

THE HIGH COURT

FAMILY LAW

[2017 No. 23 HLC]

BETWEEN

M. S.

APPLICANT

AND

A. R.

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 29th day of January, 2018

1. This is an application pursuant to the Hague Convention on the civil aspects of international Child Abduction signed at the Hague on 25th October, 1980 (the Convention) as applied by Council Regulation (EC) No. 2201/2003 of 27th November, 2003 (Brussels II bis) (the Regulation) for the return of two children A.S. born in Dublin on 7th April, 2010 and M.S. born on 15th February, 2013. The applicant and the respondent are the natural parents of both children.
2. Both parents are Polish nationals. In May 2007 the applicant came to Ireland. On 21st August, 2008 the respondent came to Ireland and they commenced living together. They come from the same area in Poland. In November 2015 unhappy differences arose between the applicant and the respondent as a result of which the applicant decided to return to Poland. He wished to take the two children with him. He claims that the respondent gave her consent to both children living permanently with him in Poland. The respondent disagrees and contends that she did not agree to the permanent removal of the children to Poland. She states that she consented to their return to Poland for a temporary period until such time as she could establish herself in more secure employment so that the children could return to Ireland and be with her.
3. On 10th November, 2015 the applicant and the children flew to Poland with the respondent's consent. The applicant states that prior to leaving Ireland he and the respondent attended at the local social welfare office and informed the relevant authorities that he and the children would be leaving the country. He gave up his social welfare benefits. He states that he and the respondent packed his car with his belongings and the children's belongings including their toys and summer clothes. Having conveyed the children to Poland he returned and brought the car to Poland on 13th November, 2015. They informed A.S.'s school in Ireland that he was leaving the country and moving to a school in Poland. The respondent drove him and children to the airport and walked them to the departure gates. He claimed that she knew they would not be coming back and that he and the children would be living in Poland.
4. The applicant states that on 13th November, 2015 three days after the children's departure to Poland the respondent sent him a text message asking if he had made arrangement for A.S.'s new school in Poland. On 14th November she sent a further message stating that she would send trousers to Poland for A.S. to wear to school. On 21st November, the applicant sent the respondent a text asking her to provide financial help for the children. She replied "of course I told you I would help with the money. Just as much as I can. How much do you want?". The applicant states that he requested a sum of €250.00 per month in respect of each child. In addition on 24th November, the applicant stated that he wished to take A.S. to a speech therapist to which the respondent agreed. On the same date the respondent sent him a message asking him to swear that he would take care of the children.
5. The applicant also claims that prior to their departure for Poland the respondent commenced a relationship with T.L. She had a new job as a courier and flyer distributor. This affected her plans to visit Poland over Christmas. He claimed that he offered to pay for her flights but she declined. However, the respondent visited Poland in February, May and August 2016.
6. On arrival in Poland the applicant and the children lived initially with his family and then in an apartment near the parties' home town. A.S. attended kindergarten. The applicant enrolled M.S. to commence in kindergarten in September 2017. The children visited their paternal grandparents every weekend and initially visited the respondent's parents. The children spoke Polish and M.S. was initially looked after by the applicant's mother. In November 2015 the applicant commenced work. He entered a one year lease agreement for an apartment from 1st April, 2017 to which they moved.
7. The respondent claims that she originally came to Ireland intending to live and work here permanently. She denied that the breakup of her relationship with the applicant was because of her relationship with a third party. She stated that the reason for the breakup was his failure to provide for the family and he recorded a number of criminal convictions.
8. The respondent states that the applicant knew from the beginning that the children were to stay in Poland on a temporary basis. They initially received temporary residence status as certified in documents dated 14th August, 2016 which would continue until 1st April, 2017. They could have been registered for permanent residence following the applicant's return with the children to his parents' home in their home village.
9. It is accepted that during the period in Poland the respondent maintained telephone contact with the children. She went to Poland three or four times to see them commencing in a period 21st – 26th February, 2016. In a visit between 10th – 14th May, 2016 the respondent requested that the children be allowed to return with her to Ireland. She bought airline tickets on two occasions. However, she claimed that when she arrived to take the children she was not allowed to see them. She exhibited tickets in respect of the children's proposed return dated 16th September, 2016.
10. The applicant states that he started work with a building company at the end of November 2015 and continued in that employment until February 2017. The applicant also states that he had employment from time to time as a car body repair specialist in Poland. He submitted evidence that this job was available to him on a long-term basis. However, the departure of the respondent and the children for Ireland caused him to follow them here to seek the children's return to Poland as a result of which he gave up that employment. During the course of these proceedings he obtained employment in Cork. The respondent and the children live in County Kildare.

