REDACTED

THE COURT OF APPEAL

FAMILY LAW

[Appeal No 2015 423]

Kelly J.
Finlay Geoghegan J.
Irvine J.

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCITON AND

IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 OF THE 27TH NOVEMBER, 2003

IN THE MATTER OF B AND V (MINORS)

BETWEEN

R

APPLICANT/RESPONDENT

AND

R

RESPONDENT/APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan on the 4th day of November 2015

1. The appellant ("the Mother") is the mother of the two boys named in the title to the proceedings. The Mother brings this appeal against the order and judgment of the High Court (Abbott J.) of 31st July 2015. That order provided that subject to certain undertakings given by the applicant ("the Father"), and subject to certain conditions specified therein, the two boys were to be returned to the jurisdiction of the courts of the Federal Republic of Germany as soon as possible or by 14th August 2015.

2. The Mother is a Polish national. She has represented herself throughout these proceedings. She appears to have been unable to obtain legal aid in this jurisdiction. The Father is a German national. He has been legally represented through the legal aid system in this jurisdiction.

3. The Father and the Mother were married to each other in Poland in April 2010. They subsequently lived in Germany and their elder son, to whom I will refer as "B" in this judgment, was born in Germany in July 2010. Their younger son, to whom I will refer as "V" in this judgment, was also born in Germany in March 2012.

4. The immediate facts giving rise to the present proceedings were that on 8th December 2014, the Mother brought the two boys to Ireland without the knowledge or consent of the Father. On arrival in Ireland, she notified the Father immediately of the whereabouts of the children and also notified the gardaí in Ireland. The Mother has a sister and father and other family members living in Ireland. She appears to have initially lived with the sister.

5. In the days following the Mother and boys' arrival in Ireland, there were several communications between the Mother and Father in relation to the future living arrangements for the boys, Mother and Father. Those communications are referred to in detail below.

6. No agreement was reached between the Mother and the Father. On 16th December 2014, the Father sent an email to the Mother seeking that she bring the boys back to Germany by 4th January 2015. This did not happen and the Father commenced proceedings before the Family Division of the local Court in Germany in early February 2015, and on 16th February 2015, made an application to the German Central Authority for the return of the boys to Germany pursuant to The Hague Convention and Regulation 2201/2003.

7. Following the usual request from the German Central Authority and instructions given in this jurisdiction, the proceedings were commenced by special summons on 26th March 2015.

8. Thereafter, the proceedings took the normal course before the High Court with case management and directions for filing of affidavits. There were affidavits filed by the Mother and the Father in addition to the original grounding affidavit sworn by the solicitor for the Father. The proceedings were heard over two days in the High Court on the affidavit evidence. There was no cross-examination. Judgment, ex tempore, was delivered by Abbott J. on 31st July 2015 and on certain undertakings, the order for return made subject to conditions.

9. On 10th August 2015, the Mother filed a notice of expedited appeal and issued a motion for a stay on the order for return made by the High Court. By order of this Court of 13th August 2015, a stay was granted on the order of the High Court pending the determination of the appeal and directions given for the purpose of expediting the hearing of the appeal. The Mother then brought further motions seeking the admission of further evidence and documents in the appeal. Those applications were heard and

determined on 3rd September 2015 and permission given for the filing of a further affidavit and the admission of certain additional documents. Other documents were refused to be admitted and the Mother's application to admit evidence from third parties was also refused. Additional directions were given for the hearing.

10. Both parties have filed written submissions in advance of the hearing of the appeal. It is appropriate to record that the Mother, who conducted the appeal herself, has done so in both a well-informed, measured and focused way which greatly assisted the Court in determining certain difficult issues in this appeal. The Father was present throughout the hearing of the appeal and was ably represented by Counsel and solicitor, who likewise made focused submissions in the appeal.

11. It is clear from the affidavits filed and the submissions made that whilst, unfortunately, it appears that certain difficulties have arisen between the Mother and the Father in relation to their own relationship, both are utterly devoted to their two sons and have the best interests of their sons firmly at heart, albeit that their respective subjective assessments as to what is in the best interests of their sons for their future living arrangements differ.

12. The parents' life was made significantly more difficult by the unfortunate illness of their elder son, B, which commenced in 2014. In April 2014, he was diagnosed with a rare form of brain cancer and was operated upon in Germany for a partial removal of a tumour in May 2014. The family pressures were increased also due to the fact that the Father, who had been diagnosed with burn out syndrome and depression in 2013, suffered severe injuries following a road traffic accident two days after the operation of B in May 2014.

13. In August 2014, all members of the family spent time at two separate rehabilitation clinics in the same town by the sea in Germany. It appears that the Father spent a longer time at his clinic after the Mother and two boys returned to their home.

