Neutral Citation [2012] IEHC 450

THE HIGH COURT

[2010 No. 39 HLC]

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 ABDUCTION

AND IN THE MATTER OF COUNCIL REGULATION (EC) 2201/2003,

AND IN THE MATTER OF S M AND C M (CHILDREN)

BETWEEN

M M

APPLICANT

AND

R R

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 31st day of July 2012

1. This is an application for the return of two children, S M and C M to the jurisdiction of the courts of England and Wales in accordance with the terms of the Hague Convention on the Civil Aspects of International Child Abduction and the Brussels II *bis* Regulation (Council Regulation (EC) 220112003). S M was born in England on 7th September, 2003 and will attain the age of 16 in 2019. C M was also born in England, on 12th November, 2004 and will be 16 in 2020.

2. The applicant is the father of the children, the respondent is their mother. The respondent is the mother of a third son, D, born on 14th April, 2011, whose father is not the applicant. The parties were married to each other on 7th April, 2003 and were divorced by order of the Reigate County Court in January 2007. A decree absolute was granted on 2nd March, 2007. The parties are joint holders of rights of custody in respect of the children, pursuant to the laws of England and Wales.

3. This matter and the parties involved have a complicated history. After the parties separated, the applicant enjoyed access with the boys. In February 2008, the relationship between them, as it existed at that point, had deteriorated to the extent that the respondent made an application for residence of the minors. In April of that year, an order was made granting contact to the applicant with the children at a contact centre. Such access continued until March 2009, when an incident occurred at the contact centre between the applicant and the respondent's then partner and father of her third child, Mr. M S This incident led the applicant to apply for a non-molestation order pending which there was no contact between the applicant and the children because of the applicant's stated fear of Mr. S. Mr. S was charged with actual bodily harm and was due to attend court to enter a plea in August 2009. The application for the non-molestation order came up for hearing on 28th August, 2009 and the order was made in the absence of the respondent.

4. In or about July, 2009, the respondent along with the boys and her then partner, Mr. S, left England for Spain, where Mr. S had obtained employment. This move took place despite the fact that the respondent's solicitors, in correspondence relating to the pending proceedings involving the parties, wrote to the applicant's solicitors to say that they had spoken to their client and "she states that she has not current plans to move house and will let me know at any time in the future should she decide to do so". On their arrival in Spain, the respondent, Mr. Sand the children lived in rented accommodation, for which they signed a lease dated 28th July, 2009. The children were registered in school. The respondent says that the applicant was aware that she was living in Spain that he had been told so by her sister. A letter from the primary school that S had been attending and where it was intended that C would also attend states that "an informal conversation was held with the mother of the two boys prior to the end of the Summer term [22nd July, 2009] during which we were informed that she intended to relocate to Spain". The letter continues to state that "formal withdrawal procedures were not completed". The respondent says that the applicant was not exercising his custody rights at the time of the removal of the children from the school and the move to Spain and that she was the sole carer of the boys.

5. Mr S lost his job in Spain in late 2009/early 2010. The respondent, her partner and the boys left in January, 2010 and drove to Cherbourg where they boarded a ferry to Wexford. The drive from the south of Spain to Cherbourg took two days, according to the respondent. They arrived in Ireland on or about 15th January, 2010. The respondent says that she contacted the local department of social welfare in an attempt to obtain assistance. She ultimately failed the requirement that she be resident for two years but says that her details and the fact that she had arrived in Ireland would have been recorded.

6. On their arrival in Ireland, the children were registered in school in New Ross. They were registered first on 26th January, 2010 and, according to a letter from the school attended until 20th January, 2011. It was noted, in particular, in C's school report that he had settled in well and was making excellent progress. Ms. Linda Nangle, social worker, says, in her affidavit, that they left New Ross "quite abruptly when the school the children attended got a call from the High Court Office (Principal Registrar Kevin O'Neill) seeking information on the children's whereabouts under Child Protection and Enforcement of Custody Act 1991".

7. The respondent moved the boys to Bunclody, Co. Wexford and D was born on 14th April, 2011. The respondent says that at that stage, when they moved in January, 2011, she intended to home school the boys until the end of the school year and enrol them in a new school in September, 2011. Although she says in her affidavit that she obtained advice from the school in relation to home-schooling the children, in her evidence to the Court, she said that no such advice was sought or given.

