THE HIGH COURT

[2017 No. 7 H.L.C.]

IN THE MATTER OF AN 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 1980

AND

IN THE MATTER OF COUNCIL REGULATION 2201/2003/EC

AND

IN THE MATTER OF M. AND L. MINORS

BETWEEN

P. E. O.

APPLICANT

AND

S. E. O.

RESPONDENT

JUDGMENT of Ms. Justice Reynolds delivered on the 4th day of August, 2017

1. These proceedings are brought by the applicant, the father of a nine year old girl and six year old boy, in which he seeks the return of these children to England and Wales pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction, 1980 (the "Hague Convention"), the provisions of the Child Abduction and Enforcement of Custody Orders Act, 1991 and the Matrimonial and parental judgments: jurisdiction, recognition and enforcement, Regulation (EC) No. 2201/2003 (the "Brussels II bis Regulation"). The children were brought to Ireland by their mother in July 2015.

Background

2. The parties were married to one another on 18th March, 2011, in England. Both children had been born prior to the marriage, M. on 30th September, 2007 and L. on 27th January, 2011. Subsequently the relationship between the parties broke down and they separated in September 2013. After the marriage breakdown, the children continued to reside with the respondent. Difficulties arose in relation to the applicant's access to the children in circumstances where he maintains that he was unaware that the children had been removed from the jurisdiction and he subsequently sought a court order to regularise matters.

3. Pursuant to a Child Arrangements Order dated 16th December, 2015, the applicant was granted access every other week for a period of two hours, being increased over a period of months to a maximum of five hours every other week.

4. The Order also provided as follows:-

> "… no person may cause the children to be known by a new surname or remove the children from the United Kingdom without the written consent of every person with parental responsibility for the children or the leave of this court."

5. Furthermore, it provided:-

> "However, this does not prevent the removal of the children, for a period of less than one month, by a person named in the Child Arrangements Order as a person with whom the children shall live ....
>
> It may be a criminal offence under the Child Abduction Act 1984 to remove the children from the United Kingdom without the leave of the court."

6. The applicant subsequently exercised access to the children on 17th January and 14th February, 2016. What happened thereafter is a matter of considerable dispute between the parties herein and it is clear from the transcript of the Court proceedings that the breakdown of their marriage was particularly acrimonious.

The Applicant's Position

7. The applicant contends that during the course of access with the children on 14th February, 2016, he was advised by them that they had moved to Ireland with the respondent and had been enrolled in a local school. Having confronted the respondent, he contends that she advised him that this was not the case and that they remained living in the United Kingdom in the former family home.

8. He states that the respondent subsequently informed him in or about May or June 2016 that they were living in Ireland with her new partner.

9. The applicant is a Nigerian national and the respondent a Hungarian national. The applicant accepts that he originally entered the United Kingdom under false pretences. Whilst he took steps to process his asylum application in the United Kingdom, it is clear that the parties married before his immigration status had been regularised. He firmly rejects the respondent's assertion that he sought to use his marriage or indeed the paternity of his children as the basis for regularising his status in the United Kingdom.

10. Furthermore, he denies the respondent's assertions that he was guilty of violent and/or threatening behaviour during the course of their marriage and asserts that at all material times he was a loving and caring father to the dependent children.

11. The applicant accepts that he was aware that the respondent had rekindled a relationship with a former partner since in or about 2014 and that a child of that relationship was born in April 2015. Further, he accepts that he knew that the respondent's new partner

was living in Ireland but asserts that at no point did the respondent inform him that she was moving permanently to live in Ireland with the children. He confirms that he had his suspicions, particularly in June 2015, when he learnt that the children had not been attending their school. He states that he was advised that the respondent had taken the children out of school for a week to attend a wedding in Ireland. Subsequently, he became concerned again about the whereabouts of the children and made a further enquiry with the children's school. He was advised that the school had been told not to reveal anything about the children's whereabouts.

12. Due to his ongoing concerns, he applied for a Child Arrangements Order in October 2015. He further states that he had been served with divorce proceedings in September 2015 wherein the respondent confirmed her address as being the original family home, where access was being exercised.

