

**THE HIGH COURT**

**FAMILY LAW**

**2011 15 HLC**

**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) NUMBER 2201/2003 OF 27 NOVEMBER 2003**

**AND IN THE MATTER OF CR, A MINOR**

**BETWEEN:**

**G**

**APPLICANT**

**AND**

**R**

**RESPONDENT**

**JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12th DAY OF JANUARY 2012:**

1. The applicant is the mother of and the respondent the father of the minor, CR, who is now aged 13 years. His parents were married in 1995 in the United Kingdom, but were finally divorced in July 2008 having separated from each other in 2005. There is no Court order in place in relation to custody and access arrangements. Upon that separation in 2005 father returned to live in this State where he was born and reared, and, with the agreement of mother, the three children of the marriage (two boys and one girl) including CR, came with father to this State and resided here. According to the applicant's second affidavit, she maintained contact with her children by telephone each Sunday, and in addition visited them in Ireland at Christmas 2005, and that in alternate years the children were either with her or with the respondent. She refers to the fact also that in August 2005 the respondent brought the children on holiday to her in England. She denies that she was "happy" to see the children return to Ireland, and that she reluctantly agreed to that happening, believing that it was at that time in their best interests.

2. At some point prior to July 2010 CR's sister must have returned to live with her mother in the UK, but certainly until July 2010 CR resided here with his father and older brother, and attended school here in the normal way. This State was at that stage his habitual residence.

3. It appears that during the summer of 2010, CR's sister came to Ireland on holidays and stayed with her father and siblings, and that during that period she encouraged CR to move back to the UK to live with his mother. According to father's first affidavit, he believes that CR's sister told CR that life in the UK would be great for him and that given his age CR believed her. On the other hand, mother in her first affidavit states that for about two years prior to July 2010 CR had expressed a wish to return to live with her in the UK. One way or another, CR returned to live with his mother in July 2010, and attended school there.

4. Father in his second affidavit states that he believes that before CR decided to return to the UK in July/August 2010 he was encouraged in that regard by both mother and his sister telling him how good life would be in mother's new house, and that he would be taken on trips to places of interest and on visits to relatives in England. Father believes that these promises were not kept, and that CR found that he was left in the house on his own for long periods. Father states also that CR has told him that he was happy in England up to Christmas 2010, when he came to stay with his father for the Christmas holiday. He believes also that when CR returned to his mother after that Christmas break he told his mother then that he wanted to return to Ireland to live with father, but that mother told him that he could not do so until he reached the age of 16 years.

5. There is disagreement between mother and father as to the basis on which CR returned to the UK at that time. Father says that it was agreed that he would do so, but that it was agreed also that if CR expressed a wish to come back to this State and resume living with father he would be permitted to do so. Mother states that this is not so, and that CR first went over for a two week 'trial period' in July 2010, during which she told him that if he chose to continue to live with her thereafter, he would have to do so until he reached at least the age of 16 years, as she was concerned not to have disruption and inconsistency in his education and general life pattern. She believes that CR made a conscious choice to remain in the UK, and was not pressurised to do so by her or his sister. From a subsequent affidavit sworn by father it would appear that while he had agreed with CR that if he wanted to return to Ireland at any stage he could do so, and that he asked CR to so inform his mother and get her agreement to that basis also. It appears that mother and father did not and do not speak directly to each other about this or other matters. Mother is adamant that she never agreed that he could return to Ireland if he so chose before reaching age 16, and would never have agreed to his returning to the UK on that basis as CR's welfare is her paramount consideration, and she would not have wanted his life disrupted in this way.

6. Mother believes that from the time CR decided to remain with her in the UK his habitual residence became the UK. He attended school locally there, and mother believes that this school will provide a better education for CR than will the school he is attending in Ireland since September 2010.

7. At any rate it appears that in July 2011 CR and his sister came to Ireland for a two week period during which there was a family wedding here. Return tickets were booked by father's brother here, and they came here together on the 13th July 2011. They were due to return to their mother on the 26th July 2011. However, only CR's sister returned to the UK on that date. CR remained here with

his father and older brother.

8. There is a conflict of evidence around the circumstances which led CR to decide that he did not want to return to his mother in the UK on the 26th July 2011. In her application form to the Central Authority in the UK for them to take all necessary steps in order to have CR returned to the UK she has stated that while CR was on holiday here in July 2011 CR decided that he wanted to again live in Ireland and that father decided that it would be better if CR lived here and did not bring CR to the airport with his sister for the planned return flight. That application form was exhibited in an affidavit sworn by a solicitor at the Brunswick Street Law Centre, Dublin for the purpose of grounding the Special Summons issued herein.

