

THE HIGH COURT

[2011 No. 11 HLC]

FAMILY LAW

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991, AND IN THE MATTER OF THE HAGUE CONVENTION AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003

AND

IN THE MATTER OF H. J. AND D. J. (CHILDREN)

BETWEEN

A.K.

APPLICANT

AND

A. J.

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 8th day of June, 2012

1. This application pursuant to the Hague Convention on the Civil Aspect of International Child Abduction ("the Convention") and Article 11 of Council Regulation (EC) 2201/2003 ("the Regulation") is in respect of two boys, H., born on 5th June 2002, and now ten years of age, and D., born on 17th September, 2004, who is now seven years old. The application is for the return of the children to the jurisdiction of the courts of Poland.

2. The applicant is the mother of the boys and the respondent is the father of the boys. The mother and father were never married to each other. They were in a relationship which appears to have ended some time after the birth of D. and before the summer of 2008.

3. The father came to Ireland in 2003 after the birth of H. and prior to the birth of D.. He has set up a small business which he continues to operate, apparently successfully, to the present time. Since approximately 2007, he has been in a relationship with B., a Polish woman. She is and has been for some years his partner. They were living together in Ireland prior to the summer of 2008. They now also have a daughter together, born in 2011.

4. The mother and the father both come from a relatively small town in Poland. The mother and the boys continued to live there after the father came to Ireland. The father contributed to the maintenance of the boys. There is a dispute as to the extent of same which is not relevant to any issue which this Court has to determine.

5. In June 2008, the mother agreed that the boys would come on holidays to stay with the father in Dublin. They were to return to Poland prior to the end of June. The father did not return the boys to Poland as agreed. The father retained the boys in Ireland without the consent of the mother in June 2008. Since that date, they have lived with the father and his partner, B. and have attended a local primary school in Dublin.

6. It is admitted, for the purposes of these proceedings, that the retention by the father of the boys in Ireland in June 2008 was a wrongful retention within the meaning of Article 3 of the Hague Convention. This wrongful retention forms part only of the basis of the mother's application for return.

7. The father took the boys to Poland for Christmas in December 2010. At the end of December 2010 or early January 2011, the father took the boys out of Poland and to Ireland without the consent of the mother. He states he arrived back in Ireland on 5th January, 2011. On behalf of the mother, it is contended that this was a wrongful removal of the boys from Poland which remained the country of their habitual residence in December 2010. I propose referring in the judgment to this removal as of December 2010. Nothing turns on whether the father and the boys left Poland at the end of December 2010 or in the first days of January 2011. The father disputes that this was a wrongful removal of the boys from Poland within the meaning of Article 3 of the Convention as he contends that the mother did not seek to prevent them leaving and by this time, the boys were no longer habitually resident in Poland. He contends that they had acquired a habitual residence in Ireland. On behalf of the mother, it is also contended that such removal was in breach of rights of custody then held by the courts of Poland by reason of extant custody proceedings.

8. The present proceedings are unusual in a number of respects. First, the father has been living in Ireland since 2003, the initial wrongful retention commenced in June 2008, and these proceedings were only commenced by the mother on 31st May, 2011, pursuant to an authorisation signed on 6th April, 2011. Secondly, even after the commencement of the proceedings, the fixing of a hearing date was exceptionally delayed by reason, primarily, of difficulties in communication between the mother in Poland who speaks no English and her Irish lawyers. Thirdly, whilst the father had been legally represented up until the date of the hearing, the Court granted his lawyers leave to come off record on the morning of the hearing. The Court was satisfied that the father did not comply with agreements made with the lawyers in relation to his representation and failed to give appropriate instructions. The father represented himself at the hearing with the assistance of an interpreter. However, understandably, he was not familiar with the complex legal provisions and principles at issue. Fourthly, since September 2008 there have been custody proceedings initiated by the mother before the Polish District Court- in K.- in which both parties participated and in which by a decision of 16th February, 2012, parental care for the boys was given to the father. Fifthly at the hearing on 29th March, 2012, the Court was asked not to give its judgment until such time as the justification of the Polish District Court - in K. - for its decision of 16th February, 2012, was translated into English and made available to the Court. The justification had only become available to the parties in the preceding

days. At the request of counsel for the mother, a further short hearing was held on 22nd May to enable submissions be made in relation to the justification and the fact of the appeal lodged by the mother against the order of the Polish District Court of 16th February, 2012.