8. On 23rd September, 2011, a member of the community contacted the Department of Social Work in the HSE, South Eastern Area

to advise that the respondent, Mr. Sand the children were living in a caravan in a derelict farmyard near C. The Gardai at Bunclody were alerted to the information the HSE had obtained and, with the welfare of the children in mind, it was decided that a home visit would be undertaken. The respondent advised the visiting team that they had been residing in the caravan for three to four months and that she was unaware of the orders of the courts in the UK, believing that the matters had been resolved in 2008. The respondent advised that they were moving from the caravan to a house they had sourced to rent. In her evidence to the court, the respondent said that she had lied to the social workers who visited her, believing that they were going to take the children into care. The day after the home visit had been undertaken, the respondent contacted the Social Work Department to say that she was returning to the UK with the children.

9. Having considered the situation the respondent was in, with particular concern for the welfare of the children and having obtained information from Social Services in West Sussex that Mr S was known to them as a person who posed "a risk of potential harm to children" and having concerns that the respondent might leave the area, Emergency Care Orders were sought and granted in respect of the three children. The children were placed in foster care on 20th October, 2011. The Care Orders have been extended since that date and the children remain resident with their foster family in the Wexford area.

The applicant's efforts to locate the respondent and the children
10. On 21st September, 2009, an application was made to court under section 33 of the Family Law Act, 1986, by the applicant in the proceedings herein for a disclosure order to attempt to locate the whereabouts of the children. Various persons and institutions were ordered to disclose information but no light was shed on the location of the respondent and the children. The children's school disclosed that the children had been withdrawn.

11. In September 2009, the respondent's solicitors advised that she had gone away for a few weeks because her father had passed away but that she would attend court on 5th October. She was scheduled to attend court on 5th October, which hearing was adjourned for a week to allow her to appear. She failed to appear again on 12th October and the matter was transferred to the High Court. A further hearing was held in November 2009 and an application was made for the recovery of the abducted children in March 2010.

12. On 28th April, 2010, the High Court in England declared that there had been a wrongful removal or retention of the children within article 12 of the Brussels II *bis* Regulation.

13. A further order was made for disclosure by the High Court in England against Lloyds TSB on 28th April, 2010 on foot of which it was discovered that the Respondent had been drawing money from a cash machine in New Ross, Co. Wexford. The respondent's mother gave evidence to the court during which she suggested that the respondent was in Ireland. It appears that she, the children and Mr. S arrived in Ireland in January, 2010. It proved difficult to serve the respondent with the proceedings herein, which were originally returnable for 15th December, 2010. When she was served, on 19th January, 2011, for a return date on 26th January, the respondent failed to appear. A further order was made on 26th January that the respondent was to appear in the High Court on 2nd February, 201l.That order failed to be served despite the efforts of the solicitors involved. The respondent had left the address she was living at when she was served on 19th January. On 4th February, 2011, an application was made for a further disclosure order under s.36 of the Child Abduction and Enforcement of Custody Orders Act, 1991 directing the principles of seven national schools in the area the respondent and the children were thought to be living to furnish information to the High Court. The principal of one school told the High Court that the boys had been attending school from 20th January, 2010 until21st January, 2011 but were no longer attending.

14. On 4th May, 2011, having considered the inability of the respondent's solicitors to locate the respondent and the children, the court made an order striking out the proceedings with liberty to re-enter. The children were finally located in October, 2011 when they came into the care of the HSE and an application was made by the applicant to re-enter the proceedings and to have the HSE joined as a Notice Party. The proceedings were re-entered by Irvine J. on 17th November, 2011.

The assessment of the child psychologist
15. The first psychological report was done in relation to the boys on foot of an order of Ms. Justice Finlay Geoghegan on 22nd February, 2012 by Ms Anne O'Connell. Both boys presented as in the low average range of ability which Ms. O'Connell attributed to the unstable lives the boys had had. However, Ms. O'Connell stated that both boys had the intellectual ability to express an opinion and did so, telling her that they wished to stay with their mother, preferably in Ireland but not necessarily so.