9. However, in her first affidavit, mother herself expands upon the events leading to CR's decision not to return to the UK. In that regard she states at paragraph 11 of her affidavit that two days after CR went to Ireland in July 2011 she discovered in his bedroom a school report which was hidden in his school bag. This is in spite of the fact that she had asked him for any letters and for a book belonging to her. She later found also that CR had taken two X-box games belonging to her partner to a friend's house. She and her partner were apparently particularly concerned about CR having taken the X-box games which had been missing for some time, as they were rated over 18, and CR had denied any knowledge of what had happened to them, and is not permitted to use them due to his age. The games were retrieved from CR's friend's house by her partner. She states that on many occasions CR had been warned not to use the X-box and the games. It appears that in a telephone conversation to CR on the 16th July 2011 mother gave out to CR about these matters, and she believes that it was as a result of that conversation that CR made his decision not to return to the UK at the end of the fortnight's holiday in Ireland. She believes that CR believes that he will have an easier life with his father "*whereby he is permitted to do as he pleases and is not disciplined at all*". She states that she was informed by her daughter after this conversation with CR that it was the reason why CR decided not to return to her in the UK.

10. In his second affidavit, father sets out in some detail what he knows of CR's feelings about life with his mother in the UK. He says that his eldest son has told him that on the 14th July 2011 at about 9pm at the wedding party referred to he found CR in a corner away from the wedding party crying and clearly very upset. He says that his eldest son told him that CR had told him that his mother was going to kill him when he got back to the UK because she had found his school report and was very unhappy about it. Having been told this by his eldest son, father went to talk to CR, and, according to his affidavit CR told him that he was very unhappy living in the UK with mother and her partner, that he was finding school work very difficult, and that when he had sought help from his teacher, that teacher had told him to get help at home or from other students, but that his mother had told him not to be bothering her about it. According to this affidavit, CR told father that he was getting into trouble at home deliberately in order to get his mother's attention, and that he was being left on his own at home after school for long periods until about 7.30pm. He gave details of CR being left alone also during the Easter holidays. CR apparently complained that in order to get to school two bus journeys were required, and the only alternative would be to travel by bicycle through rough areas, and to leave home at about 7.30am if he was to get to school on time. He also complained of bullying at school.

11. He also refers to CR stating that he was unhappy living with his mother, his sister and his mother's partner. He sets out quite a lot of detail about difficulties which CR says that he was having with his mother and his older sister as well as with mother's partner. He states also that while CR has been living with him in Ireland, CR has not been misbehaving or using bad language or accessing over 18 material, and that he would not permit these things to happen. He goes on to deny various matters to which the applicant has referred in her affidavit.

12. Father has given details of his own financial difficulties. Father attends college himself, as does CR's elder brother who is here in Ireland. Father has stated that he does not have much disposable income but that he has done his best to send over money to CR while he was in England, and to pay for airfares for visits to him by CR and his sister.

13. It appears also that while in the UK, CR had two sessions with a school counsellor where he was able to tell him about the difficulties he was having at home with his mother and sister, and mother's partner. He did not find these sessions helpful according to what father has stated in his affidavit.

14. Father has stated also that he never put pressure on CR to stay with him in Ireland. He says that it was not an easy decision for CR to make, and that he simply does not like living there, and father believes that being in England with his mother is very detrimental for him both emotionally and educationally.

15. As I have said, father himself had embarked on a course of study at NUI Galway. He has apparently taken a year out from college in order to be available at home for CR since July 2011. He believes that upon his return to college CR will have the support of his grandmother as well as uncles and aunts who live nearby. He states that CR has a very good and close relationship with his grandmother and other relatives who he sees regularly. He believes that family is very important to CR, and that there are frequent family get-togethers around birthdays, christenings, weddings as well as Sunday dinners.

16. Father has given details in his second affidavit about difficulties which have arisen in telephone contact between CR and his mother, and in particular of a serious panic attack which CR had following a particular telephone call from his mother, which resulted in CR having to be taken to hospital. CR had apparently not wished to have telephone contact and was frequently upset after them. However, contact was renewed following agreement reached through the parties' legal representatives, and I note that a consent order was made by Finlay Geoghegan J. on the 5th October 2011 whereby mother is to have telephone access with CR between 6pm and 8pm each Monday, Wednesday and Saturday.