Orders of the Polish Courts

11. On 2nd November, 2016 the respondent initiated an application before the Polish Courts seeking the return of the children to Ireland under the Hague Convention. This application was dismissed by the District Court at Bielsko-Biala on 21st December, 2016. The respondent appealed this decision to the Regional Court of the Bielsko-Biala – Department No. 2 Civil Affairs. The appeal was dismissed on 23rd March, 2017. The initial hearing before the District Court in Bielsko-Biala took place on 16th December, 2016. It resumed on 20th December. On the 16th December the applicant agreed to allow the respondent to take the children for the weekend in Poland on the basis that they would be returned to the applicant on the following Sunday or Monday. The decision of the Polish Court at first instance was delivered on 21st December. In those proceedings both parties had been legally represented.

12. In his first affidavit the applicant avers that the respondent took the children to her mother's home but did not return them to him. He saw the children at her parents' home over Christmas and New Year. The respondent refused to return the children when requested. The applicant took legal advice and was informed that under Polish law both parents have equal rights to custody in respect of their children and was also advised that he could not seek an order for their return in the proceedings which were then in being which were limited to issues under the Hague Convention.

13. Following the dismissal of the respondent's application under the Hague Convention which had alleged the wrongful removal of the children from Ireland to Poland he attended at the respondent's family home on 30th December, 2016 but she did not bring the children out to see him. He visited the house again on January 1st, 3rd and 5th. On each occasion he texted the respondent to tell her that he was outside the house but she refused to bring the children out to see him. On Friday 6th January at approximately noon he again went to the respondent's parents' house and she did not come out on request to see him. He subsequently concluded that she was not present at that stage because later that day at 6.20pm he received a text from the respondent informing him that she and the children were in Ireland. He immediately replied stating that he wished the children to be returned to Poland. He did not believe that the respondent would remove the children from Poland without his consent. He then reported this removal to the police at Bielsko-Biala on 6th January. Subsequently, he initiated the proceedings under the Hague Convention in Poland on 20th February, 2017 by signing a Hague Convention application form.

Judgment of the District Court in Bielsko-Biala

14. In a lengthy and detailed judgment on 21st December the District Court in Bielsko-Biala dismissed the respondent's Polish Hague Convention abduction proceedings and refused to order the return of the children to Ireland. The court made a number of findings of fact upon which it based its conclusions. It stated:-

"With time, the relations between the parties deteriorated. They both got in countless fights and arguments. The police intervened two times. The last recorded police intervention was in November 2012. In September 2015 the participant [the father] started to suspect that the applicant was seeing another man. He found out by using a special computer programme for reading sent emails that the applicant's new love life was T.L. In October 2015 the applicant decided to end the relationship and told the participant about it on 6th November, 2015. ... The participant decided to leave Ireland and go back to Poland. He informed the applicant that he was taking the children with him [which she agreed]. On the 10th November, 2015, the applicant drove the participant and the children to the airport in person and walked them to the gates. She was aware at this time that the participant would never come back to Ireland. He only took a few of his belongings and the children with him. He packed the rest of his belongings, with the help of the applicant, in his car which brand was Porsche and brought it back in Poland afterwards. The children's belongings such as clothes and toys were also packed in that car. Before he left Ireland, the parties both went to the employment office, where the participant resigned from his unemployment benefit and his family benefit.

Until the day he left, the children's interest were focused in Ireland. The minor A.S. attended [school in Ireland] since August 2014.. The children also benefited from medical treatment in [Ireland] -.

... In mid-April 2016 he rented an apartment in Bielsko-Biala where he lived with his children. In June 2016 his new partner M.W. along with her three year old daughter moved into his apartment. The apartment had three bedrooms, a kitchen, a bathroom and a toilet. It was fully equipped. The minor A.S. has his own room in which he can sleep and rest in good conditions. The minor M.S. shares a room with her father's partner with whom she shares a bed ... Primarily the participant provides for his family from temporary work ... He has worked in this company since 1st December, 2016 on the basis of an indefinite duration contract of employment and earns 1350pln net per month."

15. The court received a number of reports in respect of the welfare of the children and heard evidence from both parents. It stated:-

"The minor A.S. is currently 6 years old. After his arrival in Poland as a 5 year old he began to go to the 1st class of primary school No. 2 in K because he was registered under the address of his grandmother ... He regularly attended classes, always was prepared for school and had all the required school supplies. The participant always showed interest for the progress and the boy's behaviour, he regularly attended parent's meetings and came to every individual consultation. During the school year 2016 – 2017 the minor repeats his first year under the framework of the kindergarten No. 6 in Bielsko-Biala.

The minor M.S. is 3 years old. While her father works, she remains under her grandmother's care D.S. The child is well looked after."

