Z.D. v. K.D.* [2008] IEHC 176, MacMenamin J. considered the evidence of subterfuge in a case where the respondent mother left Poland for Ireland without giving notice to the applicant. The case bears comparison to this one: that respondent had no connections in Ireland and did not inform the authorities about her new location. MacMenamin J. considered that while it was not an elaborate plan, there was evidence of subterfuge. In that case, there was no evidence that the child had evinced a particular attachment to Ireland but there was an attachment to the mother and a wish to remain in her care. There was insufficient evidence of significant settlement in terms of place, home, school, people, friends, activities and opportunities in Ireland.

5.6 The Respondent argues that because the Applicant commenced these proceedings after a period of one year from the date of the wrongful retention of the child, that the child has settled in his new environment and that the Court should exercise its discretion not to return the child as it is no longer a summary, urgent return as envisaged by the Convention.

5.7 The Respondent also submits that the Applicant was guilty of culpable delay since the proceedings issued. The original hearing date, 4th July 2024, was vacated because the Applicant had not yet submitted his replying Affidavit.

5.8 There was some argument addressed to the issue of when the Court should assess the settlement issue: the date on which proceedings began or the date on which the case was heard? In this case, the issue does not truly arise. The evidence addressing the issue of settlement was sparse. While the child has been living in Ireland for well over a year, he does not refer to one friend by name, nor was the Court given any detail of activities and engagement with his community which indicate that the family is in fact settled. There is no other family member here. This is a child who has been instructed not to tell his father where he is and who has been in transit from early in 2022. Since then, even before his application in January of 2024, his father has been seeking his return. It is difficult to see how, in these circumstances, the issue of settlement can be resolved in favour of the Respondent.

5.9 It may be that if a child has settled in a new country and where he has expressed objections to a return that a court might feel obliged to act on the child's objections; it is always a balancing exercise. In this case, as in *Z.D.*, the difficulty for the Respondent is that much of the delay was caused by her refusal to tell the Applicant where she was. As late as 2023, when she had been away from home for well over a year, she was still refusing to give an address to the Applicant. While there is evidence of her not contacting her local consulate, this evidence is secondary to the texts exhibited and described above. These clearly show a concerted effort to hide her own location and that of the child.

5.10 While this child has been in school in Ireland for over a year, his level of comfort in his home here and in his relationship with his mother does not, in my view, constitute the level of settlement in the environment envisaged by *Re N* or that required by the Convention. The facts lead to a conclusion similar to that in *Z.D.*, namely, that there is insufficient evidence of significant settlement here despite a long period, albeit in different towns and schools, in Ireland. It is clear that the Applicant never stopped asking for details of their location and repeatedly requested their return and, as set out above, the Respondent refused

to reveal it. While the child is feeling safe here, there is no sense from the evidence that he has settled here in the sense that he has made an emotional home here with friends and interests to compare to those he left in Ukraine.

5.11 For these combined reasons, I cannot find that W has settled in Ireland. There is no strong evidence of settlement in terms of emotional connection with people and place. The child has moved at least six times in the years since he left Ukraine and even when he finally came to Ireland he had moved before these proceedings began. At all times, W was aware that his father was seeking his location or seeking his return. At no point was there a sense of security for this mother and child which might support the finding that there had been a real, emotional settlement of the child in a new community.

5.12 The Respondent points to what she argues is acquiescence from June of 2023, a time when she submits that the Applicant knew that they were in Ireland. However, the fact that must be established is one of settlement in the new country. That evidence is missing here, even taking a later date, looking at the evidence adduced in affidavits and at the court report on W.

5.13 The Applicant has established contact with numerous consulates and embassies and a consistent trend of messages asking for contact and asking the Respondent to return. In the circumstances, this case must be differentiated from that of *P.B. (No. 2)* in which the same issue arose. There, the respondent had ties to this jurisdiction. This Respondent had none. Also, that respondent had no contact with the applicant, unlike the regular messages received here.