9. The evidence in this application included all the affidavits sworn by the parties and exhibits thereto; the report of Dr. Byrne-Lynch dated 12th February, 2010, following her interviews with the boys on 25th and 31st January, 2012; oral evidence from Dr. Byrne-Lynch; oral evidence of the father and the mother on limited cross examination of some matters deposed to in the affidavits and the petition, orders and justification of the Polish District Court and notice of appeal therefrom.

10. The Court, in this application, is exercising a limited jurisdiction. It is not an application to decide on the care or custody of the boys. The relationship between the father and the mother has regrettably broken down. There are many allegations made in relation to each other. Most are not relevant to the issues which this Court has to determine and it is not proposed to make any findings in relation to them in the judgment and only to refer to them where necessary. They are a matter properly for consideration by the Court with jurisdiction to take decisions in relation to the future care or custody of the boys. Nevertheless, a summary chronological factual history is necessary.

Factual History

11. Prior to June 2008, the boys lived with their mother in K., Poland. The boys' maternal grandmother and great-grandmother were also involved in their care. From 2003, their father had been living in Ireland. In June 2008, the boys came to Ireland with their mother's consent to spend a holiday with their father but were not returned by him to Poland at the end of June 2008 as agreed. Thereafter, they continued to live with their father and his partner, B., and since 2011, their half-sister in Dublin.

12. In August 2008, the mother states she came to Dublin and sought with the assistance of the gardai to find her children. She did not find them. The father contends that she had his mobile phone number at the time but does not assert that he told her where the children were living. The father changed their place of residence from time to time.

13. On 15th September, 2008, the mother filed a petition with the Regional Family Court in K. seeking sole parental authority over the boys and asking that the father be deprived of parental authority. The address given by her for the father was his parents' address in K. and it was stated that his address in Ireland was unknown.

14. The justification of the Polish District Court for its decision of 16th February, 2012 ("the justification") records that the father made a request to a Family Law court in Dublin in August 2008, which fixed a date of 2nd October, 2008, for the trial. This Court has not been given details of those proceedings. It appears probable that this was the District Court in Dublin. The justification indicates it refused jurisdiction to deal with the matter and there were further communications between the Court in K. and the District Court throughout 2009 in relation to potential assessments which did not bear fruit.

15. The first hearing in the Polish court took place on 26th March, 2009, and the father attended.

16. In October 2009, the mother came to Dublin, visited the father at his place of business and saw the boys on one occasion. The father had provided his business address to the Polish Court during 2009. He states that this has been his consistent business address since 2008.

17. On 16th February, 2010, the Polish Court, in the Polish proceedings, made an order that for the duration of the court proceedings, the place of residence of the boys be with their mother. No steps appear to have been taken to seek to enforce that order in Ireland.

18. In November 2010, the mother travelled again to Ireland and went to the school being attended by the boys. She saw the Principal of the school. It is unclear whether she saw the boys. The mother's brother has resided in Ireland throughout this period.

19. In December 2010, the father took the boys to Poland for Christmas. He states that they met with the mother and her parents and his parents during the visit. This is not disputed. The mother's father is a retired policeman. The father received a telephone call from a local policeman and states that he was asked whether the boys were "ok" and also to call to the police station but that he indicated he had no time and did not do so. He also states that shortly thereafter, he left Poland by car with the boys. He had travelled to Poland in his Irish registered car and states that this would be easily identifiable in his local area in Poland and he did not seek to hide that he was there.

20. The Polish proceedings continued throughout 2011. In May 2011, H. made his First Holy Communion in Dublin. His maternal grandmother and maternal uncle attended. The mother was invited but states that due to a new job she was unable to travel.

21. On 31st May, 2011, these proceedings were commenced. The Irish solicitors had not been instructed with the home address of the father. Ultimately, he was served on 24th June, 2011, at his business address. The father, with the assistance of legal representation, delivered a replying affidavit sworn on 11th July, 2011.