16. The court reviewed subsequent events. It noted that by the end of November 2015 the respondent had taken a job which impeded her planned trip to Poland for Christmas. The father hoping at that stage for a reunion proposed to pay for the mother's flight to Poland but she declined. She obtained another job in January 2016 receiving a promotion to Deputy Manager and earning €1,400.00 per month. She resided with two friends in a five roomed flat. but had continued to reside in the house where she had lived with the father until May 2016. She had regular contact with the children via facebook. The court was satisfied that she told the applicant that she would send on clothes for school and there was a discussion about child support. She spoke about her longing for the children. The court noted that the mother came to Poland in February, May and August 2016 staying with her parents living in K. She took the children there and spent time with them. In February she informed the father that she wished to take the children to Ireland. He refused. Before her visit in August 2016 she enrolled A.S. in a senior kindergarten group in the town where she was living in Ireland and M.S. in a free early education programme there beginning in September. She also submitted a request for child benefit and bought the children flight tickets. The father refused to consent to the children's departure or to hand over their passports to her. Following her return to Ireland the respondent submitted a request for Child Recovery under the Hague Convention on 2nd November. The court stated that:-

"In order to prevent the applicant's arrival in Ireland given pursuant to the Irish Domestic Violence Bill she filed a request

to the Naas District Court for the issue of [a] protection order against the participant and indicated his Irish address. In this case, the court issued a warrant against the participant prohibiting the use of violence, harassment, and threat against the applicant and the persons she took care of. The court also issued a date for the session on the 12th December, 2016. Both documents were delivered to the applicant at his Irish address."

17. This is a reference to a Protection Order sought and granted by the local District Court on 17th October, 2016 on the basis that the court concluded that there were reasonable grounds for believing that the safety or welfare of the applicant and dependent persons required the issuing of the order. It required that the father who was then in Poland with the children should not use or threaten to use violence against, molest or put in fear the applicant or any dependent persons (presumably the children). A summons had been issued returnable to 12th December, 2016 seeking a safety order pursuant to s. 2 of the Domestic Violence Act 1996. The Protection Order continued until the hearing date which was set for 12th December.

18. On 12th November, 2016 the applicant father applied to the District Court in Bielsko-Biala for an order entrusting him with parental custody in respect of both minors. This case was registered and on the 14th November, 2016 the District Court adjourned the proceedings pending the determination of the mother's application under the Hague Convention.

19. The court made the following determination in respect of the mother's application:-

"The court did not give credence to the applicant's testimony, because she only accepted a temporary stay of the children in Poland, meant to last until Christmas, and after until the end of the 2016 holidays. The applicant did not present any credible evidence, yet the burden of proof of the unlawful child removal rested upon her. The witness L.R.'s testimony[her mother] also cannot be given any credence because her knowledge about the parties' relationship and about the children's arrival in Poland was explained to her by the applicant. The participant denied the applicant's testimony, confirming in his own testimony, that she gave him the permission to take the children back to the country. She also said that he was a good father and that no harm should happen to the children. M.S.'s witness testimony also contravenes with the applicant's testimony; it results from A.R. testimony that Mr. S was present while she talked with the participant about her coming for Christmas to Poland.

The court also did not give credence to the applicant's testimony concerning the alleged drug consumption of the participant. These allegations are not confirmed by the participant nor by the witness M.S. who lived with the parties for a long time and come to that it results from this witness's testimony that it was the applicant that smoked marijuana and that she allocated a large part of her income for this.

The court did not give credence to the applicant's testimony in the part where she affirms that the participant used physical violence against her. The use of violence by the participant against the applicant is not confirmed by the witness M.S. who according to what A.R. said was supposed to be an eye-witness of the participant's acts of violence. The participant testified that he never hit the applicant. Nevertheless it happened that he yanked at her or at her clothing. The applicant admittedly submitted a protection warrant against the participant. It is however to underline that she submitted the request for protection early in September 2016, meanwhile, when the last recorded police intervention happened in November 2012. ... The presented circumstances give evidence to the fact that the applicant's real intention was to present a bad image of the participant for the purpose of this proceeding. What shows [sic] that the applicant was not scared of the participant is the fact that she proposed to pay his fine in Ireland what would permit his departure without any consequences."

20. The court also rejected evidence given by the applicant that the children were neglected by their father in that he did not dress them properly. The community interview report did not substantiate this nor did the school's opinion concerning A.S. Furthermore her evidence that the breakup of the relationship was caused by the fact that the father had an affair with another woman was rejected. The court was satisfied that the father having moved back to Poland hoped for a reunion with the A.R. and that she would come back to the country and live with him. It stated "the aforementioned circumstances show that the applicant deliberately used untrue or half true statements in order to achieve her goals."

21. The court also stated that during the proceedings it interviewed the child A.S. but not M.S. on the basis of its shared opinion with an expert psychologist that the minor because of her age and other factors was not able to participate in a hearing. The court heard from A.S. concerning his relationship with both his parents.