6. <u>The Views of the Child</u>

6.1 The argument is also made that W objects to being returned, that he is old enough for the Court to consider and act upon his views and that, accordingly, he should not be returned, even after balancing his views against the main objectives of the Convention, which favour immediate return.

6.2 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if a child does in fact object and, if so, what is the weight of the objection, given the maturity of the child. Finally, if established and when assessed in that way, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention. Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child, and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is important to consider the views of W and whether this factor persuades me to take the exceptional step of refusing to return him.

6.3 In *A.U. v. T.N.U.* [2011] 3 IR 683, Denham C.J. commented that: "*A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence*." The weight to be attached to his views increases as the child gets older, see for instance *M.S. v. A.R*. [2019] IESC 10, paragraph 64.

6.4 In considering whether the children's objections are made out, the expression of a mere preference is not sufficient; the word "objection" imports strong feelings as opposed to a statement of preference on the part of the child, to use the words of Whelan J. in *J.V. v. Q.I.* [2020] IECA 302 (at para. 69).

6.5 Donnelly J. reviewed the law in this regard in in *D.M. v V.K.* [2022] IECA 207. As set out there, at paragraph 106, this Court is required to balance all of the circumstances of the case and to be vigilant to view the policy of the Convention in light of the best interests of the children rather than as a mechanism to punish a parent who has wrongfully removed or retained a child.

6.6 The Respondent relies on *M v. M* [2023] IECA 126, where Donnelly J. relies on the decision of Finlay Geoghegan J in *MR v AR* [2019] IESC 10. At para [81], Donnelly J. made the following comments:

6.7 "*At para 65 of MR v AR Finlay Geoghegan J went on to give general guidance as to how a court should exercise its discretion while noting that each case is based on its*

facts. In this paragraph, the Supreme Court identified why there was a balancing act between those policies requiring a return and the individual circumstances of the child who objects to return. The balancing is to determine "what is, in the limited sense used, in the best interests of the child at that moment". *The Supreme Court said that the weight to be given to general Convention policies favouring return and the objections of the child may vary with time. The further one is from a prompt return, he less weighty the general Convention policies will be. Counsel for the father correctly identified promptness in court procedures as an important factor in the Convention policy and said that this case was not one to be determined on a delay basis such as the case of* DM v VK [2022] IECA 207". [Empasis of Donnelly J.]

6.8 The Respondent points to the phrase "*the best interests of the child at that moment*". It seems to me that this phrase cannot be taken out of its context as this risks missing the point of the quotation, which is, expressly, the child's best interests in the *limited sense used,* in other words, in the context of the Convention. The best interests of any child in this situation are mirrored by the animating principles of the Convention. This includes the child's wishes, of course, but that is only one factor. A child is entitled to have a meaningful relationship with both parents. A child is entitled to a degree of security in life and repeated upheaval, particularly if moves are made by stealth as was the case here, is contrary to that aim. If one removes any child from the company of the other parent, lasting damage is done to the child. While a child himself may have preferences, or even objections to living in a particular country, it is relatively rare for a child's objection to outweigh the Convention objectives and persuade a court to refuse to return the child based on those objections alone. Nonetheless, the views of the child are important and must be weighed carefully in the balance when making this important decision which will have such a significant effect on that child.

7. Views of the Child: Evidence and Report of the Assessor

7.1 This boy has objected to being returned to Ukraine and there is no other way of reading his views. I am also satisfied that he is sufficiently mature that I should consider his views. There is an added, and serious, factor in this case: the child, whether logically or not, has formed the view that his father's village is at risk. There is no evidence of this in any of the affidavits and, on the contrary, there are averments as to the facts on the ground which are that the Applicant lives in a place in which there are alerts and bomb shelters but where there has not been an invasion nor is there any evidence of bombs or devices detonating or exploding in the area, let alone evidence of murders or anything of that nature. Nonetheless, the child's fears appear to be genuine, even if they are not evidence-based.