14. In August 2014, the younger son, V, was diagnosed with cortical dysplasia.

15. The Mother commenced counselling therapy in October 2014.

16. There is dispute between the parties in relation to an alleged affair of the Father, which the Mother states ultimately provoked her to leave her home and Germany with the boys on 8th December 2014. That dispute is not directly relevant to the issues which this Court has to determine on this appeal.

Father's Application – Issue
17. The Father's application in the High Court was for an order for the summary return of the boys to the jurisdiction of the courts of Germany. The application is brought pursuant to The Hague Convention on Child Abduction as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991. Regulation (EC) 2201/2003 also applies as both Germany and Ireland are members of the EU. The Father was required to establish that the boys were habitually resident in Germany prior to 8th December 2014; that he held rights of custody which he was then exercising, and that the removal of the boys by the Mother was in breach of such rights. It was never in dispute that the boys were habitually resident in Germany prior to 8th December 2014. Further, it is not disputed that the Father, as the father of the boys, married to the Mother, holds custody rights in accordance with the laws of Germany. The Father was, until 8th December 2014, living with the Mother and the boys in Germany and was exercising those rights. The only issue raised by the Mother was in reliance upon an alleged power of attorney signed by the Father following the accident in which he was injured. Whilst the Mother deposed on affidavit that this gave her the right to decide upon on the residence of the boys, that was not substantiated either by the terms of the document produced or any provision of German law.

18. Accordingly, I am satisfied that the trial judge was correct in deciding that there was a wrongful removal of the boys by the Mother from Germany to Ireland on 8th December 2014. It was never contended that the Father had consented in advance of the boys being taken to Ireland or that taking the boys to Ireland without the consent of the Father was not in breach of his rights of custody.

Settlement
19. Once the Father has established that there was a wrongful removal of the boys within the meaning of the Convention and proceedings were commenced in Ireland within one year from that date, the Irish courts are obliged, pursuant to Article 12 of the Convention, to make an Order for the return of the boys to the jurisdiction of the courts of Germany "forthwith" unless the Mother establishes one of the defences set out in Article 13 of the Convention. Whilst in the notice of appeal, the Mother had sought to raise an issue as to whether the Irish courts had jurisdiction to consider whether or not the boys had settled in Ireland, even where the proceedings were commenced within a period of one year, she did not, correctly, in my view, pursue this at the oral hearing. The terms of Article 12 are clear. The issue of settlement only arises, either under Article 12 where a period of more than one year has elapsed from the date of wrongful removal to the date of commencement of the proceedings, or where a respondent establishes one of the defences provided for in Article 13 and, accordingly, the Irish courts have a discretion as to whether or not to return the child.

Defences
20. The Mother, before the High Court, and on appeal before this Court, sought to establish two defences to the application for return: acquiescence and grave risk/intolerable situation. Each of these are defences provided for in Article 13 of the Convention which, insofar as relevant, provides:

"Article 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 other body which opposes its return establishes that-
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> . . ."

21. Each of these defences put forward by the Mother will be considered in turn.

Acquiescence

22. The proper approach to a Court determining whether or not on the facts presented, a respondent had established that there has been acquiescence by the wronged parent, in this instance, the Father, was set out by the Supreme Court per Denham J. (as she then was) in *R.K. v. J.K.* [2000] 2 I.R. 416 at 429/430. In that judgment, Denham J. stated "Acquiescence means acceptance, acceptance of the removal or retention of the child". She agreed again (as she had previously done in P. v B. (Child Abduction :Undertakings) [1994] 3 I.R. 507) with the approach set out by Waite J. *in W. v. W. (Abduction*: *Acquiescence)* [1993] 2 FLR 211, where, at p. 217, he stated:

> "'The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.'"

Denham J. then observed in *P.v B*. "The test is objective not subjective and made on all the circumstances of the case."

23. In *R.K. v. J.K.* Denham J. at p. 430, also agreed with the then more recent summary of the position as to acquiescence set out by Lord Browne-Wilkinson in the House of Lords in Re H (Abduction: Acquiescence) [1998] AC 72, where at p. 90, he stated:

"To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In re S. (Minors) (Abduction: Acquiescence) [1994] 1 F.L.R. 819 at p. 838: … "the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact." (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

24. Denham J. concluded having considered these authorities, "the matter of interpreting the term 'acquiescence' under The Hague Convention should be approached on a strongly factual basis with a common sense interpretation of the term applied".

25. The Mother, as she did before the High Court, relies on two distinct sets of facts as constituting acquiescence by the Father for the purposes of Article 13(a) of the Convention. The trial judge rejected each. The Mother submits to this Court that he was in error in doing so and draws attention to certain aspects of the facts which, she submits, were overlooked by the trial judge.