16. After the re-entry of the proceedings, the respondent made an application for a further assessment of the children to take place, particularly with regard to the issue of settlement. Ms. O'Connell was specifically asked to discuss and explore the interaction the boys had with the local community, including their schooling and extra curricular activities as well as their feelings of stability and security they associated with living in Ireland and why. Ms. O'Connell was asked to direct these questions specifically to three periods of time in the boys' lives, first when they were living in New Ross in the period leading to December 2010, second, the time period to November 2011 shortly after they were placed in foster care and third, at the current time. She was further requested to discuss with the boys their wishes for the future care and living arrangements and whether they had any objections to returning to live in England, including the possibility that their mother and D would not return to England with them.

17. In her report, Ms. O'Connell says that the boys do have memories of violence in the house they lived in England, and when they came to Ireland and reported as being extremely fearful of their father coming back to take them back to England, to prison or to some other punitive place. They reported that this fear originated from their mother. As to their future living arrangements, Ms. O'Connell points out that because the boys are so young, they have a limited capacity to imagine alternative scenarios and living arrangements and can only offer suggestions as to their future based on situations they have experienced to date. Ms. O'Connell reports that the boys did not like their life in England, because it was characterised by violence and rows. Likewise, they do not have good memories of moving to Spain or of their time in New Ross. The message that comes clearly from Ms. O'Connell's report is that the boys would prefer to live with their mother. The boys are choosing the situation they know, that is being with their mother. Their father has, for many years, been a person they are afraid of, whom they thought was going to cause them harm or cause them to be imprisoned. Ms. O'Connell notes that the applicant is working hard to counteract the negative opinion the boys have of him, and that the boys seem to be responding well to these efforts.

The preliminary issue
18. The respondent made a preliminary application to the Court that the proceedings as re-entered by the applicant be struck out for want of jurisdiction and/or failing to disclose a reasonable cause of action. The respondent claims that because of the provisions of article 1O(b)(ii) of the Brussels II *bis* Regulation, the courts of England and Wales have lost jurisdiction in respect of matters pertaining to the welfare of the children by virtue of the withdrawal of the proceedings by the applicant in this jurisdiction on 4th May, 2011. As a consequence of this, the respondent claims, jurisdiction as to the welfare of the children transferred to the Irish

courts. Article 10 ensures that the courts of the country of the child's habitual residence remain seised of the matter of that child's welfare. The intention is that the alleged abductor does not gain a juridical advantage. There are two exceptions to this rule as provided for in Article 10. The first of these is where the habitual residence of the child has changed and there has been acquiescence to that change by any and all persons holding custody rights. The second exception is where the child's habitual residence changed and there is an additional meeting of four additional requirements set out in Article 10(b):

> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
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> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
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> (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
>
> (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

19. It is clear that in this case, none of the exceptions apply. It is accepted that the habitual residence of the children did not change. The four exceptions set out in Article 10(b) are also not applicable. The respondent discovered that the children were in Ireland in or about June 2010. He lodged his request for their return with the Central Authority in August 2010. The proceedings were instituted in December 2010. The proceedings were subsequently struck out with liberty to re-enter on 4th May, 2011 on the basis that the respondent could not be located and there was the possibility that the respondent or the children were no longer in the jurisdiction. The order striking out of the proceedings with liberty to re-enter in those circumstances could not be considered to be a withdrawal of the request to the Central Authority. That request was maintained by the applicant and he continued in his efforts to locate the children. Further, Finlay Geoghegan J., on 25th April, 2012, held, with regard to an application by the respondent to have the order re-entering the proceedings set aside that "the applicant is entitled to have the proceedings re-entered and the respondent is entitled to fully defend the proceedings. In the interests of the boys who are the subject matter of the proceedings, they must be now brought forward and heard and determined as soon as is consistent with fair procedures". Accordingly, the respondent must fail in respect of the preliminary issue.

