

APPROVED

THE HIGH COURT

2019 No. 16 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

IN THE MATTER OF I.C. (A MINOR)

BETWEEN

Z.C.

APPLICANT

AND

A.G.

RESPONDENT

JUDGMENT of Mr Justice Garrett Simons delivered electronically on 14 May 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for the return of a child to his place of habitual residence, Poland. The application is made pursuant to the Child Abduction and Enforcement of Custody Orders Act 1991 (as amended). The Act provides that the Convention on the Civil Aspects of International Child Abduction 1980 (*“the Hague Convention”*) shall have the force of law in the State, and that judicial notice shall be taken of it.

NO REDACTION REQUIRED

2. To protect the child’s identity, I will refer to him throughout this judgment as “Jan”, rather than by his real name. The parties to the proceedings are Jan’s father and mother. The application has been brought by the father alleging that the mother wrongfully removed Jan from Poland in December 2018.
3. The mother has not formally conceded that the removal of Jan represented a “wrongful removal” within the meaning of the Hague Convention. Indeed, at one stage of the proceedings, the mother asserted—mistakenly as it transpired—that she had the right under an order of a Polish Court to determine unilaterally the child’s place of residence.
4. However, it is fair to say that the thrust of the submissions of the parties were directed not to this threshold issue, but rather to the posterior question of whether any of the so-called “defences” to an application for the return of the child under Article 13 of the Hague Convention has been made out by the mother. This judgment proceeds therefore on the basis that the removal of the child to Ireland was a “wrongful removal” and that the criteria under Article 12 have been fulfilled. The court relies in particular on the affidavit of laws of 25 November 2019 (discussed at paragraph 13 below).
5. The three principal issues to be resolved by the High Court in this judgment are as follows. First, would the return of the child expose him to physical or psychological harm or otherwise place him in an intolerable situation (the “*grave risk*” defence). Secondly, would the return be contrary to the “best interests” of the child. Thirdly, it is necessary to consider whether the child “objects” to being returned, and, if so, to apply the three stage test established in the case law.
6. I will address each of these issues in sequence below. Before turning to that task, however, it is necessary first to set out the relevant procedural history.

PROCEDURAL HISTORY

7. These proceedings concern the legality of the removal of a young boy (“*Jan*”) from Poland. Jan is currently seven and a half years of age. Jan’s mother brought him to Ireland on 8 December 2018, and the child has been residing here since that date. The mother had initially argued that the removal was lawful in circumstances where she asserted that she has the right to determine the child’s residence as a result of certain orders made by the Polish Courts on 5 November 2018. This interpretation of the court orders is disputed by the child’s father.
8. The father made a written request to the Central Authority of Poland that the child be returned to his place of habitual residence, Poland. This request was conveyed to the Central Authority of Ireland by the Central Authority of Poland on 29 May 2019.
9. The application had been listed before the High Court on a number of occasions in June and July 2019.
10. The High Court (Ní Raifeartaigh J.) made an order dated 1 July 2019 directing that the child be interviewed by a clinical psychologist, and a report to the court on the interview be prepared for the purposes of ensuring that the child is given the opportunity to express their views and be heard in the proceedings. The form of the order follows the standard order which is now common in these cases.
11. A report dated 22 July 2019 was submitted to the court. The report’s conclusions are stated as follows.
 10. Conclusion:
 - 10.1 [The child] has settled in the short time that he is in Ireland but stated that he would like to talk to his father. From his account, there is a possibility that his mother has not encouraged contact with his father. Outside of the difficulties in respect of his father’s use of alcohol no other reason was voiced as to how his parents separated. No reason was offered as to why he was living in Ireland, other than mentioning that the amount of pollution from factories in Poland. [The child], while having a level of understanding appropriate to a six and half

year old, would not be mature enough to understand the nuances of his parent's relationship difficulties. It is a distinct possibility that his understanding of the family narrative is influenced to an extent by those adults with whom he is in regular contact.