13. As already stated, that Order was granted on 16th December, 2015. During the course of that hearing, the applicant raised his concerns about the living arrangements of the respondent and children, causing the Court to enquire as follows:-

> "Judge: Mrs. E., the first question we need to clear up I think is, are the children currently in England, are they in the UK?
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> Mrs. E.: Yes.
>
> Judge: Have they remained in the UK?
>
> Mrs. E. No, we went to visit my partner who lives in Ireland."

The respondent subsequently refers to the children as visiting Ireland and as staying "for a little while over there".

14. After the granting of the Order, access took place on a couple of occasions and after the children's disclosure in relation to their move to Ireland, the applicant took steps to have the Order enforced.

15. The applicant's position is that at no time did he consent to the respondent removing the children to the within jurisdiction.

16. In January 2017, the applicant completed the necessary application form with the Central Authority for England and Wales seeking the return of the two dependent children.

The Respondent's Position
17. It was conceded at the outset that the habitual place of residence of the two children was in England and Wales prior to their removal from that jurisdiction. Further, it was accepted that notwithstanding the breakdown of the marriage, the applicant continued to exercise access with the children.

18. Following upon the marriage breakdown, the respondent commenced a relationship with her current partner, E.A., a Nigerian national resident in this State. The applicant and her partner had their first child E., who was born on 8th April, 2015 in the United Kingdom. A second child of the relationship, M.A., was born in September 2016 within this jurisdiction.

19. The respondent asserts that she and the two children moved from England to Ireland on 28th July, 2015. Since then they have resided with her new partner and his child from another relationship, together with the two children from their own relationship, in Southern Ireland.

20. The respondent contends that she informed the applicant on "numerous occasions" that she was moving to Ireland with the children. In this regard, it is clear that the children ceased attending their old school in the United Kingdom at the end July 2015.

21. The respondent asserts that she brought the children over to England in order to facilitate access on numerous occasions. She further contends that whilst the applicant did have access on 16th January, 2016 and also in February 2016, he failed to exercise access on two further occasions when the respondent travelled over from Ireland to England.

22. The respondent accepts that she continued the rental agreement on the former family home after the removal of the children to Ireland in circumstances where this was to facilitate access with their father.

23. Furthermore, the respondent admits that she retained her United Kingdom tax credits and continued to claim child benefit in England, albeit that these matters have now been regularised with the relevant tax and social welfare authorities. The respondent has also terminated the rental agreement in respect of the family home aforesaid.

24. The respondent contends that the applicant was well aware that the children were residing in Ireland in circumstances where he made such contention during the course of the proceedings in December 2015 and advised the Court that the children were no longer in the United Kingdom and had been removed from their schools. Furthermore, she submits that he was fully aware of her relationship with her new partner and the fact that he resided in Ireland.

Proceedings before this Court
25. The Family Law Summons in this case issued on 13th February, 2017. On 22nd February, 2017, the respondent appeared before the Court. After a number of adjournments to facilitate the filing of affidavits and the preparation of a clinical psychologist's report, the hearing took place on 11th July and 12th July, 2017. Both parties were legally represented and no oral evidence was given. The respondent was present for the hearing but the applicant was unable to travel, due to the ongoing issue of his status in the United Kingdom.

Issues in the Case
26. At the outset, it was conceded that the children were habitually resident in the United Kingdom prior to their removal from that jurisdiction.

27. Further, it was conceded that the applicant has and had custody rights, and was exercising them within the meaning of Article 3 of the Hague Convention.

28. The key issues therefore arising in this case are as follows:-

> (1) when did the removal occur?;

(2) whether the applicant consented to the removal;

(3) whether he acquiesced to the retention of the children in Ireland; and

(4) whether, in circumstances where the summons issued some seventeen months after the children's removal, the defence that the children are now "well settled" applies, and if so, how the Court should exercise its discretion.

These issues arise in the context of the Hague Convention and the Brussels II bis Regulation, the relevant provisions of which are set out below.

Consent and Wrongful Removal

29. Article 3 of the Hague Convention defines wrongful removal in the following terms:-

> "The removal or the retention of a child is to be considered wrongful where
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> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
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> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

30. Article 13 of the Hague Convention, further provides that:-

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of 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 –
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> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention."