17. As far as CR's education in Ireland is concerned, father has stated that CR has settled in well at a local primary school, and has made many friends there. He says that he is doing well in school. A school report from the school principal in his current primary school has been exhibited. That report states that CR has settled well in the school, and participates well in class and completes to his homework, and socialises well with his fellow students. The principal feels that CR has adjusted well, and seems to be of a happy disposition. The principal notes also that CR has missed 11 days school due to a sore foot, and a sore throat/cough.

18. In his second affidavit, father agrees with the applicant's concerns that CR requires consistency and regularity in his life, and states that CR will only progress educationally if he is happy and secure, and he does not accept, as the applicant has stated, that he will receive a better education in England. He believes that an enforced return to live with his mother in England will cause him psychological and emotional harm, and will potentially damage irreparably his relationship with his mother and his sister.

19. In her second affidavit, mother states that while he was in England, CR had friends in the area. She states also that while he was often not permitted to go out, this was because of homework or because it was dark, and that he was permitted to go out to meet or stay with his friends at weekends. She accepts that CR complained of some bullying at school, and that when she learned of this she made his school aware of this and everything was resolved. She also states that CR has told her that he was being bullied at his

primary school here, and that nothing was done about it. She denies that CR was left on his own for long periods, and says that at most it would have been for a few hours until she or others returned from work. She states that in fact she adjusted her work hours so that she could be at home at weekends and at evening time, and she denies that he was left on his own at home during Easter holidays in 2011. She states also that at all times, she, her partner and CR's sister would help CR with his homework, although frequently CR would say that he had none to do. She disputes also the difficulties set forth above about CR getting to school, and states in that regard that he rode his bicycle to school only when he chose to do so, but that most of the time he would get a lift with a school friend or they would get the bus together. She says also that when she was not at work she would drive CR to school herself.

20. Mother in her second affidavit sets out her belief that CR has decided that he wants to live here with his father because life is easier for him here, but she believes that this is detrimental to his welfare due to lack of discipline and structure here. She believes also that CR has been heavily influenced by his family here, and is under duress from his Irish family to remain here. She fears that if he remains in Ireland he will lose contact with her and his family in England, and that this will be detrimental to him in the future. She believes also that father is often absent from home and that is non-communicative most of the time and that he does not care properly for CR in Ireland. As an example, she states that she believes that CR has a bath only once a week, and that it is in water already used by others. She does not state her source of knowledge for this belief, though it can be inferred I think that it is information given by CR's sister.

21. Finally, mother expresses concerns about the respondent's ability to care for CR when he returns to college, and she fears that CR will be left to the care of relatives, and has stated specific concerns about the respondent's father's drinking habits, and an alleged involvement with drugs by a nephew of the respondent. She also complains that the respondent has never been able to hold down a job, and runs into financial difficulties. She does not believe that such an environment is good for CR into the future, and that a better environment for CR can be provided for him with her in England. She does not believe that a return to England will expose CR to grave risk of emotional and psychological harm, and that there was none for him in the past when he was living there with her.

22. CR's older brother, who has at all times lived with his father since 2005, has sworn an affidavit also in support of CR's wish not to return to the UK. I do not propose to attach too much weight to this evidence, though the applicant has submitted that there is within it some evidence to suggest that this brother has unduly influenced or encouraged CR's attitude to a return to the UK. It is quite likely that this affidavit is partial, and perhaps understandably so given the sibling relationship. But in any event it is clear from the evidence and report of Annette O'Connell, Clinical Psychologist, which I deal with below, that she is satisfied that CR's views are his own, and that he is well capable of forming them and expressing them, and has done so independently and without pressure from others.

#### **Report of Anne O'Connell – Consultant Clinical psychologist:**

23. By order dated 7th September 2011, Finlay Geoghegan J. directed that Ms. O'Connell should interview CR and report to the Court (ensuring that CR is given an opportunity to express his views) in relation to (a) the circumstances in which he was living prior to coming to Ireland on the 13th July 2011, (b) the circumstances in which he came to remain in Ireland from the 26th July 2011, (c) his wishes in relation to his future care and living arrangements including where he should like to live, (d) if those wishes do not include living in the State whether he has any objection to returning to live in England, (e) in the event of any objection to returning to live in England being expressed, his reasons for the objections, (f) if he were to return to live in England any wishes as to how the return would take place, and (g) any other information he may wish the Court to take into account in deciding the application that he be returned to England.