The relevant law

20. Article 3 of the Hague Convention provides that:

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

21. Article 3 must be read in the context of Article 5 in relation to custody rights. Article 5 provides "rights of custody shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence". The respondent claims that the applicant was not exercising his custody rights at the time of the alleged wrongful removal or retention of the children, and that removal or retention could not, therefore, be considered to be wrongful under Article 3 of the Hague Convention. The applicant states that he was at all times, while the children resided with the respondent in the UK, after their separation, in contact with the children. He continued to have parental authority of them. His contact with the children was regulated by the Court to take place every two weeks. He states that, apart from two occasions when he did not take up the access because of a fear of Mr. S, the respondent's partner, he committed fully to the access visits.

22. After the children were removed to Spain by the respondent, Mr. M made several attempts to locate them, making applications for discovery orders under the UK Family Law Act to the High Court as detailed above. When they were located, and the Emergency Care Orders were sought, Mr. M was served with the proceedings in December, 2011. He travelled to Wexford and attended the hearing at Gorey District Court. An access schedule was set up and has been implemented and the applicant enjoys telephone access with the boys. In March, 2012, Mr. M travelled to Ireland again where he met the children in the presences of Ms. Nangle in Dun Laoghaire. It could not be said that Mr. M was not exercising his custody rights over the children at the time of their removal to Spain.

23. If the removal is to be considered to be wrongful and the proceedings were commenced within a year of the admitted wrongful retention then the court must, under Article 12 of the Convention, order that the child be returned to the country of habitual residence. This is so unless it is demonstrated that the child is now settled in the new environment. Article 13 contains the exceptions to the mandatory obligation to return the child provided for in Article 12. The respondent in this case submits that Article 13(b) is applicable; "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". The Court must now consider the relevance and the applicability of the defences of settlement and examine whether it is appropriate to exercise the discretion afforded to it in Article 13(b) to take the children's objections, insofar as they exist, into account.

Settlement

24. In *P.L. v. E.C. (Child Abduction)* [2009] 1 IR 15, the Supreme Court considered the issue of settlement, holding that it "must be assessed according to all the circumstances. It is ultimately a matter of appreciation of all the facts. The Court must make a careful and balanced judgment. There is a physical and an emotional element. Family, home and school come into it, as does the absence, to the extent that it is relevant, of contact with the applicant parent."

25. It is clear, in this case, that although the children have been living in Ireland for over two years, a large portion of that time was spent concealed from the authorities and the applicant by the respondent. In *Cannon v Cannon* [2005] 1 FLR 169, Thorpe LJ set out in his judgment, at para. 53, that

> "A broad and purposive construction of what amounts to 'settled in his new environment' will properly reflect the facts of each case, including the very important factor of concealment or subterfuge that has caused or contributed to the asserted delay. There are two factors that I wish to emphasise. One relates to the nature of the concealment. The other

relates to the impact of concealment on settlement".

He continued that "it will be very difficult indeed for a parent who has hidden a child away to demonstrate that it is settled in its new environment and thus overcome the real obligation to order a return". That statement was approved in the Supreme Court in *P.L. v. E.C. (Child Abduction*), Fennelly J. saying that the finding of the High Court that "there was an element of concealment or subterfuge on the part of the respondent in concealing her whereabouts", which could also be said in relation to the case before the Court, should be put in the balance when considering the issue of settlement.

The children's objections
26. It is clear from the report of Ms. O'Connell that the children would prefer to live with their mother in the long term. Ms. O'Connell states clearly, however, that the boys do not have an objection to returning to live in the UK. It is clear that the objections of the child are not decisive but are merely to be considered as part of the discretion afforded to the Court in Article 13(b).

27. In *Z.D. V K.D* [2008] 4 IR 751, McMenamin J. stated, in considering what weight ought to be attached to the child's views, that "the views of the child are not synonymous with an obligation to bow to the child's wishes". That view was restated by Birmingham J. in *A.U v. T.N U* [2011] IEHC 268, upheld by the Supreme Court [2011] IESC 39.