26. The Mother firstly relies upon an email sent to her by the Father on 12th December 2014. The email is headed 'Final version of promised Email!' It followed an earlier draft which was in substantially the same terms, except that the draft did not include a series of questions at the end of the email set out below, which the Mother submits demonstrates that the Father had, by this time, clearly accepted that she and the boys were going to remain in Ireland. It is necessary to set out in some detail the terms of the email:

> "My dear [R].,
>
> Last days I was thinking a lot about our future and past. First years in [D] were also not always easy because of my long way to work and back but there we were still more happy and joyful in daily life. I agree we went in very bad water before this April and cancer diagnosis is . . . still after very good operations of [B] and me going again working after my accident we didn't learn from our bigger mistakes . . . Unfortunately we managed better life just for some weeks before and after REHABILITATION at [ ]. We gave us finally more freedom and possibility for more sport activities but our verbal fights got even worse after [B] went back to [K]. Well 2 or 3 possibilities/ways I could imagine for our future in the moment . . .
>
> 1. Me coming to Ireland next summer (earliest from 1st July)! Up to now still my favourite option . . ."

[He next sets out advantages and disadvantages in paras. (a) to (h)]

> . . .
>
> "2. You coming back to [C]. (sometime next year, maybe summer, earlier or later) . . . after starting your dream job as Art Therapist."
>
> [He next sets out principally advantages in paras. (a) to (i) inclusive].
>
> "3. [-] . . . nobody wants I am sure.
>
> . . .
>
> Daily fights I have now with my parents who wants me to go to Police because they want to see their grandchildren again and are afraid of healthcare in Ireland especially for B, about too many new influences like language, other or less food because everything is much more expensive. Well all because of almost one night stand with my love for studies . . . I could never imagine that one mistake could have such consequences but well I also couldn't imagine such family life with so many health and financial difficulties, missing respect and ability to listen and take care of each other, so different attitudes about education, protection of our boys. . .
>
> I am even more tired now and hope that we will find a solution for all of us which will be THE BEST FOR OUR SONS, and our only COMMON TREASURE!!!

Few more important questions . . . please answer them as fast as possible:

1. When should I cancel the [ ] places in [daycare placement] before Christmas or in January? Of course I don't want to pay when you don't come back for our boys. Also for December I don't really want to pay just for these 1, 5 days!

2. What about your Fitness center – did you cancel membership because you left Germany?

3. What about A and [A]. Plus insurance how should I deal with it alone?

4. Which medicine you need or will probably need next year or is medicine cheaper on your island? I told you that I want to order medicine again this year because of tax file for 2014 – just if we need of course, so please think and send me list – thankx a lot!

5. Is it ok that I will try to sell lots of toys, board games, B's new bike, bike seat for V, your bike (my racebike as well) . . .

6. If I will sent Christmas gift you want to have some of your or boys clothes, shoes, toys? Well I would need [K]. full address in [B]. for that.

7. What else you and our sons could need from Germany, our flat?

Good night and kisses for you all 3 [R]

Your father and still husband"

27. The Mother relies also on two forms signed by the Father in which he notifies the day care placement of the boys in [C]. that they are leaving. The forms are signed by the Father and dated by the person in charge of the day care placement. The Mother submits that the fact that the Father acted on Question No. 1 in the email immediately on 12th December 2014, is evidence that he accepted at that time that the boys were going to remain with her in Ireland.

28. She also relies upon the fact that he parcelled up the children's toys and sent them to his parents' house some distance away and cleared their flat of certain of her belongings.

29. However, the attitude of the Father changed on 15th December 2014, and he communicated this to the Mother by email of 16th December, attaching a letter dated 15th December requiring her to return the boys to Germany by 4th January 2015. The terms of this email and letter are also of significance. That letter discloses that he went, on 15th December, with his parents to the office of a 'Lawyer and Mediator' and that they "got very good counselling". He then stated in the letter:

"Before we will start legal actions, I want to give you the chance to countermand your criminal offence (notification because of wrongful removal of a child/common daily custody means that one is not allowed to move habitual residence without agreement of the other parent) when bringing our both sons [names and date of birth] as fast as possible but latest until 4th January 2015 – before abroad health insurance . . . is running out – back to our flat in . . . . and we will find a mutual agreement for realisation of our common custody and guardianship.