The Decision of the Polish Court

22. The court set out the terms of Article 3 of the Hague Convention and noted that the right to custody must be considered under the law of the country in which the children resided permanently before their removal or retention. The court therefore considered the rights to custody and guardianship under the Guardianship of Infants Act 1964. It was accepted by the Polish court that the mother was the only lawful guardian of the children and there was no doubt that she exercised her right to custody and guardianship prior to the children's arrival in Poland. However the court did not consider the removal of the children from Ireland to be unlawful because of the consent which the mother gave to their departure and long-term future residence in Poland. It then considered Article 13 of the Convention and noted that a judicial authority may 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 maturity at which it is appropriate to take account of its views. It noted that in considering the circumstances referred to in the Article the judicial and administrative authorities should take into account the information relating to the social background of the child provided by the central authority or a competent authority of the child's habitual residence. The real issue in the case was whether the removal of the children to Poland was meant to be temporary or definitive. The court placed particular emphasis on the fact that the mother sent text messages to the father within three days of the children's departure that she would send trousers for school, knew of the intention to send A.S. to school in Poland and completely accepted that idea. The court concluded that if the children's departure was meant to be temporary the enrolment of A.S. on a permanent basis in primary school was inconsistent with that proposition. In addition on the 21st November, 2015 child support was discussed with the mother who raised no objection about it. In the court's view this was consistent with the fact that the child's mother would remain in Ireland. A monthly sum was discussed. The court set out each of the facts that satisfied it that there had been no unlawful removal or retention of the minors by the father. The court was satisfied that the mother agreed to let the children leave and change their place of residence. A number of messages were received before Christmas 2015 in which she appeared to indicate a change of mind stating that the children should be with their mother and that "maybe I should come and take them back". The court stated that the order which it made in the Hague Convention proceedings did not settle other aspects of parental responsibility or the decision concerning the children's place of residence. It stated that the competent jurisdiction in that matter was the Polish Custody Court in separate proceedings. It noted that the custody proceedings had been adjourned pending the determination of the Hague Convention proceedings. The mother's claim for relief under the Hague Convention was refused.

23. Even though the respondent removed the children from the jurisdiction without telling the father, the children's mother appealed the Polish District Court's ruling. This appeal was dismissed on 23rd March, 2017.

The Hague Convention Proceedings in Ireland

24. Following the receipt of a request from the Polish Central Authority to the Irish Central Authority these proceedings were instituted on 14th August, 2017 returnable to the 6th September. They were grounded upon the affidavit of Mr. Chris Walsh sworn 14th August which exhibited a number of relevant proofs. A number of case management hearings were then conducted. An order was made on 1st November, 2017 for the assessment of A.S. This was carried out by Ms. Jacinta Nolan on 7th November, 2017. A legal aid application by the respondent was refused. She obtained the assistance of a "McKenzie friend" who was permitted by order made on 13th December, 2017 to be present and address the court on her behalf. The hearing before this Court took place on 15th January, 2018.

25. A number of affidavits have been exchanged between the parties which the court has considered together with the exhibits therein contained and the report of Ms. Nolan.

26. No oral evidence was tendered at the hearing.

27. The applicant seeks the children's return because they were wrongly removed from Poland and the jurisdiction of the Polish Courts. The following Articles of the Hague Convention are relevant:-

"Article 3

The removal or the retention of a child is to be considered wrongful where –

(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

(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.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

28. Article 12 provides that where a child has been wrongfully removed under the terms of Article 3 and at the date of the commencement of the proceedings before the judicial 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, the authority concerned shall order the return of the child forthwith. In this case the special summons was issued within twelve months of the alleged wrongful removal. Thus if the court finds that the children were wrongfully removed by the respondent, it must direct their return forthwith to Poland subject to the provisions of Article 13 of the Convention.

29. Article 13 states:-

"Notwithstanding the provisions of the preceding Article, the judicial ... authorit[y] of the requested State is not bound to order the return of the child if the person, ... which opposes its return establishes that:-

(a) the person ... having the care of the person of the child was not actually exercising the custody rights at the time of removal ... or

(b) there is a grave risk that his ... return would expose the child to physical or psychological damage or otherwise place the child in an intolerable situation.

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.

In considering the circumstances referred to in this Article, the judicial ... authorit(y) 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."

30. The court in determining these matters is authorised to take judicial notice of the law of the State of habitual residence of the child or of that country's judicial or administrative decisions without recourse to formal proofs under Article 14. Article 19 provides that a decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue. Article 20 states that the return under Article 12 may be refused if it is not permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

31. The court also notes that for the purpose of the Convention Article 5 provides that "rights of custody" includes "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

Habitual Residence

32. The assessment of habitual residence is a question of fact.

33. The parents in this case were unmarried. It was submitted that until an application was made to the Irish courts the father had

no rights in respect of the children pursuant to s. 11 of the Guardianship of Infants Act 1964 as amended by s. 13 of the Status of Children Act 1997. It provides that any person who is a guardian of an infant may apply to the court for its direction on any question affecting the child's welfare. The court may give such directions as it thinks proper concerning the custody of the child and the right of access of his/her father or mother. In the case of a child whose father and mother have not married the right to make an application regarding the custody of the child and the right of access extends to the natural father. Under s.6A of the 1964 Act as amended the court may on the application of a child's father where the parents are unmarried appoint him to be a guardian of the child thereby providing him with the legal basis upon which to make application for orders concerning the child's welfare. The father in this case made no such application. However, since his children's birth and until his departure with them to Poland following the breakdown of his relationship with their mother, he exercised and undertook all parental daily obligations and took care of his children with their mother jointly. The court is satisfied and it is not in issue that the children left this jurisdiction with the express consent and assistance of the respondent.