22. On 27th July, 2011, the Court made an order that the boys be interviewed and assessed by Dr. Byrne Lynch for the purpose of giving them an opportunity to be heard in the proceedings in accordance with Article 11(2) of the Regulation. Throughout the autumn of 2011, counsel acting on behalf of the mother, sought adjournments to enable instructions to be taken from the mother. The interview of the boys was postponed until after the mother had had an opportunity of delivering a replying affidavit. Ultimately, on 2nd November, 2011, the father issued a motion seeking an order dismissing the proceedings for want of prosecution. The solicitor acting for the mother in this jurisdiction delivered an affidavit outlining difficulties associated with interpretation and communication with the mother. The Court determined that the interview with the boys should go ahead in January 2011 and in February 2011, fixed a hearing date and indicated that the matter should proceed even if no replying affidavit had been delivered by the mother. Ultimately, an affidavit sworn on 6th March, 2011, was delivered. Further complications had arisen in communications between the Irish solicitors and the mother. The Court made an order admitting the affidavit.

23. The mother travelled to Ireland for the hearing on 29th March, 2011.

24. The boys were interviewed on two occasions: on 25th January and 31st January, 2011, by Dr. Byrne-Lynch. Dr. Byrne-Lynch did not interview, by direction of the Court, any other person in relation to the proceedings.

25. On 16th February, 2012, the Polish court, in the proceedings brought in September 2008 by the mother seeking sole parental custody and limiting the custody rights of the father, decided (as translated):

"1. To dismiss the request of applicant A. K..

2. To entrust the parental care of minors H. J., born on 5 June 2002 in K., and D. J., born on 17 September 2004 in K., directly on the father- A. J., and to restrict the parental care with regard to the mother - A. K. in such a manner that she reserves the right to the mutual decision of the parents regarding such significant matters of the minors as establishing the place of their stay, the method of disease treatment as well as the organisation and place of their entertainment."

The Polish District Court subsequently issued its justification for its decision which this Court has considered. The justification makes clear that whilst the father participated by attending many of the hearings before the Polish Court and being represented by a lawyer at others, he did not bring the boys to Poland for assessment as required by the Polish court. There is a dispute about the availability of passports and the mother's consent for the purposes of new passports. However, it also appears that the father was unwilling to bring the boys to Poland for the purposes of assessment.

26. In April 2012, the mother lodged an appeal against the decision of the K. District Court of Family Law dated 16th February, 2012 which is due for hearing shortly. The father has stated he proposes attending the hearing in Poland.

The Law

27. In this application, the Irish High Court is exercising a limited jurisdiction pursuant to the Convention and Article 11 of the Regulation. The mother, as the applicant, must establish that there was a wrongful removal or retention of the boys within the meaning of Article 3 of the Convention. To do this, she requires to establish that prior to the date of the alleged wrongful removal or retention:

- (i) The boys were habitually resident in Poland;
- (ii) the alleged wrongful removal or retention was in breach of rights of custody held by her or the Polish courts; and
- (iii) the alleged custody rights were actually exercised or would have been exercised but for the removal or retention.

28. Where a wrongful removal or retention is established, then this Court is bound pursuant to Article 12 of the Convention to order the return of the child forthwith where the proceedings have been commenced within a period of one year from the date of the alleged wrongful removal or retention. Where the proceedings are commenced later than one year, then the Court is obliged to make a return order "unless it is demonstrated that the child is now settled in its new environment". Where that is established, it is contended that the Court has a discretion whether or not to make an order for return, having regard, in particular, to Article 18 of the Convention.

29. Notwithstanding the obligations imposed on a court by Article 12 of the Convention, Article 13 provides that the Court is not bound to order the return of the child in certain exceptional circumstances. The one relevant to the facts in this application is if the Court 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". The onus is on the person opposing the application *i.e.* the father to establish that the child does object to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. If those facts are established, then the Court has discretion as to whether or not to make an order for return and the principles according to which that discretion should be exercised are referred to in more detail below.

30. It is important to note that a decision made by the Irish High Court on this application for return is expressly provided by Article 19 of the Convention not to be taken to be a determination on the merits of any custody issue. Article 1 and the caselaw relating to the Convention establishes that the purpose of the Convention is to secure the prompt return of children wrongfully removed or retained in another Contracting State to the State of habitual residence. One of the primary underlying principles is that it is in the best interests of a child that the courts of its habitual residence determine disputes in relation to the child's care and custody as they are best placed to do so. The objects of the Convention also include the protection of children from the harmful effects of wrongful removal or retention and deterring wrongful removal or retention of children from one Contracting State to another.