> Explicitly I can point out first of all that I didn't expect anyhow such sudden escape of yours and second of all I don't agree at all with the new living place for our children . . .
>
> As I've told you by phone, I inform you explicitly that … reserved us the places in Daycare Center up to 31st January 2015 for sure, after that we will probably loose these, . . . because they would have to put them officially on waiting list from 1st February 2015.
>
> I still hope for a happy end FOR THE WELLBEING OF OUR SONS but unfortunately this decision is just up to you from now on. In this spirit I am thankful for regular phone calls, which are meanwhile fortunately more calm and objective and that I can finally talk and sing with my children again. First of all I wish our children a Merry Christmas and hope for a much better year for OUR BOTH UNIQUE TREASURES but also for us!"

30. The children did not return by 4th January 2015 and there were further communications between the parties and possibly some vacillation by the Father in the month of January. The Father then commenced proceedings in the Family Division of the local Court in Germany and sought and was granted, on 10th February 2015, a provisional order of sole custody. On 16th February 2015, he made the request to the German Central Authority to commence proceedings for the return of the boys pursuant to The Hague Convention.

31. Applying, to those facts and exchanges the principles set out by the Supreme Court in R.K. v. J.K. in the judgment of Denham J. above, the Court has concluded that the trial judge was correct in deciding that the "promised email" sent by the Father on 12th December 2014, was not evidence of acquiescence by him within the meaning of Article 13 of the Convention even when considered in a context that it was a second email following an initial draft, was a "promised email" in the sense, of being promised in the course of oral discussions, and included specific questions as to practical matters which are consistent with the Mother and boys remaining in Ireland for a period of time. In reaching this conclusion the Court has also taken into account the fact that the Father did, on the same day, sign the boys out of their day care centre and also took steps to clear the flat, which was the former joint home of the Father, Mother and the boys, of toys and possessions of the Mother.

32. Nevertheless, it does not appear to the Court that the indications given by the Father in that email and the steps taken, which undoubtedly envisaged a future plan for the family, which included the boys and the Mother remaining in Ireland for a period of time, should be regarded as "subsequent acquiescence" by the Father to the wrongful removal of the boys to Ireland in breach of custody rights which he then held and was exercising.

33. The reasons for which the Court has reached that conclusion are the following. Firstly, these indications in the email were given by the Father within three days of learning that the boys were in Ireland. Whilst the Mother called him on 8th December 2014 to say she and the boys were safe and away, it was only on 9th December 2014 that she told him that they were in Ireland. It is clear from both affidavits that there were significant and emotionally difficult conversations between the Father and the Mother over the following three days. The email of 12th December indicates two or three possibilities which the Father "could imagine for our future in the moment". Secondly, he appears to be seeking to find solutions (as I am sure the Mother was also seeking at that time) in the

interests of the wellbeing of his sons. Third, and perhaps most importantly, there is no evidence that the Father had obtained legal advice prior to writing the email of 12th December, or that he was informed of his general right of objection to the Mother moving the place of residence of the boys from Germany to Ireland. Fourth, within four days of sending that email, and still only seven days after learning that the Mother and the boys were in Ireland, he sent by email of 16th December the letter dated 15th December in which he expressly stated that he did not agree to the change of residence of the boys and seeking their return by 4th January without the need to commence legal proceedings.

34. On an assessment of those facts, it does not appear to the Court that the indications given by the Father in the email of 12th December, even when considered in the context of the prior draft email and the steps taken by him on that day in relation to the children, can be considered a real acceptance of the fact that the boys would continue to live in Ireland for an indefinite period. Rather, it appears that they were an immediate attempt by the Father to find solutions in the interests of the sons, and undoubtedly contemplated that a solution might be that the boys remain in Ireland, and, as he indicated, his "favourite option" for him to come to Ireland the following summer. However, being so close to the removal of the boys, and without taking legal advice it does not appear to the Court that he can, in the words of Lord Browne-Wilkinson, be considered to have "clearly and unequivocally" shown and led the Mother to believe that he was not going to seek to assert his rights, including an application for the summary return of the boys to Germany. The fact that as early as four days later, he made clear that he did not consent to the move and was contemplating legal action in the event that there was not a voluntary return, is such that the indications given do not create an injustice for the Mother nor are inconsistent with his seeking a summary order for the return of the boys to Germany.

35. The second set of facts relied upon by the Mother are the actions taken by the Father whilst in Ireland in May 2015. First, it is not in dispute that he visited, with the Mother, the principal of the school then being attended by B, and discussed the future schooling of B, including during the following two years. Secondly, he attended with the Mother at a District Court at a hearing before the district judge in relation to a Protection Order obtained by the Mother from the District Court in January 2015. There is dispute as to what exactly was stated by the Father to the district judge. Irrespective of the dispute, the furthest the Mother can put the facts relied upon is that the Father both discussed a move to Ireland and entered into negotiations with her in relation to a settlement of the various proceedings. Unfortunately, from the children's perspective, no settlement was reached at that time.