28. Denham C.J., speaking for the court in *A.U v. T.N U*, referred to the decision of Baroness Hale in *Re M (Abduction: Zimbabwe)* [2008] 1 AC 1288 at paragraph 46:

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

29. The test to be applied in this jurisdiction was set out by Finlay Geoghegan J. in *CA. v. CA.* (*otherwise C.Mc.C*) [2010] 2 I.R. 162 at para.25:

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

30. The boys are now aged 8 and 7, the same age as the children were in *A.U v. T.N.U.*, where their views were taken into consideration in the court's exercise of its discretion to refuse to return them to the country of their habitual residence. Birmingham J., in that case considered that the children were serious, intelligent and capable of forming their own views. The views they formed were, according to the assessor's report, clear and well considered. In her first report to the Court in this case, Ms. O'Connell states that both boys scored in the low average range of ability on standardised tests. This, she states, is unsurprising in view of the disruptive nature of their life to date. She continues in her assessment that, overall, the boys are immature. However, she offers the opinion that "they have the intellectual ability to express an opinion, and have done so, clearly stating that they wish to stay with their mother (preferably in Ireland but not necessarily so)".

31. It is clear from the reports that the children's overriding wish is to live with their mother. The respondent says that this should be taken into consideration by the Court and that the Court should exercise its discretion not to return the children to the jurisdiction of the courts of England and Wales. The respondent offers in support of this statement the judgment of Finlay Geoghegan J. in the recent case of *A.K. v A. J* [2012] IEHC 234, where she stated in relation to children who were aged 10 and 7 years old:

> "The boys, in interview, expressed an objection to returning to live in Poland in circumstances where their father and B. continue to live in Ireland. Dr. Byrne Lynch makes clear that the boys' objections to returning to Poland relate mainly to their wish to stay living with their father and B.. Dr. Byrne Lynch records that they indicated that they would be prepared to return to Poland if their father and B. were moving there, although they prefer living in Ireland."

32. While the children in that case were of a similar age to the boys here, their family situation was very different. They were living with their father, his partner and their half sister. Their father had set up and was running a small business in Ireland and was not in a position to move back to Poland. Further, in that case, the Polish courts had awarded parental authority to the father, in full knowledge that he was living in Ireland with the children. It is not the case that Sand Care living with their mother, even though steps are being taken to reunify them with their mother over a period of time. They are currently in foster care, and will remain in the care of the authorities here if an order of non-return is made, and will go into the care of the authorities in England if they are returned there. Further, in her evidence to the Court, the respondent said that, if the boys were returned to England, she would consider going back too, and bringing D, whose father lives in the UK, with her.

Grave risk
33. Finally, the respondent submits that to return the children to the jurisdiction of the courts of England and Wales would be to expose them to a grave risk of physical or psychological harm, and that this risk of exposure to grave risk is sufficient to trigger the exercise of the Court's discretion under Article 13 of the Hague Convention not to return the children. The boys are, of course, in the care of the HSE in Ireland. If an order to return the children was made, they would return to England in care where they would be

separated from their mother and from D. While it is the case that the courts have found that separating children is to be avoided, see, for example the judgment of O'Dalaigh CJ in *B. v. B.* [1975] IR 54 and, more recently, the judgment of Finlay Geoghegan J. in *F.N v CO*. [2004] 4 IR 311, where the strength of the sibling bond was referred to, in this case, the boys are already separated from D and will continue to be for a period of time if the Court decides that they should stay in Ireland.

34. In her judgment in *A.S. v. P.S.* [1998] 2 IR 244, Denham J discussed the issue of grave risk, stating that

> "The underlying philosophy of the Convention and the heavy burden required to be proved to meet art. 13(b) was set out in *Re HB* (*Abduction: Children's Objections*) [1997] 1 F.L.R. 392. Hale J. held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned."

35. The issue of what constitutes a grave risk has been dealt with by the High Court in two recent judgments. In *I.P v T.P* [2012] IEHC 31, Finlay Geoghegan J. considered the application of Article 13(b):

> "39. The proper approach of the Court to a potential defence under Article 13(b) is now well established. It has been repeated by the Supreme Court of the United Kingdom in *Re E*. (*Children*) *Abduction: Custody Appeal* [2011] UKSC 27, at paras. 29 to 38 in the judgment of the Court delivered jointly by Baroness Hale of Richmond and Lord Wilson JJSC. In that decision, the UK Supreme Court considered *inter alia* the application of the Hague Convention by national courts in the context of an article 13 defence subsequent to the judgment of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [GC] no.41615/07 ECHR [2010]- (6.7.10). That case concerned the interrelationship between Article 8 of the European Convention on Human Rights and orders for return under the Hague Convention.
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> 40. As stated in that judgment, the defence provided for in Article 13(b) of the Hague Convention is one which should be given a restricted application but that does not mean it should never be applied at all. The burden of proof normally lies with the person who opposes the child's return. The standard of proof is the ordinary balance of probabilities. It is for them to adduce the evidence to substantiate the exception."