34. The respondent claims that this agreement extended only to a temporary removal of the children until such time as she could establish herself in stable employment and living circumstances in Ireland where she hoped and intended to remain indefinitely with the children. She states that the children were to be returned to live with her in Ireland when her situation stabilised following the breakup of the relationship. She claims that Ireland remained the place of habitual residence of the children at all times relevant to this application.

35. This very issue lies at the heart of the determination made in the course of the Hague Convention proceedings in Poland as set out in the judgment already quoted.

36. It is clear on the evidence that the children's country of habitual residence was Ireland prior to their departure for Poland with the respondent's consent in November 2015. The applicant submits that the evidence establishes that the parents intended that they would live in Poland after their return and that their country of habitual residence changed to Poland by agreement at the time they left Ireland. It is for the national Court to take into account the circumstances specific to each individual case when considering the place of habitual residence of the child. A number of factors are relevant to this determination including the fact that the children were born and brought up in Ireland until the date of their departure for Poland in November 2015. That departure was consented to by their mother. A number of other factors are relied upon by the applicant to support this submission including the period during which the children remained in Poland, the circumstances in which they came to be there, commenced their education and were integrated socially and with other family members; the fact that they are Polish nationals, speak Polish, and were the subject of court proceedings in Poland including an application by their father for custody which was adjourned pending the determination of the Hague Convention application. These are facts from which it is claimed a change in habitual residence may be inferred.

37. The court is satisfied that the principles applicable to the determination of the children's place of habitual residence are summarised in *D.E. v. E.B.* [2015] IECA 104 in which the relevant principles in Case C-497/10 *Mercredi v. Chaffe* (22nd December, 2010), Case C-523/07 *Re: A.* [2009] ECR I-2805 and Case C-376/14 *C. v. M.* (9th October, 2014) were considered and applied.

38. In *C. v. M.* a number of questions had been referred by the Irish Supreme Court to the CJEU. The court was asked to consider whether when a child has been removed in accordance with a judgment of a court of competent jurisdiction which is provisionally enforceable but is overturned on appeal by a judgment which then fixes the residence of the child in the home of the parent who lives in that court's jurisdiction, the court of the Member State to which the child has been removed, must determine, by undertaking an assessment of all the specific circumstances of the case before it whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention.

39. The CJEU concluded that Article 11(1) of the Regulation "can be applied for the purposes of granting an application for return only if the child was immediately before the alleged wrongful detention, habitually resident in the Member State of origin". The court then stated:-

50. As regards the concept of 'habitual residence', the court has previously stated, in interpreting Article 8 of the Regulation in the judgment in *A. ...* and Articles 8 and 10 of the Regulation in the judgment in *Mercredi ...* that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgments in *A. ...* paras. 31 and 35 and *Mercredi ...* paras 44 and 46).

51. In those judgments the court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case ... The court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment ...

52. The court explained that, to that end, account must be taken of, *inter alia*, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State ... The court also held that the intention of the parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence ...

53. Further, in para. 51 to 56 of the judgment in *Mercredi ...* the court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

54. The concept of the child's 'habitual residence' in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the above mentioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in para. 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

55. When examining in particular the reasons for the child's stay in the Member State to which the child was removed and

the intention of the parent who took the child there, it is important, in circumstances such as those of the main proceedings, to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it. Those factors are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary.

56. Having regard to the necessity of ensuring the protection of the best interests of the child, those factors are, as part of the assessment of all the circumstances of fact specific to the individual case, to be weighed against other matters of fact which might demonstrate a degree of integration of the child in a social and family environment since her removal, such as those mentioned in para. 52 of this judgment and, in particular, the time which elapsed between that removal and the judgment which set aside the judgment of first instance and fixed the residence of the child at the home of the parent living in the Member State of origin. However, the time which has passed since that judgment should not in any circumstances be taken into consideration.

40. The court answered the question posed by stating that the Member State to which the child was removed must determine by undertaking an assessment of all the circumstances of facts specific to the individual case, whether the child was still habitually resident in the Member State of origin immediately before the alleged wrongful retention. As part of that assessment, it held that it was important that account be taken of the fact that the judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it – a fact peculiar to that particular case.

41. The Court of Appeal was satisfied that the fundamental approach of the CJEU was that a child's habitual residence must be established by the national Court taking account of all the circumstances of fact specific to each individual case. The assessment must include the conditions under which the child moved and the reasons for the child's stay in the Member State to which it had been removed. The absence of consent of one parent who holds parental responsibility to a move of the habitual residence of the child to another Member State is a matter which must be weighed with all the other relevant circumstances of the case.