10.2 Any negative experiences in his parents relationship, which he may have witnessed is likely to have had an impact on his thinking. He has voiced a wish to speak with his father and this should happen as soon as practicable. It is also important for his self-identity that his biological father continues to play a role in his life regardless of how small that may be. Any narrative from his mother or other important adults in his life should not undermine the role of his father however marginalised he has become in their thinking.”

12. The progress of the proceedings was delayed pending the determination of an application for legal aid on the part of the mother. The legal aid certificate issued towards the end of July 2019, and the case was listed for hearing on 26 September 2019. In the event, however, the matter could not be heard on that date, and it was instead listed for hearing on 18 October 2019. On that occasion, counsel for the mother applied for an adjournment in circumstances where the mother asserted that she had obtained a legal opinion from a Polish lawyer which indicated that she had the right to determine the residence of the child. It was also suggested that the father may have implicitly consented to the removal of the child to Ireland, or, at least, to the mother having the right to determine residence. The legal opinion was in the Polish language, and a translation was not available as of 18 October 2019. The adjournment application was resisted by counsel on behalf of the father.
13. In the event, I decided to adjourn the proceedings in circumstances where, if the legal position had been as suggested by the mother, then this would be largely determinative of the question of whether there had been a wrongful removal. The parties undertook to obtain an independent legal opinion from an agreed expert. It took some time for the parties to obtain the independent legal opinion. An affidavit of laws has since been filed on 25 November 2019. The independent legal opinion indicates that the legal position is

not as had been suggested on behalf of the mother. See, in particular, paragraphs 9 to 11 of the affidavit of Malgorzata Kieltyka, as follows.

- “9. The enforceable court order of 5 November 2018 that confirmed the settlement included in the court minutes (amicable final settlement) should be understood by implication that the parties to the proceedings had the intention of determining the place of residence of the child to be in Poland, and according to more restrictive views, even in the town where the mother resided at the moment of issuing the ruling. This is the predominant view of the judicature in Poland. Therefore, without the consent of the father or the relevant Polish court order in this respect, the mother was not allowed to take the child to live outside Poland.
 10. It follows from the Court Order and from the Court Minutes that the parties regulated only the issue where the child should live (namely that the child should live with his mother), so the Polish Court did not decide at all about the issues of restricting the parental authority of the father (or depriving the father of his parental authority). This means that the father co-decides together with the child’s mother, according to general rules, whether the child can leave Poland and go abroad (permanently or even temporarily only).
 11. In such cases the parent with whom the child lives, when the remaining parent disagrees to the child leaving Poland to another country, should apply to the Polish Family Court to obtain such consent. Such court ruling supersedes the decision (consent) of the other parent.”
14. A new hearing date for the proceedings was fixed for 13 December 2019. The hearing commenced on that date, and the proceedings had been part heard, when the parties indicated to me that terms of settlement had been agreed. The terms of settlement were handed into court, and the mother gave certain undertakings on oath to the court. The intention had been that the mother would return the child to Poland not later than 15 January 2020. In the event, this did not occur. The explanation offered by the mother for her non-compliance with her undertaking is that she had recently discovered that she is pregnant, and has been advised not to travel for medical reasons. It seems that the mother has had a history of miscarriages.