24. Ms. O'Connell was also directed to assess CR and report her professional views on (a) the degree of maturity of CR, (b) whether CR is capable of forming his own views and if so a general description of the type of matters about which he appears capable of forming his own views, (c) whether CR objects to being returned to England, (d) if CR does so object, state (i) the grounds for such objection, and in particular whether it relates to an objection to living in England and/or a desire to remain in Ireland, or whether it relates to an objection to living with or living in the vicinity of a particular parent and/or a wish to live with the other parent, and (ii) whether any objections expressed have been independently formed or result from the influence of any other person including a parent or sibling.

25. Ms. O'Connell interviewed and assessed CR pursuant to the said order on the 30th September 2011 and has provided a Report to this Court.

26. She reports that CR was brought to her by father and that she interviewed him on his own. He presented as a quiet pleasant and cooperative teenager who answered all questions fully and thoughtfully. She reports that he became tearful at times when speaking of his life in England, the difficulties and pressures he has experienced since returning to Ireland and his worries for the future.

27. She sets forth the history of the children coming to this State following his parents' separation in 2005. He told her that his sister opted to return to her mother in England when his brother started to attend college here, but that he chose to remain, and that in the summer of 2010 his sister and mother persuaded him to return to England "for a while" and that he agreed but in the belief that if this did not work out he could return again to Ireland. He apparently stated that he had no recollection of his mother telling him that if he returned to live with her he had to remain until he reached the age of 16 years. He was clear that by Christmas 2010 he knew that he did not wish to remain in England, but that having discussed the matter with his father that Christmas they both agreed that it would be better to wait until the end of the school year.

28. Ms. O'Connell reports that CR stated that he was very unhappy in England, mentioning a long commute to school, bullying over his accent, and a non-involvement in sports. He described stresses at home with his mother, her partner and his sister, and that when he came to Ireland in July 2011 he clearly stated to his father that he did not wish to return to England, and that his mother had made many abusive telephone calls to him since July 2011.

29. She reports also that CR stated that he had settled well into his old school here, and that he is happy being able to spend more time with his older brother and other Irish family members, and further that he always believed that he could return here if things did not work out in England, and that it was his own decision to remain here. She reports also that he "emphatically does not wish to return to his mother's house" and that he wishes to continue to remain here living with his father, as he had done from 2005, apart from the eleven months or so which he spent with his mother from July 2010 to July 2011. He apparently expressed sincere regret at having returned to England for that period of time.

30. He informed Ms. O'Connell that he found school in England too far away and to be a hostile environment, and that the area where his mother lives is unfamiliar to him following his departure from there in 2005. He feels that he belongs here in the locality where his father lives and is from, which is a small rural environment where he is close to relatives, and where he and his friends can cycle

around after school and play outside, unlike where his mother lives, and where he must remain indoors.

31. CR also gave details of upsetting phone calls he has had with his mother since remaining here, describing some of these as threatening and cajoling, with his mother stating that he will never be let back to the locality where his father lives. He described a panic attack which had overcome him about a week prior to Ms. O'Connell's interview, and which as already referred to resulted in him being taken to hospital by ambulance.

32. Ms. O'Connell reported that the main cause for CR's stress is his fear that he will be required to return to live with his mother, and that he would not be able to return to Ireland, and expressed fear of violence towards him by his sister in England.

33. Ms. O'Connell describes CR as a teenager of average intellectual ability with good memory and a strong desire to get on with everybody. She describes him as being somewhat immature in terms of not being very street-wise, and that he seems genuinely shocked at the fall-out from his initial decision to try living in England, and then reversing that decision, or finding out that it is not as simple as a straight-forward reversal. She states also that CR did not clearly think through the consequences of his actions, partly because his father appears to have been very non-directive about CR's wishes, and has said that where he lives is up to him, and without assisting CR to think through potential pitfalls.

34. Ms. O'Connell expresses her view that CR is capable of forming his own views, but that he has had little practise in thinking through the consequences of his actions. She goes on to state "in his instance he seems to have clearly thought about and compared his two living options, having tried both, and is now emphatic that he would prefer to remain with his father".

35. As for CR's objections to being returned to his mother, Ms. O'Connell states that he has expressed emotional and inter-personal conflict in his mother's house, unlike with his father, and that further that he had found it hard to settle in England and into school in England, despite having given it a year to try and do so. She expresses it as her view that CR has not been influenced by anyone in coming to his wish not to return to England and she believes him when he stated to her that his father has left the choice to him.