Issues

31. It is not in dispute that the boys were habitually resident in Poland from birth until they came to Ireland in June 2008. Further, that at all material time prior to the order of the Polish Court of 16th February, 2012, the mother held parental authority under the laws of Poland which constituted rights of custody within the meaning of the Convention in relation to the boys. It is also not in dispute that there was a wrongful retention of the boys within the meaning of Article 3 of the Convention as such retention was in breach of the mother's rights of custody.

32. As the proceedings were not commenced within 12 months of June 2008, it is necessary for the purposes of the application of Article 12 to determine whether or not there was a wrongful removal in December 2010. The first issue which requires to be determined in relation to the alleged wrongful removal in December 2010 is whether the boys, in December 2010, remained habitually resident in Poland, or, as contended by the father, that their habitual residence had changed to Ireland. As the agreed starting point is that the boys were habitually resident in Poland until 2008, the onus is on the father to establish that there was a change in habitual residence between June 2008 and December 2010.

33. It is settled law in this jurisdiction that habitual residence is not a term of art but a matter of fact to be decided on having regard to the evidence in the case (*C.M v. Delegation Provincial de Malaga* [1999] 2 I.R. 363 *per* McGuinness J. at p. 381).

34. Counsel for the mother submits that it is now settled law that where, as on the facts herein, both parents have parental responsibility in relation to the children, that one parent cannot unilaterally change the habitual residence of the children without the express or tacit consent of the other parent or an order of the Court. She relies, amongst other matters, on the judgment of Sir Nicholas Wall P. in the English High Court in *S. v. J* [2010] EWHC 1113, where he stated:

"habitual residence is ... a question of fact. Normally speaking where a family is living together, children's habitual residence follows that of their parents. Equally if the parents send their children abroad for their education or for any other purpose with the intention that the children will return to resume family life in England, the children remain habitually resident here, even though they are temporarily living abroad. Generally speaking, although both parents often - as here - have parental responsibility for their children, it is well established that one parent cannot unilaterally change the habitual residence: it requires agreement between the parents or, at the very least, the acquiescence by another in the altered arrangements brought about by the other."

35. A similar principle was expressed by Waite J. in *Re B: (Minors: Abduction) (No. 2)* [1993] 1 FLR 993, at p. 995, and cited with approval by Macken J. in the Supreme Court in *S. v. S.* [2009] IESC 77.

36. The approach of the Irish courts to the construction of the Hague Convention has been expressed by Fennelly J. in the Supreme Court in *PAS v. AFS* [2005] 1 ILRM 306 at 314, in the following terms:

"They should endeavour, as far as possible, to interpret the Hague Convention harmoniously with the interpretation adopted by the courts of other contracting states. In practice, that means we should try to follow those decisions. The Convention is an international agreement designed to resolve situations of personal conflict and the principle of comity, a mutual trust between jurisdictions, is of prime importance."

37. On the facts herein, both parents had parental authority prior to December 2010. The fact that until 2008 the boys lived with their mother who was habitually resident in Poland whilst their father had already commenced living in Ireland. However, that does not in my judgment, change the principle state above which I should apply, that in general, one parent cannot unilaterally change the habitual residence of a child. It requires at minimum the acquiescence of the other parent or a court order to the change in place of residence.

38. Accordingly, it appears to me that on the facts herein, the father, to establish that the habitual residence of the boys changed from Poland to Ireland by December 2010, must prove that prior to December 2010, the mother had acquiesced in the boys living in Ireland. There is no allegation that she gave express consent.

39. I have concluded on the evidence before me that the father has failed to establish that the mother acquiesced in the boys living in Ireland prior to December 2010. Whilst it is true and a fact relevant to these proceedings that the mother did not commence this application pursuant to the Hague Convention in Ireland until May 2011, nevertheless, she did commence proceedings in Poland in September 2008, promptly after the boys were retained, seeking sole parental custody and seeking to limit the father's rights of custody in relation to the boys. Further, she pursued those proceedings throughout 2009, and in February 2010, obtained an order from the Polish courts that the place of residence of boys should be with her for the duration of her Polish proceedings. Whilst she did not take steps to enforce that order in Ireland, she continued to pursue the Polish proceedings, the aim of which appears to have been to obtain an order that the boys should return to live with her in Poland. The pursuit of the Polish proceedings is inconsistent with acquiescence to the boys remaining living in Ireland with their father.