36. In a factual context where these return proceedings had already commenced and were ongoing in Ireland, it does not appear to the Court that these facts relied upon by the Mother taken at their height can be considered to constitute acquiescence by the Father. They were negotiations in a context of the existing Hague proceedings for the return of the boys. Whilst the Father may well have discussed future schooling of his elder son in Ireland, that is a factual scenario which may arise irrespective of the outcome of these proceedings as the Mother is seeking, in proceedings in Germany, permission to have the boys reside with her in Ireland.

37. The conclusion of the Court is that the trial judge was correct in rejecting the defence advanced by the Mother upon the ground of acquiescence, and on the additional facts clarified before this Court is of the same view. The defence of subsequent acquiescence for the purposes of Article 13 of the Convention has not been made out on the facts herein.

38. The Mother referred the Court to a number of other decisions in relation to acquiescence for the purposes of Article 13(a) of the Hague Convention. In particular, she drew attention to the judgment of the Supreme Court of Israel of 21st June 1993 in L. v. L [INCADAT: HC/E/IL 242] ; the judgment of the Supreme Court of Appeal of South Africa in Smith v. Smith [INCADAT: HC/E/ZA 499] 2001 (3) SA 845 and the Opinion of Lord Glennie in the Outer House Court of Session Scotland in Re A Petitioner [2011] CSOH 215. The Court has carefully considered each of those judgments and the other judgments to which we were referred. The principles stated do not differ from those set out by Denham J. in the Supreme Court in R.K. v. J.K. to which we have referred and each are distinguishable on the facts from the facts at issue in these proceedings. The Mother laid emphasis on Smith v. Smith as indicating that where a wronged parent has acquiesced following a wrongful removal he will not be permitted to change his mind and seek the summary return of the child wrongfully removed. The principle identified is correct but the facts were very different. In Smith v. Smith the acquiescence had been clear and unequivocal as the father having commenced Hague proceedings, with the benefit of legal advice, then withdrew same but later following different legal advice changed his mind and commenced a second set of Hague proceedings.

39. In the light of the conclusion that the email and related steps taken by the Father on 12th December do not amount to acquiescence the principles relating to change of mind do not apply.

Grave Risk/Intolerable Situation

40. The onus is on the Mother, in relation to this defence, to establish that there is a grave risk that the return of the boys to Germany would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It is well-established on the authorities that the test is a high one: *A.S. v. P.S.* (Child Abduction) [1998] 2 I.R. 244, per Fennelly J. at para. 57. Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return.

41. The concerns and fears expressed by the Mother in her affidavits and submission fall into three parts. Firstly, she makes allegations of historical physical abuse by the Father of the boys and physical and psychological abuse of her prior to leaving Germany. She refers also to one incident of alleged physical harm by the Father to the boys in Dublin during a visit in July. Secondly, whilst making clear that she will, if an order for return is made by the Irish courts, return with the boys to Germany, the Mother has raised issues in relation, both to her status as a Polish national in Germany following a divorce from the Father; her ability to obtain social welfare or employment and the risk of criminal proceedings being pursued by reason of the wrongful removal of the boys from Germany. Thirdly, she submits that, in particular in relation to the elder boy, B, taking him out of school in Ireland where he is making good progress, speaking English as a first language and, she contends, is well settled in Ireland and bringing him back to Germany to a situation where he will have to return to day care, as he is not yet old enough for school in Germany, will place him, even if she accompanies him, in an intolerable situation. She has also referred to evidence of the boys' upset and fears at being told that they may have to return to Germany; the preferences expressed by B to remain in Ireland and the potential adverse impact, especially on his health, which she fears if he is required to return to Germany. The Mother has an understandable fear of his cancer returning and is concerned that the stress which a return to Germany would involve for him might trigger the return of the cancer.

42. These grounds were also relied upon before the trial judge. The concerns and fears of the Mother in relation to the reaction of the boys to a potential return to Germany have, however increased by events since the hearing before the trial judge in July, and she refers in the subsequent affidavits to a number of additional matters and further medical investigation, and in particular, a report from Professor Michael Fitzgerald, a consultant child and adult psychiatrist, dated 13th August 2015 on B.

43. The Mother in submission in relation to the decision which the Court must make on her Article 13(b) defence emphasises the obligation of the Irish courts to decide what is in the best interests of the boys. In doing so relies upon the judgments of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland* [2012] 54 EHRR 31 and *X. v. Latvia* [2014] 59 EHRR 3. The legal framework in which a requested court must now decide upon the defence of grave risk is complex. Nevertheless, notwithstanding the requirement that the child's best interests are considered it remains clear that the requested court is not required to conduct a full welfare assessment as to what is in the best interests of the child. The best interests of the child must be evaluated in the context of the nature of the application and the exception in the Hague Convention being relied upon. This appears to have been clarified by the European Court of Human Rights following concerns expressed in relation to its earlier judgment in Neulinger in the judgment of the Grand Chamber in X v Latvia at paras. 100 – 101 where it stated:

44. "100. The child's best interests do not coincide with those of the father or the mother, except in so far as they necessarily have in common various assessment criteria related to the child's individual personality, background and specific situation. Nonetheless, they cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return in pursuance of the Hague Convention or ruling on the merits of an application for custody or parental authority, the latter proceedings being, in principle, unconnected to the purpose of the Hague Convention .