36. I should add that in the final paragraph of her report, Ms. O'Connell expresses a view which is strictly outside the terms of what she was required to assess and report on pursuant to the order of Ms. Justice Finlay Geoghegan dated 7th September 2011. That paragraph states:

*"I would be concerned for [CR's] mental health were he to be returned to England under current difficult circumstances. In my opinion he is at risk of further panic attacks if he goes back to a situation of conflict and poor communication. He also deeply believes that the threats (of cutting off communication with his father and brother, of not being allowed back to [father's location] until he is 16 at least) are real and is very scared of this prospect. He stated clearly that he would prefer to cut ties with people in England than lose his home in [father's location]."*

37. Ms. O'Connell gave oral evidence before me and spoke to her report and was cross-examined in relation to same. I do not propose to set out everything which she stated in her evidence, as it is to a large extent contained in her report. But she did say that CR had not mentioned his mother's phone call on the 14th July 2011 when she told him of having found his school report hidden in his bedroom and about the missing X-box games to which I have referred, though he had mentioned that there were a number of difficult phone calls with his mother.

38. She also stated that in relation to his maturity that he is a trusting boy who wants an easy life in the sense that he would avoid doing something which would result in conflict, and that he does not like conflict. She agreed that he seems to enjoy a greater sense of freedom in Ireland, and is more relaxed here than in England. She reiterated that he was capable of forming his own views. She believes that he somewhat immature in the sense that he is not used to making decisions for himself. She does not believe that CR has been coached in any way by his father or brother here, and that his views are his own, and expressed in words appropriate to his age and degree of maturity.

39. In this case there is no dispute between the parties about where is the habitual residence of CR in July 2011. It was with mother in the United Kingdom. The fact that up to July 2010 his habitual residence was clearly this State is irrelevant, although the fact that CR spent five important years of his young life living with his father in this State from 2005 to 2010 is an important feature of the present case, and an unusual feature in my view. But there can be no doubt that the decision that CR move to the UK to live with his mother was a decision made with the sort of "settled purpose" referred to in *A.S. v. C.S.* [2010] 370. There is some dispute of fact as to whether or not mother made it clear, and CR accepted, that if he was to move back to live with her, CR would agree to do so until he reached the age of 16 years. That dispute of fact does not impinge on the fact that as of CR's move to the UK to live with his mother in July 2010, that state became his habitual residence for the purpose of the Convention on the Civil Aspects of International Child Abduction, done at the Hague on the 25th day of October 1980 ("the Convention").

40. Neither is there any dispute between the parties as to there having been a breach of rights of custody for the purpose of Article 3 of the Convention, even though no court in the state of habitual residence has made any order regulating custody or access, and even though there is no written agreement made between the parties regulating these matters. Thus far, the parties have been able to manage these matters to a very large extent by agreement between them from time to time. For the purposes of Article 3 of the Convention no such order or written agreement between the parties is necessary. It provides that such rights of custody referred to in that Article may arise by operation of law, and that applies in this case, and there is no dispute about that, so I do not propose to dwell on the matter longer.

41. Article 12 of the Convention provides in clear mandatory terms that where a child has been wrongfully removed or retained in breach of custody rights, and less than one year has elapsed from the date of such breach the judicial authority in the state where the child is shall order the return of the child forthwith. Nevertheless, in spite of the clear mandatory nature of the provisions of Article 12, certain exceptions are provided for in Article 13 which permits the judicial authority a measure of discretion as to whether such an order for return of the child should be refused. The issue in the present case is whether the present case comes within the exceptions provided for by Article 13 and whether the Court's discretion should be exercised by refusing to order the return of the child. Article 13 provides:

*"13. Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or body which opposes its return establishes that -*

*(a) the person, institution or body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the*

removal or retention; or

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

*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 and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."*

42. In my view neither (a) or (b) above apply in this case. Paragraph (a) is clearly inapplicable without further elaboration. Paragraph (b) has potential applicability if the Court was satisfied by evidence that to return CR to live with his mother, her partner and his older sister against his clearly expressed wishes, and to a school where he is unhappy and has been bullied on account of his Irish accent and so forth, would cause him to suffer physical or psychological harm "or otherwise place the child in an intolerable situation". The only evidence of potential physical harm in the present case is the evidence in Ms. O'Connell's report and her evidence that returning CR to his mother could bring on another panic attack like that which required him to be brought to hospital in September 2011 while he was with his father. I do not consider that prospect to be so weighty as to require the Court to refuse to make the order sought.