42. In this case the respondent clearly made a case under the Hague Convention that the applicant father had wrongfully retained the children in Poland following a consent given by her for their temporary stay in Poland as outlined above. The Polish Court determined that this was not so. It considered all of the circumstances of the case and determined that the children were habitually resident in Poland. It considered the relevant factors set out above when making that determination. The respondent mother had agreed to their removal to Poland and to their integration in schools in a process that clearly involved integration socially in their new community with their respective extended families.

43. The court is satisfied of the following facts:-

- (i) The children since their birth in Ireland resided with their parents here as a family unit. A.S. commenced early education here. They were fully and socially integrated in the community availing of educational, social and welfare services.
- (ii) The relationship between the parents broke down and the applicant father with the mother's consent left for Poland with the children on the 10th November, 2015.
- (iii) The children's toys and personal possessions were packed into the family car. The applicant father returned to Ireland and brought his own and the children's possessions including their toys to Poland on 13th November, 2015.
- (iv) On his return to Poland the applicant and the children initially lived with his family in the area in which he had grown up. He obtained work which was initially on a casual basis. The children became socially integrated with his and to some degree their maternal family who assisted in his and their integration in Poland.
- (v) The children were integrated into society in Poland in the following ways following their arrival:-
 - (a) A.S. commenced school on the 16th November, 2015. His mother sought assurances about his attendance at school and sent clothes over for him to wear when going to school. Later he commenced kindergarten on the 6th September, 2016.
 - (b) M.S. was looked after initially by her grandmother when her father was out to work as she was not old enough to commence in school.
 - (c) Both children spoke Polish.
 - (d) The children remained in Poland between the 10th November, 2015 and the 5th/6th January, 2017.
 - (e) The applicant and the children moved into an apartment together on the 1st April, 2016 on foot of a one year lease the father had obtained.
 - (f) It is clear from the evidence that the applicant father resumed his life in Poland and obtained employment there to support the children. Further evidence of this is provided by the relationship which he formed with his new partner in 2016 and moved in with her and her three year old which continued for some months.
 - (g) It is indicative of the applicant's intention to remain in Poland on a long term basis that he formed a new relationship. His new partner lived with him and the children in 2016. Her daughter also lived with them during the period of their relationship.

44. The respondent claims in her affidavit that since 5th January, 2017 the children have resided with her in Ireland with the applicant's consent. A short affidavit from the respondent's mother M.S. in Poland claims that on 20th December, 2016 the applicant stated in her presence and the presence of her daughter "do what you please with the children now". She states that he made it clear to the respondent and her mother that he gave his consent to the removal of the children to Ireland. This is denied by the applicant who states that had he given such a consent he would have returned the children's passports and vaccination booklets to the respondent before they left Poland. That exchange was said to have occurred during a period when the children were staying with their mother in Poland. On 18th December, 2016, a Sunday, the mother was due to return the children to the father to enable

A.S. to attend kindergarten the following day but did not do so.

45. I am satisfied on the evidence available that no such consent was given. No arrangements were made or attempted to be made by the applicant with the respondent for removal of the children to Ireland in accordance with any such alleged consent such as those originally made for the departure of the children to Poland. I am confirmed in this view in that the first information furnished to the applicant of their departure was by text on the 6th January following a number of visits to the respondent's mother's house to see the children and attempts to speak to their mother from in or about 30th January as already outlined. At that time, he had initiated custody proceedings which were still pending in Poland and had obtained a favourable ruling in the Polish Court rejecting the Hague Convention application brought by the respondent.

46. In all the circumstances, I am satisfied that the respondent consented to the removal of the children from their place of their habitual residence in Ireland on 10th November, 2015 in the knowledge at that time that the children would be cared for permanently in Poland. Though the respondent clearly changed her mind about this after the event, nevertheless, the applicant on the basis of the consent given returned to Poland and set about establishing a stable and permanent home there for himself and the children in a community in which his family and the applicant's family resided. He took steps to establish his working and family life there and to integrate the children into the community and their extended family. It is clear from the evidence concerning their return to Poland, what happened while the children were in Poland and the fact that the applicant discussed the payment of maintenance and support for each of the children with the respondent that for some period at least the respondent continued to support this permanent move making a number of trips to see the children from time to time who had now embarked on their new life in Poland.

47. I am satisfied that in or about May/June 2016 the respondent changed her mind and sought the return of the children with her to Ireland which was refused by the applicant. He clearly persisted in this objection which led to his application for custody in the Polish Courts on 12th November 2016. She had not taken any step prior to the initiation of the Hague Convention proceedings on the 2nd November, 2016 to procure their return. She did however purchase airline tickets for 16th September, 2016 with the intention of returning with the children on that date to Ireland. The applicant refused to allow this.