7.2 The child is a pre-teen whose views were articulated clearly to the court assessor. It is plain that he objects to returning to the Ukraine. This boy's description of his life in Ukraine was detailed and had emotional depth and poignancy. He became upset, according to the report, when describing the circumstances in which his dad left their family home. He was able to recall details of activities in his Ukrainian school.

7.3 The boy goes on to describe three different moves while living in Poland and the circumstances of each new location. He describes the journey to Ireland and his first placement here, which he did not like. In his second town, he has been there for a year and says that it is really good, and he and his mother are happy there. He is enjoying school and referred to one adult who works as a carpenter, a job which he hopes to take up when he is older. There are no references to school friends or to any other person. He can now speak English but prefers what the assessor describes as his native tongue.

7.4 The key passage in respect of his objection is as follows:

"*My father wants me to go back to Ukraine, I am so scared of that. Thousands of people there are murdered every day. My father says it's safe but so many rockets fly into the*

region where he lives. I think [Named City] is safer than his place because there is air defences there. Where my father lives there are no air defences. It's a village. It's about twenty or thirty kilometres from [Named City]. I am afraid of dying."

7.5 In a later passage, he adds:

"*Imagine sitting in the bathroom because it's the safest place in your house and then a rocket coming and the glass flying out of your windows*." The evidence he offers to support his conclusion that Ukraine is unsafe is that some people that his mum knows have been killed in the war.

7.6 I take these objections seriously and have considered W's view very carefully. His only objection to return is based on his personal safety. Anyone would sympathise with this view, but it does not appear, on the evidence before me, to be one that has been formed on a sound factual basis. This child, who has been living for over two years with only one parent, which parent actively concealed their whereabouts from the other and who has averred, incorrectly, that there was consent to bring the child to Ireland, is named as the basis for the child's view that Ukraine is unsafe insofar as the child knows that people in that country have died and thinks that there is no defence for the area to which he would be returned. His perception appears to be incorrect. W refers to the father's place not being covered by air defences but that is contradicted in the Applicant's affidavit: they live near an airport and have reasonable defences as a region. Ukraine is a very large country, some parts of which have not suffered as grievously as others, as case law in this respect makes clear.

7.7 Balancing W's poorly substantiated view with the objectives of the Convention, it seems to me that such a fear cannot outweigh the imperative to return a child to his home. The objection to a return here is based on the simple assertion of a fear with no supporting evidence of any actual danger to this child, if he is returned. Deterrence of child abduction, comity and trust in respect of other signatory states are the animating features of the Convention. While sympathetic to W's position, his father can provide undertakings to reassure

the Court, the Respondent and to W himself that he will be moved if there is any threat to him. The undertakings may include arrangements for appropriate counselling or medical help for the child in managing his fears. W's extended family all remain in Ukraine and his own life here has all the hallmarks of a temporary settlement: his continued preference for his native language and the fact that there are no detailed references to childhood friendships or activities.

7.8 To an extent, the child's fears overlap with the grave risk defence, to which I now turn. That defence appears to be grounded, almost entirely, on these statements of fear coupled with the assertion that there is no air defence in the area, as there is no other evidence in the affidavits addressing the issue of risk.

8. Grave Risk

8.1 The Hague Convention provides, at Article 13, that: "*the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that … b) there is a 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.*"

8.2 Finlay Geoghegan J. set out the legal test for grave risk in *C.A. v. C.A.* [2010] 2 IR 162, at paragraph 21: *"[T]he evidential burden of establishing that there is a grave risk … is on the person opposing the order for return … and is of a high threshold. The type of evidence which must be adduced [must be] 'clear and compelling evidence*'."

8.3 Case law establishes the kind of risk that has persuaded a court to refuse to return a child: a risk of violence to the child (usually based on evidence of previous violence), a risk of suicide to the child or to the respondent, or evidence of an event such as famine or war which would render the child's position unsafe, as set out by Fennelly J. in *A.S. v. P.S.* (Child Abduction) [1998] 2 I.R. 244, paragraph 57.