43. The phrase "psychological harm" is wide, and not easily defined even by experts, I suspect. There is a spectrum of harm presumably, ranging from minimal at one end to extreme at the other. At what point the anticipated psychological harm reaches the tipping point so as to require the exercise by the Court of its discretion to refuse to return the child would be a matter for evidence in any particular case, supported I suggest by clear expert evidence to guide the Court in the exercise of that discretion, and each case must be judged on its own facts and its own particular circumstances. I do not think that any anticipated or even presumed harm of a psychological nature by a return against CR's wishes has been established such that return should be refused on that ground alone. That is not to disregard or even to give undue weight to what I consider to be the very genuine and deep wish on his part to remain with his father in this State. I simply do not consider that the expert evidence in this case, such as it is, establishes as a matter of probability that psychological harm will be suffered if CR is returned. The evidence does not go that far.

44. The phrase "intolerable situation" is vaguer still in my view. Given that it is provided for in the Article as an alternative to either physical or psychological harm, it must embrace a wide range of situations, factors and circumstances in the place of habitual residence, which, though falling short of being likely to cause physical or psychological harm, may yet amount to situations which the child ought not to be expected to endure. I take "intolerable" to mean "unbearable" or "other than what the child should reasonably be expected to endure". Again, each child is different. What one child can readily endure or bear might be utterly intolerable to another for any number of reasons. Again each case must be judged on its own facts and circumstances and by reference to the particular child. It suggests a subjective test, yet a Court will always be aware that simply because a child expresses a wish against something does not mean that his wishes must be acceded to. There are general policy considerations behind the Convention which may require that a child's clearly expressed wishes or objections should yield to those other considerations. The child's wishes are not always determinative, but they must be considered and taken into account. This was touched upon by Finlay Geoghegan J. in her judgment in *C.A. v. C.A. (otherwise CMCC)* [2010] 2 I.R. 162 at page 174 when she referred also to the comments of Baroness Hale of Richmond in *In Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 A.C. 1288 at p.1307. Those comments were made in the context of considering a child's objection to being returned, but they seem to have some relevance also to the similar consideration of whether or not a return would for the particular child place him or her in an "intolerable situation".

45. I prefer to reach my conclusions in the present case, not on the basis that a return to the UK would place CR in an intolerable situation, even though I have little doubt from the evidence adduced, including that of Ms. O'Connell and the contents of her report, that CR himself would consider that to have to go back to the environment which he left in July 2010 and decided himself not to return to, would be intolerable for him, but rather by reference to the penultimate paragraph of Article 13, which stands separate from paragraph (a) and (b) of the Article for the exercise of the Court's discretion to refuse an order for return. In other words, this additional basis for a refusal does not depend for its operation on the establishment of physical or psychological harm or an intolerable situation. It is free-standing, as has been made clear in the judgment of Denham J. (as she then was) in *T.M.M. v. M.D. (Child Abduction: Article 13)* 1 I.R. 149 where she stated at pp. 161-162 of her judgment:

*"This aspect of art.13 is a separate ground. The child's views alone are sufficient basis to refuse to return her. I agree with the approach in S. v. S. (Child Abduction)(Child's Views) [1992] 2 FLR. 492 where it was determined that the part of art.13 which relates to the child's objection to being returned is completely separate from para. (b) which referred to the grave risk of physical or psychological harm and that there is no reason to interpret that part of the article as importing a requirement to satisfy para. (b) or to interpret the word 'object' to mean something stronger than its literal meaning. However, this is an area where the exercise of the discretion of the judge must be done with great care .....*

*Whilst it is a separate ground, a decision not to return a child to the country of its habitual residence is a decision of the court and care should be taken ... that it is not, nor does it appear to be, the decision of the child."*

46. I believe that it is clear from the report and evidence of Ms. O'Connell that CR is a 13 year old boy who, while immature in the sense that he is not used to or accustomed to making serious decisions for himself, has sufficient maturity to form and express his own views and opinions, and to have them given serious consideration and taken into account by this Court. Ms. O'Connell has interviewed and assessed CR. She is impressed by the sincerity with which he expresses his wish not to return to the UK to resume the life which he commenced there in July 2010 and which by July 2011 he was sufficiently unhappy with as to have no wish to return after the fortnight's holiday here. I appreciate that mother is of the view that a single telephone call shortly after CR's arrival here in July 2011 and in which she may have given out to CR about hiding his school report and about taking her partner's X-box games ought not to be regarded as a sufficient reason for this Court to refuse to order his return. I of course have no quarrel with that. But in my view it would be wrong, in the light of the available evidence, to regard CR as having decided only on the basis of that one conversation that he no longer wished to live in the UK with his mother and his older sister, and to have formed his views in that regard only on that date in July last.