48. The court is satisfied on the balance of probabilities that the parties made a clear agreement that the father should return to Poland with the intention that he and they would remain permanently there. I am satisfied that their place of habitual residence for the purpose of this application is and remains Poland notwithstanding their long connection with this jurisdiction prior to their departure. I am satisfied that the nature and extent of their integration into Polish society against the background of the strong family connections which they have with Poland, the fact that they speak Polish and the fact that they have commenced their education in Poland and the circumstances of their departure from Ireland fully suggests that their return to Poland was permanent and that the court should proceed on the basis that the children's habitual residence for the purposes of these proceedings at the time of their removal from Poland on 5th/6th January, 2017 was Poland.

Parental Rights and Custody

49. Under Polish law both parents are entitled to custody rights in respect of the children. It is a matter for the Polish Courts in the pending custody proceedings to determine what their care and living arrangements shall be in the future based upon their best interests. For the purpose of this application the court is satisfied that the applicant father was exercising rights of custody over the children with the consent of the mother during their stay in Poland. The Polish Courts are seised of an application brought by their father concerning the children which was adjourned pending the determination of the Hague Convention proceedings. They are now concluded. Therefore the court is satisfied that the Polish Courts are also vested with custody rights in respect of the children because of that pending application. Article 3 indicates that a right of custody may be vested in a person, institution or other body which includes a court. As stated by Keane J. in *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110 at p. 132:-

"Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending would, absent any legally excusing circumstances, be wrongful in terms of the Hague Convention. ... In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state."

This statement of principle was approved and adopted by the Supreme Court in *G.T. v. K.A.O.* [2008] 3 I.R. 567 at paragraph 24.

50. The court is therefore satisfied that the children were removed from the jurisdiction of the Polish Courts in breach of the father's right to custody as provided under Article 3 of the Convention. Custody proceedings in Poland are still pending, the Polish Courts having determined *inter alia* that the presence of the children in Poland was not the result of their unlawful removal from Ireland but occurred with the express consent of the mother to what was intended to be their long-term removal to Poland. The court is therefore also satisfied that the removal of the children from Poland by the mother was in breach of the Polish courts' right to custody under Article 3.

Article 13

51. Article 12 of the Convention requires the court to direct a child's immediate return if he/she was wrongfully removed or is wrongfully retained. However, the court is not bound to do so if under Article 13 the respondent establishes that:-

- (a) The applicant was not actually exercising his custody rights at the time of removal; or
- (b) there is a grave risk that child's return would expose him/her to physical or psychological harm or otherwise place him/her in an intolerable situation.

The court has already determined that the respondent mother has failed to establish that the applicant was not exercising his custody rights for the reasons stated above.

52. The mother claims that under Article 13(b) there is a grave risk that the child would be exposed to physical or psychological harm or be otherwise placed in an intolerable situation if returned to Poland. It is also claimed that the court should exercise its discretion to refuse to return the child because A.S. objects and has attained an age and degree of maturity at which that objection should be taken into account. In that regard the court has the benefit of Ms. Nolan's interview with A.S. In determining this matter the court has considered this report and the admissible evidence adduced.

53. When allegations are made that the return of a child to another jurisdiction will give rise to a grave risk of physical or psychological harm or an intolerable situation for the child, it is not for the court to determine whether the alleged incidents relied upon did or did not occur. That issue is the subject of the proceedings which are presently pending before the Family Court in Poland. The approach to be adopted is set out in the decision of the Supreme Court in *A.S. v. P.S.* [1998] 2 I.R. 244 in which Denham J. (as she then was) delivering the judgment of the court stated (at p. 259) that:-

"The law on "grave risk" is based on Article 13 of the Hague Convention ... It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.

This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.

The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

54. There is a heavy burden imposed on the respondent to satisfy this Court that there would be a grave risk of substantial harm if the children were to be returned and/or whether any such risk of harm could be reduced or extinguished by undertakings or by reliance on court procedures in the Convention State.

55. The relevant principles were helpfully summarised by Finlay Geoghegan J. in *C.A. v. C.A.* [2010] 2 I.R. 162:-

"21. It is common case, in accordance with the decisions of the Supreme Court, ... that the potential defence provided for in Article 13(b) is a rare exception to the requirement under the Convention to return children who have been wrongfully removed from their jurisdiction of habitual residence and that it is an exception which should be strictly applied in the narrow context in which it arises. Further, it is common case that the evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return ... and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence"."

The respondent points to a number of matters to support her submission that such circumstances exist.

56. The respondent relied upon a Protection Order issued by the District Court against the applicant in October 2016 almost a year after the couple had separated and he had returned with the children to Poland. The Polish Court noted that there were two occasions in 2012 when An Garda Síochána had been called due to family disturbances to their home in Ireland. I am not satisfied that the existence of this application and order should be regarded in the circumstances as establishing a basis of grave risk to the children.