40. Hence, I have concluded that the father has failed to establish that the habitual residence of the boys changed from Poland to Ireland prior to December 2010 and that the boys remained habitually resident in Poland in December 2010.

41. The second issue which arises in relation to the removal of the boys from Poland to Ireland by the father in December 2010, is whether the removal was in breach of the custody rights then held by the mother. The father contests this on the basis that the mother did not object to the father removing the boys from Poland. The mother continued to hold parental authority and had the benefit of the Polish Court order of February 2010 that the boys reside with her at her place of residence in Poland. In the absence of an express consent by the mother to the boys being removed from Poland by the father, I have concluded that the removal of the boys from Poland in December 2010 was in breach of the custody rights then held by the mother. Hence, it was a wrongful removal within the meaning of Article 3 of the Convention.

42. As the present proceedings were commenced within one year of the wrongful removal of the boys from Poland in December 2010, the issue of settlement under Article 12 does not arise and it follows that this Court is obliged pursuant to Article 12 to make an order for the return of the boys to Poland unless one of the exceptional circumstances provided for in Article 13 of the Convention applies. It is therefore necessary to consider the defence made that the boys object now to being returned to Poland and are of an age and degree of maturity at which it is appropriate to take account of their views.

43. In accordance with current practice, the boys were interviewed by Dr. Byrne- Lynch, an experienced child clinical psychologist. They were interviewed on two occasions. The boys, in interview, expressed an objection to returning to live in Poland in circumstances where their father and B. continue to live in Ireland. Dr. Byrne-Lynch makes clear that the boys' objections to returning to Poland relate mainly to their wish to stay living with their father and B.. Dr. Byrne-Lynch records that they indicated that they would be prepared to return to Poland if their father and B. were moving there, although they prefer living in Ireland.

44. The proper approach of the courts in Ireland to the determination as to whether a child objects to being returned to its country of habitual residence, and if it does, to the exercise of the discretion given it under Article 13 of the Convention, has recently been set out by the Supreme Court in *A.U. v. T.N.U.* [2011] IESC 39. Denham C.J., in delivering the judgment with which the other members of the Court agreed, stated at para. 27:

"A court in deciding whether a child objects to its return should have regard to the totality of the evidence."

45. The totality of the evidence in this case includes the fact that the father has been living in Ireland since 2003, where he has established a small but successful business from which he supports himself, his partner, B., their daughter and the boys. The father, in his oral evidence to the Court, made clear that he continues to run this business in Ireland and that he would not have the same opportunities in Poland. The father also has responsibilities to his partner, B., and their daughter who live in Ireland. That forms part of the factual situation which pertains to the boys, the subject matter of these proceedings. The Court must, in determining whether the boys object to being returned to Poland on the facts herein, must do so upon a factual basis that as a matter of probability, the father will continue to live and work in Ireland in the short to medium term. This is not a case of a parent who has moved with the child from the country of habitual residence and there is no good reason for which the parent should not now return with the child to the country of habitual residence.

46. On the facts herein, I am satisfied that the boys do now object to being returned to Poland and, accordingly, the Court should consider whether they are of an age and degree of maturity at which it is appropriate to take account of their views.

47. Dr. Byrne-Lynch's assessment, which I accept, is that the boys presented to her with maturity levels roughly in line with their ages, then of nine and seven. At those ages and at the level of maturity, I have concluded it is appropriate to take account of the boys' views. However, the weight to be attached to those views by the Court in exercising its discretion is a quite separate matter.

48. The determination that the boys object to being returned to Poland and that they are of an age and degree of maturity at which it is appropriate to have regard to their views gives the Court discretion pursuant to Article 13 as to whether or not to make an order for the return of the boys to Poland.

49. In *A.U. v. T.N.U.*, Denham C.J., agreed with the analysis of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2008] 1 A.C. 1288, where, at para. 46, she stated:

"In child's objection cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

50. Denham C.J. set out the general approach at paras. 35 and 36 in the following terms:

"35. The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.

36. It is also the case that in interpreting and applying Article 13 of the Convention that courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the Court has discretion pursuant to Article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. The circumstances in which children would not be returned are exceptional. As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in the case of *R.M (Abduction: Zimbabwe)* 1 AC 1288 the extent to which the child's objections 'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant."