> "101. Thus, in the context of an application for return made under the Hague Convention , which is accordingly distinct from custody proceedings, the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention , which concern the passage of time, the conditions of application of the Convention and the existence of a "grave risk", and compliance with the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.
>
> 101. This task falls in the first instance to the national authorities of the requested state, which have, inter alia, the benefit of direct contact with the interested parties. In fulfilling their task under art.8 , the domestic courts enjoy a margin of appreciation, which, however, remains subject to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power."

45. The policy underlying the Hague Convention is that the best interest of a child is in general served by the courts of his or her habitual residence determining custody or access disputes. Those courts are normally best situated to carry out the requisite full welfare assessment. The purpose of the summary order for return where there are custody disputes is to enable this happen. A related purpose of the Convention is to deter child abduction as defined which is in general harmful for children.

46. In an application such as the present, where Regulation 2201/2003 also applies, this principle is repeated by the terms of the Regulation, subject to certain exceptions. It is important to note that even if the Irish courts decided on this application that they should not make an order for the summary return of the boys to the jurisdiction of the courts of Germany, nevertheless pursuant to Articles 10 and 11(6) - 11(8) of the Regulation, the German courts retain jurisdiction after such an order for non return to decide upon the custody of the boys. Further Article 11(8) expressly permits the German courts to then make an order which includes an order for the return of the boys to Germany which is enforceable in accordance with Section 4 of Chapter III of the Regulation which excludes any contest on the substance of the order for the return.

47. The requirement that the court take account of the best interests of the children does not, preclude the court from considering whether or not the Mother has, for the purposes of Article 13 of the Convention, discharged the burden of establishing that there would be a grave risk of physical or psychological harm or otherwise place the boys in an intolerable situation if they were required by a summary order of the courts of Ireland to return to Germany. Rather it requires the High Court in the first instance and then this Court to consider and examine in the context of the facts and other evidence put before it whether such a grave risk exists.

48. The trial judge in his judgment carefully considered the facts deposed to by the Mother in relation to the alleged physical harm caused by the Father to the boys and the alleged physical and psychological harm to the Mother. He considered carefully the admissions of kicking and physical chastisement of the boys and the report produced by the Mother from Ms. Langenberg, a Psychological Psychotherapist whom she had attended in Germany in September and November 2014, for psychological therapy.

49. The trial judge correctly, in considering Article 13(b), considered the future and what were the risks to the boys if he made an order for their return. On an assessment of the facts before him, and having obtained an undertaking from the Father that he would vacate the prior family home and permit the Mother and boys on return to live there pending an order of the German courts, the trial judge concluded that the Mother had not established that a return of the boys to Germany would constitute a grave risk of physical or psychological harm or otherwise place the boys in an intolerable situation.

50. In the Court's view the trial judge was entitled to come to the conclusion. He correctly applied the law and the Court agrees with his assessment of the facts on this issue.

51. Before this Court the Mother developed the further two aspects of her submission that there was a grave risk that the return of the boys would place them in an intolerable situation.

52. "Intolerable" when applied to a chid has been stated to be "a situation which this particular child in these particular circumstances should not be expected to tolerate"; see in Re. D. (Abduction: Rights of Custody) [2006] UKHL 51, 2007 1 AC 619 at para. 52. In Re. E. Children [2011] UKSC 27, the UK Supreme Court at para. 34 having referred to that definition observed:

> "Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse or neglect of the child herself".

53. In *I.P. v. T.P.* [2012] 1 I.R. 666, in the High Court, Finlay Geoghegan J agreed with these observations of the UK Supreme Court and added as relevant to the facts of that case as it is to this application that unfortunately "discomfort and distress may be almost inevitable for a child whose parents are in dispute". This is so regretfully on the facts of this application and may be exacerbated where children are wrongfully moved from one country to another in circumstances which give rise to significant dispute and proceedings.

54. It must be recalled that the present proceedings are summary proceedings for the return of the children to the jurisdiction of the courts of Germany. They are not proceedings during which it is either appropriate or possible to decide contested issues of fact. Many of the Mother's allegations in relation to the historical position are contested by the Father.