57. While in Poland the applicant formed a relationship with a young woman who had a three year old daughter. Her ex-partner made allegations of child abuse against the applicant and it is claimed that his complaint is still alive and that proceedings against the applicant for allegations of abuse continue in Poland. Very little evidence of the nature and extent of this investigation, its motivation or conclusion has been placed before the court. I am not satisfied that the appropriate threshold of proof has been reached in relation to this alleged risk to the children. The applicant states that the investigation has been completed. The respondent disagrees. Whatever about the status of the investigation initiated by his former partner's partner and which apparently, the respondent sought to have revived, it is clear that whatever evidence may be said to exist in respect of that allegation lies in Poland not in Ireland. On the evidence the allegation hardly goes beyond an assertion and is nowhere approaching the level of proof required to justify the court exercising its discretion to refuse to return the children under Article 12. I do not consider the applicant's previous minor convictions provide evidence of grave risk.

58. A similar situation applies in relation to the suggestion that the respondent alleges that the applicant beats or screams at the older child A.S. from time to time. This does not appear to have been a concern of any kind for the respondent when they were living together or when she consented to the removal of the children to Poland in November 2015. It is clear that she did not view the children to be at any, much less a "grave" risk if returned to Poland with him. The Polish Courts had the benefit of numerous school and welfare reports when considering the application under the Hague Convention.

59. In his interview with Ms. Nolan A.S. stated that he would like to live in Ireland with his mother and sister. He objected to returning to live in Poland because his father allegedly beat him, screamed at him and grabbed at him from time-to-time. He was interviewed for the purpose of obtaining his views and allowing them to be expressed in the hearing. At the time of interview on 7th November, 2017 he was aged seven years and seven months and was able to articulate his thinking and wishes. His level of maturity appeared to be that of a typical of seven year old. He was capable of forming his view. He expressed that he was happy in Ireland and wanted to stay. He had fun in Ireland and he liked living with his mother, his sister and her boyfriend. It was not thought that he was under any influence from his mother or sibling or his mother's boyfriend in stating his preference. However, he did make reference to having good friends in school in Poland with whom he played and visited in their homes.

60. The court is not satisfied that the evidence adduced by the respondent is so clear and compelling as to establish as a matter of probability any grave risk of physical or psychological harm or the existence of an intolerable situation based on the allegations advanced against the applicant.

61. The court is mindful of the fact that the Supreme Court has emphasised that it is in the best interests of a child that issues as to custody, residence and access concerning children should be determined by the court of the child's habitual residence. The children in this case were removed by the mother from Poland at a time when she had lost the application for the return of the children to Ireland under the Hague Convention in Poland. She had a right of appeal which she exercised in relation to that order. That appeal was subsequently rejected. The Polish Courts made it abundantly clear that issues in relation to custody which arose between the parents would be dealt with in the pending custody proceedings and had not been determined in the Hague Convention application. That remains the case. The Polish Courts are fully seized of all issues which the mother wishes to raise in respect of any suggested risk to either child's welfare posed by contact with their father. If there is such a risk, it is absolutely clear that it will be fully and properly addressed by the Polish Courts. It is also clear that the evidence in relation to what may be the most serious aspect of the allegations made is available in Poland. There is no evidence that the mother would be unable to take sufficient steps to protect the children in the event of their being returned to Poland.

62. The court has considered the objection made by A.S. to his return to Poland and his father's custody and his preference to remain in Ireland with his mother and sibling. He has attained a degree of maturity at which it is appropriate to take his views into account and I do so.

63. The court must take into account the underlying principle of the Convention recognised by the Supreme Court that the children's place of habitual residence is the best place to determine the respective rights of parents and the best interests of the child. I have taken into account the paramountcy of the children's interests in reaching this decision. The court has no reason not to accept that the child's views are those expressed in the report. However, the full nature and extent of the reality of his life with his father in Poland and his relationship with his father prior to his departure for Poland is not in my view reflected in the short report of the interview submitted. This is particularly so when one considers the fact that his mother was absolutely satisfied to leave him in the care of his father in November 2015 and the fact that the Polish Courts have already received evidence in relation to the care of the children, their education and welfare in the course of the Hague Convention proceedings in that jurisdiction. It also received evidence from relations of both parents as to how he cared for the children. The court also takes into account that the children in this case are very young.

64. I am satisfied having considered all of the evidence that the respondent has not made out a case that the children are at grave risk of physical or psychological harm or will be otherwise placed in an intolerable situation if returned to Poland.

Conclusion

65. The court is satisfied that the children were wrongfully removed from Poland which was at the time their country of habitual residence under the Convention. The court is not satisfied that their return places them at a grave risk or places them in an intolerable situation. However, in the circumstances the children have been in this jurisdiction since the 6th January, 2017 and in order to ensure minimal further disruption to their young lives, the court should be informed as to the likely course of the Polish custody proceedings. In particular, if those proceedings are to be re-entered following the conclusion of the Hague Convention proceedings the court would like to be informed as to when the proceedings will be re-entered and if possible potential or actual date of such hearing before finalising the order under Article 12.