8.4 In *C.T. v. P.S*. [2021] IECA 132, Collins J. outlined the history of the cases relevant to an understanding of the aims of the Convention. He concluded:

"*…there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention*." The burden of establishing such a defence is a heavy one and a discretion remains for the deciding judge even if a grave risk is identified.

8.5 In *I.F. v J.G.* [2023] IEHC 495, I summarised the law in relation to children who had been removed from Ukraine, deciding that the facts in that case required me to order the return of the child in question to her home in Ukraine.

8.6 *J.V. v Q.I.* [2020] IECA 302 was a case which arose during the COVID-19 pandemic in which Whelan J. outlined the kind of evidence necessary to establish a grave risk to a child under Article 13. There, the Court found that unsubstantiated media reports were insufficient to establish a factual basis for the fear expressed by that respondent that a child might be more at risk in Belgium than in Ireland due to the COVID-19 pandemic. Whelan J. added that a court was entitled to consider pragmatic measures such as undertakings to ensure the safety of a child in such circumstances.

8.7 At the time of writing this judgment, while many women and children have sought safety in neighbouring and in other European countries, most Ukrainian children remain, safely, at home in Ukraine. In proceedings under the Convention, it is insufficient to suggest that there is a grave risk of remaining in Ukraine at present without details as to why, details describing what conditions prevail in the place to which the child would otherwise return and details of the current situation in that region or city. There is no such information in this case. The Respondent argues that she was justified in leaving Poland on the basis that there was a rumour that the Russians might invade Poland next, but this is untenable. Fears expressed by a child, no matter how genuine, are unlikely to be sufficient evidence of grave risk where there is no evidence that the fears are reasonable or based on a true state of affairs.

8.8 The defence of grave risk must be supported by evidence. The actual risk to the child in question must be supported by evidence; a statement from a child to the effect that he believes himself to be at risk is insufficient to establish the defence. In the case of a war-torn country such as Ukraine, the case law has already developed to underscore this detailed, evidence-based approach. Similarly, the law in respect of grave risk has long determined that a claim of risk due to the psychological effects of a return must be supported, ideally by medical evidence. The evidence here is of a feeling of fear and the feeling appears to have been produced, in part, by statements by the Respondent to her child, insofar as one can tell from the replies to the assessor. The submission made in this case, that the Court can take account of grave risk issues by examining general media reports rather than evidence that has been adduced by the parties and that is subject to analysis having been provided to the opposing party, is simply incorrect. The party who relies on grave risk must prove that such a risk exists and there has been no evidence to substantiate the Respondent's claim in this regard.

8.9 In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J. emphasised the trust to be put in the courts of the child's habitual residence to protect the child even in a situation where physical harm was a risk faced by that child. The Court must, therefore, consider the facilities available in Ukraine to assess and to mitigate the risk presenting. There has been no suggestion that courts are not sitting or that there would be any difficulty in making any relevant application. It is also necessary to consider his father's ability to protect W or to mitigate any risk to him, including the possibility of sensible or pragmatic solutions which might address any concerns that W or the Respondent has in the event of a return.

8.10 While this Respondent correctly argues that the child at the centre of the *I.F. v J.G.* case was in a different position, in that she wanted to return, that does not dispose of the issue. Here, there is insufficient evidence of settlement and no evidence of grave risk save the assertion that the child fears he will die, due

to information he has received. That fear is not based on established facts, nor is there medical support to establish that this fear, in itself, might cause a grave risk to the child if returned. Nonetheless, the Court will take that element of the case very seriously and seek specific undertakings in this regard.

8.11 The Applicant has indicated that he will offer suitable undertakings as to the future safety of the child. I will hear the parties in this regard.

8.12 For completeness, I refer to an argument raised by the Applicant that the child is in fear of the Respondent due to her drinking. There is no evidence to support this claim and it has not been established. I have not considered this as a factor in making the decision to order the return of the child to Ukraine.

9. Conclusions

9.1 The child must be returned to Ukraine forthwith and I will direct appropriate undertakings having heard the parties in that regard.