47. An unusual feature of the facts in this case is that from the age of seven to the age of twelve, CR lived fully in this State with his father, his older brother and also his older sister for the most part, and only in the last twelve months has lived in the UK, apart from the years from his birth to age seven. Given the age he was when he started to live here in 2005, and the number of years spent

here subsequently, it is reasonable and indeed perfectly normal and understandable that he should have settled here during that time, made friends here both in school and outside school, and to have come to regard his father's house as his home in the full sense of that word. Nevertheless, and for some reason which is not entirely clear given the conflict of evidence in this regard, he chose in 2010 to go to the UK and live with his mother and his sister. He has stated to his father that he did so on the promise or understanding conveyed either by his mother or older sister that life would be better for him over there, and that in any event if things did not work out he could return to Ireland. There is also a limited amount of evidence that his welfare here was not being attended to as well as might be expected. There appears to have been a shortage of money as father was not working and was attending college. Some deficiencies in his personal hygiene seem to have been noticed by his mother when he went over to live with her. Perhaps food was not as plentiful as required. None of this is made very clear in the affidavits. It is certainly possible in these circumstances that the promise of a better life in the UK may have had some superficial attraction for him, and at least to the point of him wanting at that stage to 'give it a try'.

48. But it is quite clear when one considers all the available evidence and information that things did not work out as CR had expected or hoped that they would. Whose fault that is, perhaps, is beside the point as this is not an exercise in finding out who is to blame and who is not. I am quite sure that all concerned went into this new arrangement with good intentions and only wishing the best for CR. I accept completely that mother genuinely has concerns that the education available for CR in the UK is superior to that which he has available to him here. In all probability there is no rational basis for that concern, but, again, it is not this Court's function to assess the relative merits of competing educational establishments and systems of education. I think it probably is not going too far to say that it can be presumed that the best school in the world will not benefit a child optimally if the child is deeply unhappy in that environment. Conversely, a happy child can prosper even in a less advantaged or under-resourced school. My underlying point is that even if mother is correct, and she may be, that the facilities, curriculum and opportunities available to CR at the school he attended and would attend on his return, are far superior to those available to him in his father's locality, that is not a factor which alone should weigh heavily in the balance against the objections of CR, provided of course that he is somebody considered to be mature enough to form and express those views, and provided that his objections are cogent and rational.

49. It is accepted by mother that CR was the victim of school bullying in the UK. It has been said that, *inter alia*, that this was on account of his Irish accent. She naturally brought it to the attention of the school principal, but it is unclear what if anything resulted from that. CR has said to his father that nothing was done about it. Indeed, it is a difficult thing to do anything about without making the situation even worse. School can be a cruel environment, particularly as pupils reach teenage years. I am saying this, not because it is based on evidence as such, but simply as something which is widely known about, and which makes CR's complaints about being unhappy at school at least cogent, rational and not in the least extraordinary. That sort of environment is bound to have an effect on school performance, as seems to be evident from the end of term school report for 2010, which is the report which was found by mother in CR's bedroom and which led to the unsatisfactory telephone call.

50. I ought not to focus just on the difficulties which CR had in school in the UK, both socially and educationally. He seems to have had problems adjusting to the new household in the UK. He felt impeded in his freedom to go out and about compared to life here with his father, and has complained that he was left alone in the house for lengthy periods after school. It is a fact that his mother works outside the home, as does her partner and indeed his older sister. Perhaps it is inevitable in such circumstances that a child will spend some time alone in the house until others return, but this may not appeal to a boy of thirteen years, and seems to have caused distress to CR.