55. The situation to which the Mother and the boys were to return pursuant to the High Court Order was quite different from that which prevailed prior to leaving Germany. The trial judge, correctly, in the Court's view, considered that the defence of grave risk had not been made out, but did, nevertheless, obtain from the Father an undertaking to vacate the apartment which he had previously shared with the Mother and boys so as to leave it free for them to take up occupation pending decisions of the local Family Court in Germany relating to custody, access, parenting and counselling. Counsel for the Father confirmed that such an undertaking is still available to this Court.

56. Even if the allegations of the Mother in relation to the historical situation are proven to be correct (and the Court is not indicating that it accepts or rejects them), the Court has concluded that the trial judge was correct in determining that the return of the children with the Mother, in circumstances where the Father agreed to vacate the prior home were such that the return could not be considered as constituting a grave risk to the boys of physical or psychological harm. The Mother has been and is their primary carer, and she, with the assistance of the German authorities and courts, if necessary, is in a position to protect them on return in such factual circumstances.

57. Insofar as the Mother's own position is concerned, firstly, again, the trial judge obtained an undertaking from the Father not to progress criminal proceedings against the Mother in Germany and "to use his best endeavours to ensure that such criminal proceedings are not progressed by anyone else". The Mother submits that he cannot prevent the prosecuting authorities continuing the criminal proceedings. The Court accepts that that is probably correct. This is, regrettably, an issue which arises regularly in the context of applications for the return of children who have been wrongfully removed by their primary carer. If the possibility of an adverse impact on the children by reason of the pursuit of criminal proceedings against the Mother arising out of their wrongful removal were to constitute a defence, this would, in the Court's view, create a significant obstacle to the application of The Hague Convention. In many countries, the wrongful removal of children is a criminal offence. Also, regrettably, it is quite common for the wrongful removal to be undertaken by the primary carer of the children.

58. It was accepted before this Court that a prior warrant for the arrest for the Mother had now been cancelled and hence there is no evidence before the Court that the boys would be separated from their Mother on a return to Germany. Thereafter it must remain a matter for the German authorities.

59. Insofar as the Mother's status as an EU national who is a migrant to Germany is concerned, the evidence is that she may return with the boys to Germany and that there is no immediate threat to the separation of the Mother from the boys by reason of her status as a Polish national. Similarly in relation to her financial position the trial judge made it a condition of the order for return that there would be a payment of €200 per week by the Father to the Mother upon her return to Germany. Whilst the Court accepts on the evidence she may not be financially as well off immediately on her return as she is at present in Ireland, nevertheless the Mother impressed the Court as a highly able, intelligent and well qualified person determined to do everything possible to give her sons a good life. She made clear that she would return with the boys to Germany and what she has achieved by way of assistance in this country indicates that she will ensure that they are well provided for in Germany if necessary.

60. The final ground relied upon by the Mother in support of her submission that an order for the return would create a grave risk that the boys would be placed in an intolerable situation relates to their alleged current upset and anxiety at the thought of a return to Germany and also the fact that in particular the elder boy B is well settled in his school in Ireland and is making good progress. The Mother relied upon a report from Prof. Fitzgerald. That report described certain information given by the Mother and also a short exchange between Prof. Fitzgerald and B. In the latter, when asked whether he would prefer to live in this country or live in Germany, B replied: "Here". Prof. Fitzgerald further reported that when asked why he did not want to live in Germany, he said "I don't know". When asked if he had bad dreams, it appears he said "yes", but when asked what happened in the dreams he did not answer.

61. The Court recognises that a move of the boys from Ireland to Germany will inevitably be disruptive for them. Unfortunately for them they have previously experienced a sudden change in their lives on their move to Ireland. As a matter of common sense, it is understandable that a five year old boy who has been in Ireland since last December and is happy in a school and social environment here may not wish to move. However, the element of discomfort or distress which the boys will suffer if they are required to move to Germany in the company of their Mother who is their primary carer, who is clearly utterly committed and devoted to them is not such as to constitute a grave risk that they would, on such a return to Germany be placed in an intolerable situation. Pending any order of the German courts they will remain with their mother who will be able to assist them in adjusting.

62. Accordingly, the Court has concluded that the Mother has not established that the additional elements set out above would constitute a grave risk of creating an intolerable situation for the boys on a return with her to Germany.

Subsidiary procedural grounds of Appeal

63. The Mother pursued two further grounds of appeal. The first was the failure by the trial judge to interview B. In July 2015 he was just 5 years old. The Court was informed that earlier at case management in the High Court, the judge had not by reason of the age of the boys considered it appropriate to make an order that they be interviewed in advance of the hearing. Article 11(2) of Regulation 2201/2003 obliges the court to give a child an opportunity to be heard on a return application unless this appears "inappropriate having regard to his age or degree of maturity". Having regard to the age of B and V the trial judge was entitled to take a view that it was not necessary to give them an opportunity to be heard. Such an approach is consistent with judgment of the Supreme Court in B.U. v B. E (Child Abduction) [2010] 3 I.R. 737.