51. Finally, and of direct relevance to the facts herein, the Chief Justice drew attention at para. 37 of that judgment to the impact of time on the exercise by the Court of its discretion where she stated:

"The balance between the policy of summary return and the operation of the exception may alter with time. In this case, the children have been in Ireland for a considerable time. I would endorse the acknowledgment of Baroness Hale in *Re M* [2008] 1 AC 1288 where she states at paragraph 43:

'But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be'. A court should at all times seek to expedite cases arising under the Hague Convention, but circumstances such as have arisen in this case are the exception."

Conclusion

52. Applying the above principles to the exercise of the Court's discretion under Article 13 of the Convention, I have concluded that I should not now make an order for the return of the boys to Poland. The factors which I have taken into account in reaching this conclusion include the following.

53. The starting point of my consideration is the policy of the Convention in favour of the prompt return of children wrongfully removed or retained to their country of habitual residence. Allied to this is the underlying principle that the child's best interests are served by the courts of its habitual residence, making decisions in relation to its future care in the event of disputes, as they are best placed to do so. In my judgment, the courts of Poland are best placed to resolve custody disputes in relation to the boys. All members of the family units are Polish.

54. On the facts herein, a prompt return following the initial wrongful retention in June 2008 or even the later wrongful removal in December 2010 is not now feasible. The lapse of time between June 2008 and the hearing in March 2012 is, in my judgment, a crucial factor as to how the Court should now exercise its discretion. It must be noted that the mother did not, in her affidavit, offer any explanation as to why proceedings were not commenced in Ireland prior to May 2011. The Court has noted that the mother brought the proceedings in Poland without legal representation and the difficulties of communication between the Irish lawyers and the mother. The Court is not seeking to apportion blame for this to the mother, but objectively, the failure by the mother to commence the proceedings has had the effect that the boys have now been living in Ireland for almost four years. In the case of the younger boy, he was not yet four when he came to Ireland and has lived approximately fifty per cent of his life and his older years in Ireland. It is relevant that, whilst the father did not disclose the address at which the children were living in Dublin, the mother, at all material times, was aware that the children were living with the father in Dublin and at least from 2009, was aware of the business address of the father in Dublin. Accordingly, I have concluded that the father cannot be held responsible for the delay in commencing the present proceedings in Ireland.

55. The children are still relatively young, although H., the elder, is now just ten. They have a maturity consistent with their ages. In general, it is exceptional for the Court to refuse to return children of these ages by reason of objections expressed by them. However, it may be appropriate to do so in exceptional circumstances as was done in *A.U v. T.N.U.* As is clear from the report of Dr. Byrne-Lynch, that whilst the objections to returning to Poland have been independently formed, they arise from the boys' current emotional attachments to their present family unit with their father and his partner, B., and their infant sister, and have also been influenced by a negative picture painted of their mother. The emotional attachments have formed by reason of the length of time they have been living with their father and B. in Ireland. If the Court had heard this application within six months of the boys' wrongful retention in Ireland, it is probable that a very different picture would have been presented to the Court. The objections now made by the boys are understandable and consistent with the facts which on the evidence pertain to them.

56. The Court has noted with great concern the following information contained in Dr. Byrne-Lynch's report which she wished to bring to attention of the Court:

"1. Little effort appears to have been made in this case to preserve any meaningful contact between the boys and their mother and to present a positive view of their mother to the boys. On the contrary the boys have been allowed to become wary of their mother and suspicious of her motives, seeing every attempt at contact as putting them at risk of being taken or snatched and interpreting her expressed wish to have them back as a threat. The boys clearly indicated that the sense of threat in respect of their mother arose at least partially from the direct messages given to them by their father and B. about her. H. expresses strong criticism of her mother and cynicism of her motives in areas which he could only have knowledge of through the adults in his life. The boys were also of the view that the reason for moving house relatively frequently was to evade detection by their mother, adding to the sense of threat in respect of contact. They have not been shielded appropriately in this respect by their father.

2. D.'s primary emotional attachment appears to be to B. and H. is also strongly attached to her, both referring to her as their mother. A reintroduction of their mother as a significant figure in their lives will have to be accomplished carefully. She is virtually a stranger to D. He, in particular, is vulnerable to emotional disturbance with any significant degree of disruption to his present family unit. The strong attachment between the boys is a protective factor, offering them added security."