Finlay Geoghegan J. continued at para. 44:

> "Intolerable' is as has been stated "a strong word" and when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate" in *Re D* [2007] 1 AC 619 at para 52. In In *re E* the Court, at para 34, having referred to this 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." I respectfully agree with this observation and would add in relation to the facts of this case that discomfort and distress may be almost inevitable for a child whose parents are in dispute."

36. In *G. v. R.* [2012] OEHC 16, Peart J stated:

> "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".

37. It is clear that the burden of proof in relation to grave risk lies with the respondent. It is difficult to imagine how it could be that returning the children to the care of the authorities in England would constitute a grave risk of physical or psychological harm. They will most likely be placed in foster care, until, if appropriate, the necessary assessments are carried out to allow the children live with a suitable member of their extended family, most probably Mr. M's sister. It is within the power of this Court to order that the children be returned to the jurisdiction of the courts of England and Wales and to then place a stay on the order until the appropriate arrangements have been put in place in England to receive the children. That is what was done by Sheehan J. in *S.R. v. S.R.* [2008] IEHC 162, where he took the views of a 10 year old girl into account in exercising his discretion but ordered her return to Latvia, considering the over-riding policy of the Convention that children should be returned and quoting the judgment of Baroness Hale in In *re M and another* (*Children*) (*Abduction: Rights of Custody*) [2007] 3 WLR975:

> "In Convention cases, however, there are general policy considerations which may be weighed against the interests of the child in the individual case. These policy considerations include, not only the swift return of abducted children, but also comity between the contracting states and respect for one another's judicial processes. Furthermore, the Convention is there, not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting states."

Decision

Settlement

38. I now want to consider the question of settlement having regard to the facts of this case. The children as previously noted arrived in Ireland in January 2010. They resided in New Ross initially and the boys attended school there. Reference was made in the affidavit of Linda Nangle to the fact that they left school quite abruptly following a phone call from the High Court Office (Principal Registrar) seeking information on the children's' whereabouts. The children did not turn up for school on the 20th January, 2011. The respondent confirmed on affidavit and in evidence that she left New Ross following the service of these High Court proceedings on her on the 19th January, 2011. Thereafter, the children were moved to the Bunclody area and lived in a caravan, did not attend school and were living in circumstances which prompted a member of the community to contact the Department of Social Work in the HSE, South Eastern Area, leading ultimately to the children being taken into care.

39. There can be no doubt that this sequence of events can only be described as "concealment or subterfuge". Whether one calls it panic as stated by the respondent or not, the fact remains that the children were removed from school and moved from the accommodation in which they lived to a caravan in a derelict farmyard. Since the children were taken into care, they have had the benefit of attending school, they reside in a suitable foster home and they engage well in all the normal activities of young school

going boys. The current stability obtained as a result of the care orders having been put in place does not, in my view, come within the meaning of "settled in a new environment". Unfortunately as a result of the actions of the respondent, the boys' lives have been anything but settled for a considerable period of time. Initially, they were removed from England to Spain and from Spain to Ireland and when located in Ireland, they were relocated once again. Accordingly, in considering this issue, I have come to the conclusion that the children could not be said to be settled in a new environment by reason of the degree of concealment or subterfuge on the part of the respondent in concealing her whereabouts and that of the boys.

The children's objections.
40. The principles applicable to this issue have been set out above. I do not need to repeat them here. The children have been described Ms. O'Connell as being overall immature. But she went on to say "that they have the intellectual ability to express an opinion, and have done so ...". As set out above previously, the boys overriding wish appears to be a desire to live with their mother wherever she may be. Both parties have family in the United Kingdom. The respondent has no ties in this jurisdiction and while she has stated her wish to remain, she has also indicated that in the event of an order being made returning the boys to England, she would consider returning as well. There is also the position of D to be considered. Obviously it would be desirable that the two boys, the subject of these proceedings would continue to have contact with their half brother.