31. In the case of *R. (S) v. R. (M.M.)* [2006] IESC 7, the Supreme Court considered an appeal from a High Court order for the return of children to the USA under the Hague Convention. One of the issues before the Court was the proper approach to the issue of consent. In addressing this issue, Denham J. (as she then was), for the Court, adopted the principles outlined by Hale J. (as she then was) in the UK decision of *Re: K. (Abduction: Consent)* [1997] 2 F.L.R. 212:

> "(i) the onus of proving the consent rests on the person asserting it; and
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> (ii) the consent must be proved on the balance of probabilities; and
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> (iii) the evidence in support of the consent needs to be clear and cogent;
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> (iv) the consent must be real; it must be positive and it must be unequivocal;
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> (v) there is no need that the consent be in writing;
>
> (vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent."

32. *F.L. v. C.L.* [2007] 2 I.R. 630 was a case involving the question of consent to the removal of the children to this jurisdiction and acquiescence to their retention here. On the mother's account, the applicant father had consented to the removal of the children from Northern Ireland. The father contended that he had merely consented to the removal of the children from Northern Ireland for the purpose of spending a weekend with the respondent mother's parents. Against that backdrop, Finlay Geoghegan J. made the following comments on the evidential onus of establishing consent:-

> "Prior to considering this legal issue the court must determine, on the facts, whether or not the father consented to the children being retained in this jurisdiction for a period longer than a weekend in November, 2004. The principles according to which the court should determine whether there was consent are not in dispute. The onus is on the mother to establish the consent. The consent need not be in writing. However, the consent must be real, it must be positive and it must be unequivocal: see *Re K. (Abduction: Consent)* [1997] 2 F.L.R. 212 and the judgment of Hale J. at p. 217.
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> The consent must be proved on the balance of probabilities and the evidence in support needs to be clear and cogent. It is not necessary in all instances that there be an express statement such as "I consent". The court may in an appropriate case infer consent from conduct."

33. The authorities therefore make it clear that consent to removal must be clear and unequivocal, and that the burden of proof in this regard is upon the party seeking to prove consent.

34. It is clear from the facts of this case that at the time the children were removed from the United Kingdom, the respondent had indicated that they were travelling to Ireland for a short visit and gave no advance warning of her intention to remain permanently within this jurisdiction. It is evident that the respondent had already enrolled the children in a school within this jurisdiction and had advised their old school that they would not be returning in the new term. Whilst the respondent makes a bald assertion that the applicant knew that they were moving to Ireland permanently, and that she had had discussions with him in this regard, there is simply no evidence to support this. Furthermore, it is clear that in the context of the access hearing, the respondent indicated that she was still living in the United Kingdom and indeed it is notable that at the time of the issue of the divorce proceedings in September 2015, she gave her address as the former family home.

35. In the circumstances, I must conclude therefore that the removal of the children from the United Kingdom was a wrongful removal within the meaning of Article 3 of the Hague Convention and that this is not a case to which Article 13 of the Hague Convention

applies by reason of a consent to the removal of children from their jurisdiction of habitual residence. Further, I am satisfied that at the time of removal or retention, the applicant was exercising rights of custody.

Commencement of Proceedings
36. Article 12 of the Hague Convention provides:-

> "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
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> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

37. The proceedings were commenced by way of Family Law Summons dated 13th February, 2017, almost seventeen months after the date of the removal of the children. Whilst there is a clear dispute between the parties as to when the applicant became aware of the children's removal and the delay that thereafter may have accrued in the issuing of the proceedings herein, this is a matter which the court must of course take into account in considering its discretion pursuant to Article 12. However, on the net issue of whether the proceedings were commenced in excess of one year after the removal, I am satisfied that this is the case. Therefore, the "well settled" defence falls to be considered and the Court must also consider how, if it is satisfied that the children are "well settled", the discretion that should be exercised.

38. Article 13 of the Hague Convention provides:-

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of 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:-
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> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or
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> 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.
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
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> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

The Well Settled Defence, and Discretion
39. The issue of whether a child is "well settled", in proceedings commenced after one year, falls to be considered in the context of the following authorities.