64. The second ground related to the failure of the trial judge to permit the Mother to call oral evidence from witnesses she had present. In accordance with Order 133 Rule 5(2) of the Rules of the Superior Courts the general rule is that return applications such as this are heard on the basis of affidavit evidence only. The High Court has jurisdiction at its discretion "in exceptional circumstances" to direct or permit oral evidence to be adduced. The facts herein do not disclose exceptional circumstances which would have required the High Court judge to admit oral evidence.

65. Accordingly, the Court has concluded that the appeal must be rejected. The boys were wrongfully removed to Ireland. The Mother has not made out a defence pursuant to Article 13 of the Convention. The best interests of the boys will be served by the Courts of Germany, (unless the parents reach agreement), promptly making decisions, following a full welfare assessment, on disputed custody and access issues. This Court must make an order for the return of the boys to the jurisdiction of the courts of Germany upon the same undertakings and subject to the same conditions as were set out in the order of the High Court of the 31st July, 2014, save in one respect in relation to the timing of the order. Thereafter it remains a matter for the German courts as to in which country the boys may be permitted to live.

Timing of return

66. Article 12 requires the requested court to make an order for the return of the children "forthwith". In this jurisdiction it is well

established that the court may where it considers that the best interests of the child so require, either place a short stay on that order or provide that the order come into effect, not immediately, but at a proximate future date. The High Court order was made on the 31st July, i.e. during school holidays. The High Court judge made an order that it would come into effect on the 14th August. This would have permitted a return in advance of the commencement of a new school year which would have minimised disruption for the elder boy.

67. The timing is now different. B is in the middle of a school term. It is particularly disruptive for a school going child to move from one country to another in the middle of a school term. Hence it appears to the Court appropriate to defer the coming into effect of the order for return until the end of the current school term which it envisages will be approximately 21st or 22nd December.

68. There is a further reason for which the Court takes the view that it is now in the best interest of the boys that the order for return should not come into effect immediately. The Court has been told that there are both divorce proceedings and custody proceedings pending before the courts of Germany. The Mother has informed the Court that whilst she is not seeking sole custody, she is seeking an order that the children reside with her and also seeking in effect permission for them to reside in Ireland. The Father has also indicated he is not seeking sole custody. It is in the best interests of the boys that a final solution is reached as soon as possible as to where they should live. Optimally this should be agreed between their parents both of whom clearly love their sons and have their best interests much at heart. At present they remain in dispute as to what are the future living arrangements which would be in the best interests of their sons. If they cannot reach agreement, then it is the courts of Germany which under Regulation 2201/2003 have jurisdiction to make that decision.

69. In pending proceedings before the family court in Germany an indication was given that the German judge and/or guardian ad litem might be in a position to visit the children in Ireland. As the Mother is pursuing an application to be permitted to live in Ireland, it is probably desirable that the German guardian ad litem and a judge (if that is appropriate under the German system) have an opportunity of assessing the living arrangements and the situation of the boys in Ireland. It is clearly desirable in the interests of the boys that the court proceedings are progressed as soon as possible and it may be that progress may be made during the next few weeks in the custody proceedings. However that is a matter for the German courts.

70. The Mother, since coming to Ireland, has obtained an impressive list of health and welfare benefits and other assistance for herself and the boys. She understands and has informed this Court that she may lose some of these if she leaves Ireland for more that three weeks. Similar to the issues of the extent to which the boys are settled in Ireland or the comparative school or care arrangements that is not a matter which this Court may take into account in deciding on the summary return application. However it may be relevant to an overall welfare assessment which will be made by the German Courts.

71. It is important to emphasise that henceforth the Courts of Germany have jurisdiction in relation to all matters of custody and access concerning the boys. If the Mother wishes to obtain permission to remain in Ireland beyond the date fixed for the return of the boys pursuant to the order to be made by this Court, she must make an application to the relevant court in Germany and unless permitted by the German courts to remain in Ireland must return with the boys to Germany on the date to be fixed in the order of this Court.

72. The Court had indicated that it would hand down the judgment and permit the parties a short period to consider same prior to making the order indicated by the judgment. The Court will need to know for the Order the last day of B's current school term.

73. The Court will make an immediate order permitting the parties to release this judgment to their German lawyers for use in any advice or mediation or proceedings in Germany relating to the boys. If the parties wish the Court will arrange for a request to be made through the International Hague Network of Judges that proceedings