41. Undoubtedly the main desire of the boys is to remain with their mother despite the fact that they are not currently residing with her by virtue of the care orders. The boys are of an age and maturity where their views can be considered but I am far from certain that they have a real objection to a return to England. The most recent report of Ms. O'Connell of the 15th June, 2012, noted as follows:-

> "They have no specific objections to moving to England but see their mother as being a part of their home, wherever that is.
>
> ***Grounds of such objection***
>
> The boys have only recently begun to experience a normal organised and community focused home, where they attend school regularly and are involved in many activities with friends. They want to see both parents but s they have more experience of their mother and they know D, it is she who they currently choose to live with (in the absence of experience of their father in recent times). They are choosing the situation they know rather than one they do not and are not capable of factoring in the adult concerns of moving country, parenting capacity assessments, and the like. Their father appears to be working hard to counteract the negative image of him which the boys have carried for a few years, and his sons are responding well to this."

42. In considering the evidence on this issue I note that whilst the boys in this case have expressed their views, Ms. O'Connell, as noted previously, in her assessment stated that "overall, the boys are immature". Nonetheless, the boys expressed a view which clearly indicates their desire remain with their mother. I am satisfied, albeit with some reservations, that I should consider the boys' objections, as described, but, of course, the view as to their level of maturity is something to be weighed in the balance in considering the weight to be attached to the children's objections. It is also necessary to bear in mind the degree of strength of their objections. It is thus for the court to consider whether or not it should exercise discretion in favour of retention or return having regard to the test described above. As I have already mentioned the respondent has indicated that if the boys were returned to England she would consider going back there with D. I am mindful of the policy considerations applicable under the Convention. This is not a case where it could be said that the respondent cannot move back to England for economic or for any other reason. Given the facts of this case, I can see no practical basis upon which it would be appropriate to exercise the discretion of the court in favour of retention. Accordingly, I cannot refuse to order the return of the children on the basis of their objections.

Grave risk
43. I have also set out above the arguments on behalf of the respondent to the effect that returning the children to the jurisdiction of the Courts of England and Wales would expose them to a grave risk of physical or psychological harm. There is no dispute between the parties that it is most likely that on a return to England the children would be placed in foster care until the necessary assessments are carried out to allow the children live with a suitable member of their extended family. That is not something which could be said to be calculated to expose the children to a grave risk of physical or psychological harm as that phrase has been understood in the case law set out above. The suggestion that the return in care of the children to England amounts to grave risk seems to me to call into question the integrity of the social care services in that jurisdiction. There is no evidence before the court to support any such suggestion. I have referred above to the judgment of Finlay Geoghegan J. in the case of *I.P v. T.P* and it would be helpful to repeat what was said in her judgment. She referred at para. 44 of her judgment to a passage from the decision in In *Re. E.* in respect of the definition of "intolerable situation" where it was stated:-

> "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."

44. A return of the children to care in England could hardly be said to amount to "physical or psychological abuse or neglect of the child". No doubt a return to England in care will involve a degree of discomfort and distress for the children. It seems to me that that is an inevitable consequence of the circumstances in which they now find themselves particularly having regard to the fact that they are currently in care. They may suffer some distress as a consequence of being separated from their mother and D but it must be remembered that is the position in which they find themselves at present.

45. It is my view that the respondent has failed to establish the burden of proof which rests on her in regard to the issue of grave risk. Accordingly, I am satisfied that it is appropriate to return the children to the jurisdiction of the Courts of England and Wales as I do not accept that there is any grave risk of physical or psychological harm to them in so doing.

46. Given that I am of the view that an order should be made returning the children to the jurisdiction of the Courts of England and Wales having regard to the overriding policy of the Convention, it seems to me that in doing so the court should have regard to the fact that appropriate arrangements require to be made before that can be done such as the carrying out of assessment with a view to foster care. To that extent, I propose to make the order for the return of the children but place a stay on that order until those arrangements have been made. I will hear the parties further on this aspect of the matter.