40. In the Supreme Court case of *P. v. B.* (No. 2) [1999] 4 I.R. 185, Denham J. said as follows:-

> "The interpretation of the phrase "settled in its new environment", referred to by the learned trial judge, by Bracewell J. in *Re N. (Minors) (Abduction)* [1991] 1 F.L.R. 413 at pp. 417 and 418 states:-
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> 'The second question which has arisen is: what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the defendant can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas L.J. in *Re S.* did advert to art. 12 at p. 35 of the judgment and he said:-
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> > 'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art. 18 the court may or may not order such a return.'
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> He then referred to a 'long-term settled position' required under the article, and that is wholly consistent with the approach of the President in *M. v. M.* and at first instance in *Re S.* The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the defendant, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.'

I find this to be a very helpful analysis. As too is the description by Garbolino J. in the Guide at p. 136 where he describes art. 12 and its application in the United States as:-

> "The delay in filing an action for more than one year is only the first prong of the 'delay' defense. Even if it is established that a year or more has passed since the wrongful removal or retention, the second prong of this defense requires that the child must have been 'settled' in his or her new environment. In absence of evidence that the child has become

settled, the defense is not established."

41. In *P.L. v. E.C.* [2009] 1 I.R. 1, the Supreme Court referred *inter alia* to the law as set out in *P. v. B.*, adding that:-

> "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 an 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. It is the emotional element in particular which calls attention to the evidence of Dr. Greally. Dunne J. referred to Dr. Greally's evidence that C.'s presentation suggested that "he would settle anywhere". She was entitled to do so. It was consistent with the general tenor of Dr. Greally's evidence in which she described C. as a detached child. Furthermore, Dr. Greally's strictures on reliance on what she called the "verbalisations" of an eight year old point firmly against the usefulness of an adjournment for the purpose of further inquiry into the question of whether C. had settled. Finally, anticipating to some extent my judgment on the question of delay, I agree with Dunne J. that "there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts". This must also be put in the balance when considering the issue of settlement."

42. In *Z.D. v. K.D.* [2008] 4 I.R. 751, McMenamin J. said:-

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

43. The question of whether a child is settled in a new environment under the Hague Convention has also been considered in a US context and was discussed in the case of *Wigley v. Hares* (82 So. 3d 932)

> "The Ninth Circuit has provided a list of factors to consider when making the "settled environment" analysis. These include:-
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> (1) the child's age;
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> (2) the stability and duration of the child's residence in the new environment;
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> (3) whether the child attends school or day care consistently;
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> (4) whether the child has friends and relatives in the new area;
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> (5) the child's participation in community or extracurricular school activities, such as team sports, youth groups, or school clubs; and
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> (6) the respondent's employment and financial stability.
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> In some circumstances, we will also consider the immigration status of the child and the respondent. In general, this consideration will be relevant only if there is an immediate, concrete threat of deportation. Although all of these factors, when applicable, may be considered in the "settled" analysis, ordinarily the most important is the length and stability of the child's residence in the new environment …".

44. I also have regard to the decision in *Cannon v. Cannon* [2004] EWCA Civ 1330 in which the impact of subterfuge and delay on the settlement of a child were considered in some detail in a useful analysis. This was a case in which the mother of the child retained the child, whose habitual residence was in America, in Ireland at the end of an agreed holiday. A consent order for the child's return to California was made, following the institution of Hague Convention proceedings by the father. The mother returned to America for a short time before again removing the child from the jurisdiction, this time to England, and assuming new identities for herself and the child in attempt to evade detection. They were detected over four years later. The Court gave extensive consideration to the jurisprudence in this area across a number of jurisdictions and in particular, the exercise of the Court's discretion under Article 12 of the Hague Convention, saying:-

> "50. There must be at least three categories of case in which the passage of more than twelve months between the wrongful removal or retention and the issue of proceedings occurs. First there are the cases demonstrating, for whatever reason, a delayed reaction, short of acquiescence, on the part of the left behind parent. In that category of case the court must weigh whether or not the child is settled and whether nevertheless to order return having regard to all the circumstances, including the extent of the plaintiff's delay and his explanation for delay. On the other side of the case there may be no misconduct on the part of the defendant beside the wrongful removal or retention itself.
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> 51. In other cases concealment or other subterfuge on the part of the abductor may have caused or contributed to the period of delay that triggers Article 12(2). In those cases I would not support a tolling rule that the period gained by concealment should be disregarded and therefore subtracted from the total period of delay in order to ascertain whether or not the twelve-month mark has been exceeded. That seems to me to be too crude an approach which risks to produce results that offend what is still the pursuit of a realistic Convention outcome.
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> 52. In his skeleton argument for the hearing below Mr. Nicholls offered this conclusion:-
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> 'Each case should be considered on its own facts, but it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return.'
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> 53. I would support that conclusion. A broad and purposive construction of what amounts to "settled in its new environment" will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other relates to the impact of concealment on settlement.