51. Ms. O'Connell has confirmed in her evidence that CR is intellectually able to form his own views, even if in serious matters such as this he is unused to having to make decisions. She regards him as mature enough to have these views, and certainly my own impression from her evidence to the Court was that she regarded CR as being very genuine in his wish not to return to the UK and that his reasons for being of that view were not fanciful, irrational or exaggerated such that they should be ignored. She expressed the view that when he made the decision in July 2010 he did not think it through sufficiently, and that it was only when he actually experienced life in the UK that he was forced to think it through and that he did so, coming to the clear decision by Christmas 2010 that he wanted to return to Ireland, and that he regretted the decision which he had made that summer. She is satisfied that he has not been coached in these views by any other person and that they are his own.

52. I am not overlooking the fact that mother disputes much of what CR appears to have said about his life with her and in the UK generally. They must of course be taken account of as a counterweight to the facts and views put forward by way of objection to an order for return. She denies that he has been left alone for long periods at home for example. She also denies that the difficulties for CR getting to school are not as bad as he is making out. She disagrees that nothing was done about the bullying at school, and says that it ceased after she brought it to attention there. She also plays down the extent to which CR has been having rows with herself, his sister or her own partner, believing that any there have been is just part of the rough and tumble of ordinary family life. She is very much of the view that he is not looked after properly by his father, and that his schooling here is not up to the same standard as that available where she lives, and that his best interests are best served by him returning to live with her. I have set out her views from her affidavits already.

53. Counsel for mother submits that the applicant has very genuine concerns for the general welfare of CR if he is permitted to remain living with his father, and that she has set these forth in her affidavits. She submits also that this Court should be overly influenced by what CR complains of given his level of maturity and the fact that he appears to be a child who can decide one thing one day and change his mind the next. She submits that the appropriate forum for deciding what is in the best interests of CR is a welfare hearing in the UK where all necessary evidence can be mustered, and that the place of habitual residence is the appropriate jurisdiction in which these matters should be addressed and decided. She submits that this is one of the general policy considerations behind the Convention, and that it is for, *inter alia*, this reason that the convention mandates a return to the place of habitual residence, subject to the exceptions which exist. But she emphasises that it is only in an exceptional case that a Court here would refuse to order the return of the child, and that it is not the norm. It is submitted that there is nothing of an exceptional nature in the facts of the present case. It is simply the expression of a preference by a child for living with one parent as opposed to the other, and that there is nothing so serious as to amount to physical or psychological harm involved, and that CR's own stated objections should be regarded with caution given his age, and propensity to change his mind.

54. I was impressed greatly by the evidence given by Ms. O'Connell when she spoke to her report and was cross-examined on it. She was very clear that CR is a boy who is mature enough to form his opinions and that he has done so in this case. I was left very much with the impression, though she did not say so explicitly as it would be beyond her brief to do so, that if the decision was hers she would have no doubt that she would prefer that CR remains here with his father. There was no question in her view that CR was making all this up or that he was being coached or in any other inappropriate way being influenced in these matters by either his father or his older brother. I am satisfied from her evidence and report that CR's objections are deeply and genuinely held, and that he has attained an age and level of maturity at which it is appropriate to take account of his views. That is what I am to be satisfied of before deciding how to exercise my discretion. Even where those requirements are met, the Court is not bound to refuse to make the

order. There is still a balancing exercise to be conducted whereby the aims and objectives of the Convention are considered, as are the nature and extent of the objections being made on the other.

55. I am satisfied having conducted such a balancing exercise in the present case that the objections enunciated by CR and on his behalf should prevail over the aims and objectives of the Convention, namely the swift return of a child to the place of his habitual residence so that all matters concerning his welfare and custody can be determined there. In my view, this is an exceptional case. Of particular exceptionality is the fact that CR prior to 2010 had seven years' experience of life with his father and at school here with which to rationally compare the twelve months which he spent during 2010-2011 in the UK. He spent from age seven to age twelve living in this State. He had already built up friends and family relationships here and regards here as still being home. The fact that a decision which he made in July 2010 to go to live with his mother had the result that his place of habitual residence changed overnight given the settled purpose of the move, should not deprive CR of the opportunity to change his mind provided of course this can be seen other than simply a whim or the result of an isolated or incident of low significance. If his decision can be considered to be thought out, and if he is considered to be a child of sufficient maturity to be able to make up his mind about these things, it does not seem to me to be in any way contrary to the purpose or the express terms of the Convention that he should be permitted to have that change of mind before it is too late. It is increasingly the case that a child of sufficient maturity will be heard on these applications, albeit at times through a process of interview and assessment by a person with specific expertise in conducting such interviews and assessments, such as Ms. O'Connell.

56. For the reasons stated I refuse to make the order sought in this case.