57. In her oral evidence to the Court, Dr. Byrne-Lynch stressed the importance to the boys of the reintroduction of the mother into their lives and the establishment of a good relationship with the mother for the wellbeing of the boys. The Court fully accepts the importance of this for the boys and has taken into account the role of the father in permitting this situation develop. The Court, within its limited jurisdiction, made access orders while the mother was in Ireland which Dr. Byrne-Lynch kindly agreed to facilitate on a Saturday to commence the process. Nevertheless, it appears to me that the determination in the longer term of the appropriate custody and access orders for the purpose of achieving this goal, whilst not creating further difficulties for the boys by reason of their current emotional attachments, is properly a matter for the courts having jurisdiction to determine care and custody matters in relation to the boys (at present the courts of Poland), and is not a matter likely to be achieved by the blunt instrument of a summary order for return.

58. The other highly unusual feature of this case and crucial in the exercise of my discretion is the decision made by the Polish District Court on 16th February, 2012. It is clear from the justification that this was a decision made by the Polish Court in accordance with what, in translation, is referred to as "a dominant feature in Polish Family Law, namely, the welfare of the child". It is stated to be the "most crucial Directive in relation to parental custody and child's matters". The justification makes clear that the Polish District Court was aware that the boys are living in Ireland with their father. Having carefully considered all the relevant matters in accordance with the evidence available to the Polish District Court, it determined that the boys should be placed in the parental care of their father, the clear consequence of which is that they are permitted to remain living in Ireland with their father.

59. Counsel for the mother submitted that notwithstanding this determination at first instance, this Court should exercise its discretion to make an order for the return of the boys to Poland in order that they be available for assessment in Poland and available to the Polish courts for an appeal hearing. In circumstances where the Polish Court, at first instance, has determined that the boys should remain living in Ireland with their father, it does not appear to me that this Court should exercise its discretion under Article 13 to make an order for the return of the boys to facilitate an appeal where no Polish court has required the boys to so return. On the facts herein, having regard to the Polish proceedings in which both parties are participating, the Courts of the boys' habitual residence are making the decisions in relation to their care and custody.

60. I have further taken into account the provisions of Article 11(6) to (8) of the Regulation in rejecting this submission made by counsel for the applicant. These provide:

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

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child. Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

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

61. In accordance with the forgoing provisions, this Court is now obliged to transmit to the relevant Polish court or the Central Authority for Poland the documents referred to in Article 11(6). The courts of Poland retain jurisdiction to make decisions in relation to the care and custody of the boys and can do so taking into account the full welfare of the boys in accordance with the dominant principle referred to in the justification of the District Court referred to above. In the event that the relevant Polish court issues a judgment which requires the return of the boys to Poland, then it will be enforceable in Ireland in accordance with s. 4 of Chapter III of the Regulation in accordance with Article 11(8).

Relief

(i) An order refusing the mother's application to order the return of the boys named in the title to the jurisdiction of the courts of Poland pursuant to Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction.

(ii) An order pursuant to Article 11(6) of EC Regulation 2201/2003 that a copy of this judgment, the order of the Court made pursuant thereto, the transcript of the hearing before the Court, the report of Dr. Byrne-Lynch and the pleadings, affidavits of the parties and exhibits thereto be transmitted to the Central Authority for Poland and the K. District Court

at which the appeal taken by the mother is lodged.

(iii) An order permitting the parties to disclose to their Polish lawyers the above documents for the purpose of use in any Polish proceedings in relation to the boys named in the title.

Addendum

Despite their differences, the Court is certain both the mother and father want what is best for their sons. They are the people who know them best and what is likely to be best for them. It appears probable that the mother and father will be living in Poland and Ireland respectively in the short to medium term. It is essential for the wellbeing of the boys that they have a good relationship with each of their mother and father. To achieve this, they need the permission of each parent to have a relationship with the other. They also need secure arrangements put in place which will allow them move freely between the homes of each of their parents without any concern as to their ability to return. It is to be hoped that within the Polish court system, there may be assistance available to the father and mother to reach their own agreement as to the appropriate living arrangements for the boys during school terms and during holiday periods for the next few years and that the father and the mother will make every effort in the interests of the boys to reach such an agreement.