54. Concealment or subterfuge in themselves have many guises and degrees of turpitude. Abduction is itself a wrongful act, in that it breaches rights of custody, but the degree of wrong will vary from case to case. Furthermore abduction may also be a criminal offence in the jurisdiction where it occurred. The abductor may have been prosecuted, convicted, and even sentenced in absentia. There may be an international arrest warrant passed to Interpol to execute either in respect of a conviction and sentence. The abductor may have entered the jurisdiction of flight without right of entry or special leave. The abductor may therefore be, or may rapidly become, an illegal immigrant.

55. At this point I would draw a parallel between an assertion that a child has become settled in a new environment and our case law regarding the acquisition of habitual residence. There is obvious common ground between proving that a child is settled in a new environment and proving the acquisition of a habitual residence in a new environment. The decision of Sir George Baker P in *Puttick v. Attorney General* [1980] Fam 1 clearly establishes that a fugitive from foreign justice will not acquire habitual residence in this jurisdiction simply by reliance on a temporal period during which the claimant has outwitted authority.

56. This brings me to the second factor namely the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that the pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest.

57. This consideration amongst others compels me to differ from the opinion of the Full Court in Australia rejecting the previous acknowledgment that there were two constituent elements of settlement, namely a physical element and an emotional element. To consider only the physical element is to ignore the emotional and psychological elements which in combination comprise the whole child. A very young child must take its emotional and psychological state in large measure from that of the sole carer. An older child will be consciously or unconsciously enmeshed in the sole carer's web of deceit and subterfuge. It is in those senses that Mr. Nicholls' proposition holds good.

58. There will often be a tension between the degree of the abductor's turpitude and the extent to which the twelve-month period has been exceeded. Obviously the present case illustrates the possibility that the considerable turpitude of the mother's conduct will be outweighed by the quality of the false environment and the years of history that it has achieved. It is of course an injustice to the deprived father that the longer the deprivation extends the less his prospects of achieving a return. The other side of the same coin is that the longer the mother persists in her deceit the more likely she is to hold her advantage. Not only does she increase her chances of resisting an application for a return order but she also complicates the process of reintroducing the father into the child's life and reduces the prospects of ever restoring the relationship that might have been between father and daughter but for the lost years.

59. The third category of case might be termed manipulative delay, by which I mean conduct on the part of the defendant which has the intention and effect of delaying the issue of proceedings over the twelve-month limit. An instance is the Canadian case of *Lozinska v. Bielwaski* [1998] 56 OTC 59. In ordering the return of the child the court held that the father had engineered the delay in the proceedings in order to invoke Article 12(2). The court accordingly ruled he could not take advantage of the delay he had created. In this category of case the rejection of the defence comes closer to the application of a principle of disregard than to arriving at the same result by a broad and purposive construction of the asserted settlement. Such an approach is consistent with that taken to a defence under Article 13(b): an abducting primary carer cannot create a defence by relying on circumstances that flow from his or her refusal to return with the abducted child: see *Re C (A Minor) (Abduction)* [1989] 1 FLR 403."

45. In light of the foregoing authorities and having regard to the particular facts of this case, the Court must take into account the following factors in evaluating the degree of settlement in this case:-

(a) There is now a new family unit in Ireland comprising the respondent, her partner, his teenage daughter from a previous relationship, the two children the subject matter of these proceedings and their two half siblings.

(b) The views of M. who is nine years of age are that she wishes to remain in Ireland and is settled here. The younger child L. has also expressed a wish to remain in Ireland, although his views clearly carry less weight where he is only six years of age.

(c) A return to the United Kingdom now would necessarily involve the breakup of the family union and the separation of M. and L. from their family within this jurisdiction. It also necessitates the return of the respondent and the complicating factor of where the two half siblings would reside.

(d) There is no longer a family home in circumstances were the respondent has relinquished the tenancy on that property and it is further clear that the applicant no longer lives in that area. In the circumstances it is clear that there is no property available to the respondent and the children to return.

(e) Both M. and L. have now completed two years schooling in Ireland and it is clear from their school reports, which have been exhibited, that they are both progressing well and have settled into their environment.

(f) The issue of the applicant's residence in the United Kingdom remains unresolved and therefore it is still unclear as to whether the applicant himself will be permitted to continue to remain there. The applicant is also settled in a new relationship and has a young child with his new partner.

(g) The respondent's current living arrangements are such that she is a full-time homemaker, financially supported by her partner, who is the father of the children's half siblings.

46. Counsel on behalf of the applicant contends that the respondent has provided very little detail regarding the settlement of the children. However, taking into account the totality of the evidence in that regard, including the report of Dr. O'Connor which clearly presents a picture of two children who have adjusted well to their new environment, made new friendships, and are enjoying their new school regime, the Court must reject such criticism.

47. The evidence of the respondent taken together with the evidence of Dr. O'Connor and the school reports exhibited in the supplemental affidavit of the respondent presents a picture of two happy, well-adjusted children who have integrated well into their new environment and who are expecting to commence their third year in school here in a matter of weeks, such that the Court can only conclude that the children are "well settled" in Ireland and were so at the time that the proceedings commenced in February,

2017.

48. The Court was urged on behalf of the applicant that, in the event that the Court found that the children were "well settled", it should nonetheless exercise its discretion in favour of returning the children to England, and that one of the relevant factors in the delay in issuing proceedings was by reason of the subterfuge in the manner in which the children were taken to this jurisdiction.

49. On the question of subterfuge and how it impinges upon the assessment of settlement, the Court has considered what was stated by McMenamin J. in the case of *Z.D. v. K.D.,* already referred to herein, as follows:-

> "81 In *A.K. v. A.K. (Child Abduction)* [2006] IEHC 277, [2007] 2 I.R. 283, Gilligan J. accepted there was evidence that the older of two children had become fully integrated with her classmates and friends in a local community. But he also held that an absence of concealment or subterfuge was relevant to the fact that the family had become settled (para. 25).
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> 82 In *Cannon v. Cannon* [2004] EWCA Civ. 1330, [2005] 1 W.L.R. 32, Thorpe L.J. in the Court of Appeal had found that each such case should be considered on its own facts, but stated at para. 52:-
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> "… it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return."
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> 83 That judge added at para. 53:-
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> "I would support that conclusion. A broad and purposive construction of what amounts to 'settled in its new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay."

50. There is clear evidence in this case that the respondent engaged in subterfuge or concealment in respect of the removal of the children to this jurisdiction. Whilst the respondent asserts that she had discussed a move with the children to either Ireland or Hungary with the applicant, it is clear that in the months after the move the applicant was unsure of their whereabouts and indeed raised this issue in the course of the application for the Child Arrangements Order as already referred to herein. It is, however, clear from the transcript of those proceedings that the applicant asserted that the respondent was living in Ireland at that time and indeed there is reference at p. 43 of the transcript that the oldest child, M. was learning Irish. Further the applicant has averred to the fact that he had attended at the children's school and also at the family home and had been unable to make contact with the respondent or the children. In the circumstances, it is clear that the actions of the respondent in failing to come clean at the outset about her removal of the children to Ireland on a permanent basis contributed to the delay in this case but the Court is also mindful of the fact that had the applicant acted upon his suspicions in a more timely fashion, that the delay in the commencement of the proceedings would be considerably less. To repeat, the wrongful removal was on 28th day of July, 2015 and the summons issued on 13th February, 2017, which involves a seventeen month gap. Such a period is extremely significant to two young children who were already settled into their second year in their new schools surrounded by an extended family and new friends. Indeed, even if the Court was to accept that he only became definitively aware of the removal to this jurisdiction in May 2016, which seems somewhat incongruous in circumstances where he accepts the children had told him in February 2016, there is very little by way of explanation thereafter as to why the proceedings only issued in February of this year. In the circumstances, the Court can only conclude that the applicant was not putting sufficient effort into progressing his case expeditiously, particularly having regard to the effect of the passage of time on the two young children involved.

51. Accordingly, I am of the view that the discretion in this case should be exercised against returning the children to the United Kingdom. This is a case in which considerable time has passed during which the children have become increasingly settled in Ireland. Whilst the major objective of the Convention is to secure a swift return to the country of origin, it is clear on the facts of this case that this can no longer be met.

52. Clearly the decision of this Court does not in any way decide custody or access issues in relation to the children. This judgment is concerned only with the narrower issue of whether the children should be returned to the United Kingdom within the parameters of the Hague Convention. Thereafter, the provisions of Article 11, subsection 6-8, of Brussels Regulation II bis apply.

53. Furthermore, the Court has considered whether or not the applicant, through his delay in progressing his application, was acquiescing to the retention of the children in Ireland. The relevant principles have been set out by Lord Browne-Wilkinson in In *Re: H and others (minors)* [1998] A.C. 72, approved by Denham J. in *R.K. v. J.K.* [2000] 2 I.R. 416:-

> "To bring these strands together, in my view the applicable principles are as follows:-
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> 1. For the purposes of Article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in *In re S. (Minors)* "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact".
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> 2. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent.
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> 3. The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law.
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> 4. There is only one exception. Where the words or actions of the wronged parent 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, justice requires that the wronged parent be held to have acquiesced."

54. Whilst the applicant in the instant case did not progress his application as expeditiously as one might have expected, I am not satisfied that this could be said to amount to acquiescence in view of the fact that his explanation in this regard was that he had originally sought enforcement of the Child Arrangements Order before receiving the appropriate legal advice as to how to progress the matter before this Court. On the facts of this case, I am not satisfied that the applicant had tacidly acquiesced to the retention of the children in this jurisdiction having regard to the efforts made by him to determine the whereabouts of the children; by seeking

enforcement of the Child Arrangements Order and also having regard to the manner in which the proceedings have progressed before this Court. I am more persuaded by the view that his actions amounted to a "delayed reaction, short of acquiescence."

55. In determining that the discretion in this case should be exercised against the return of the children to the United Kingdom, the Court has clearly taken account of the views of the children and their objection to being returned.

56. The approach to be taken by the Court in this regard was elucidated in the case of *C.A. v. C.A. (otherwise McC)* [2009] IEHC 360, [2009] 2 I.R. 162 which adopted the reasoning of the English Courts. Finlay Geogheghan J. at p. 171 of the judgment stated:

> "Counsel for both parties were in agreement that the proper approach of this court is what has been termed the three stage approach to a consideration of a child's objections. Potter P. in *Re. M. (Abduction: Child's Objections)* [2007] EWCA Civ 260, [2007] 2 F.L.R. 72, at p. 87, stated:-
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> > [60] Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return."

57. As already stated, Dr. O'Connor, clinical psychologist, has obtained the views of both children in this case. The older child, L., has clearly expressed the view that she is much happier here in Ireland and states that she "does not want to go back to England because she is happy here." She further recounts how her father has now moved away from the area where they had resided and where they had attended school. Dr. O'Connor opined that M. displayed an "exceptional maturity and emotional honesty" and further found that she was "capable of forming her own views." The younger child, L., who is six years of age, further voiced his objection to returning to England and advised that his preference was to remain in Ireland. It is clear, however, having regard to his age and maturity, his views must carry less weight than that of his sister. Having regard to the principles to be applied in considering the objections of a child, the Court is clearly entitled to take into account M.'s views.

58. The final issue which the Court has to consider is whether there is a 'grave risk' that the return of the children would expose them to physical or psychological harm and/or an intolerable situation, as envisaged by Article 13(b). I am satisfied that this is not a proper matter for consideration having regard to the evidence in this case; the threshold for establishing 'grave risk' is very high, as set out in authorities such as *A.S. v. P.S.* [1998] 2 I.R. 244 and *P. v. P.* [2012] IEHC 31 and is simply not met by the evidence in this case.

Conclusions

59. Having considered all of the facts in the instant case, I accept that there was a wrongful removal of the children to Ireland but must refuse the relief sought in the exercise of the Court's discretion in circumstances where the proceedings were commenced more than one year after the wrongful removal and where the children have become "well settled" within the jurisdiction.