15. In light of the non-implementation of the terms of settlement, the father had taken the pragmatic approach that the hearing should be resumed, and a determination—one way or another—made by the court on the merits of the case. This approach has made it unnecessary—for the moment at least—to address the consequences of any non-compliance with the sworn undertakings given to the court on 13 December 2019.
16. The hearing resumed on 24 January 2020. Counsel on behalf of the mother applied at the outset of the hearing to have a psychological report in respect of the child admitted into evidence. I refused this application in circumstances where, first, the report had not been exhibited on affidavit; secondly, the qualifications of the author of the report had not been stated; and, thirdly, the report seemingly dealt with matters far beyond the question of the child’s views in relation to any proposed return to Poland, and, instead, addressed wider family issues. (It should be explained that I did not view the report even on a *de bene esse* basis, and that the shortcomings described above were ones identified to me by counsel for both sides).
17. I next invited submissions from the parties as to whether, given the lapse of time since the court ordered report had been prepared in July 2019, it would be appropriate that a further report should now be sought. These submissions are summarised in a written judgment which I delivered on 30 January 2020, *Z.C. v. A.G.* [2020] IEHC 30. For the reasons set out in that judgment, I directed that a further report be prepared.
18. The nominated clinical psychologist, Mr Stephen Kealy, subsequently held a consultation with Jan, and prepared a report dated 29 February 2020.
19. The report makes the following observations in respect of the potential return of Jan to Poland.

“The Return to Poland:

For [Jan] to return to Poland at this time where his father resides could be emotionally challenging and likely to harm his overall well-being. His father

appears to have little current working knowledge of his son, no relationship and no experience, from the information available, of minding his son for nearly two years. For [Jan] to return to Poland solely in his father's care could have serious emotional consequences for him.

A *considerable* amount of work needs to be undertaken to restore a relationship which will require some physical presence, which is difficult for [Jan's] father living in Poland. A return to Poland of itself does not mean that a relationship will take place unless as parents both can put in place the necessary building blocks. If the family returned to Poland, then any access will require careful preparation.

I am very conscious that [Jan's] narrative is informed by what his mother has told him. I cannot comment on the content of the narrative other than [Jan] cited his mother as his informant. It appears his mother has discussed the Court proceedings. However, [Jan] is an articulate child for his age and development. As a 7 year old his emotional reasoning is insufficient to balance his emotional responses in navigating his present situation.

His mother appears to be currently providing [Jan] with:

- Routine
- Consistency
- Predictability
- Stability

She is also likely to provide the same in Poland. However, a return to Poland will mean a significant upheaval for [the mother], her husband and baby when born. The return could engender a level of hostility because of the move, which could adversely affect a working relationship in establishing access routine. It is not unreasonable to suggest those stressors would also have an impact for [Jan].

[Jan] is open to meeting with his father with the Zoo as a suitable venue or another location.

I am very conscious of the dangers of inadequate preparation for access, be it physical or by phone/face time/Skype. If the access is too long, given the lack of recent contact, this could be particularly challenging for [Jan] and his father.

[Jan] has heard a narrative from his mother about his father. His mother appears to have engaged him in adult conversation about the Court Hearings. My impression is he has not heard a counter-narrative about his father or anybody associated with his father. If his father is to engage him, he will have to link with [Jan's] interests about which he can only be made aware of by [the mother].

I am unclear from the supplied documentation as to whether [the father] has received simple factual information about his son's interests, school performance, recreational and sporting pursuits, if any.

In the supplied documentation, [the mother] decided as to what she thought was in [Jan's] best interest without any reference to his father regardless of how tenuous their relationship was."

20. The report goes on to indicate that Jan is very attached to his mother, who is his primary attachment figure, and to her husband to whom he appears also to be attached as a secondary attachment figure. Jan is reported as having expressed no view in regard to his returning to live in the jurisdiction of Poland or as to how and when such return would take place.
21. The current position in respect of the mother's medical condition is that her gynaecologist/obstetrician has advised against travel. A letter has been provided to the High Court in this regard.
22. It had been intended that the hearing before the High Court would resume in early March 2020. This intention was, however, overtaken by events in that the public health measures implemented in response to the coronavirus pandemic resulted in the postponement of most court hearings.
23. The parties instead exchanged further written legal submissions, and both agreed that the High Court could determine the application on the basis of the hearings to date and those written submissions. The final submission was received on 28 April 2020.

ARTICLE 13 OF THE HAGUE CONVENTION

24. It may assist the reader in an understanding of the discussion that follows were I to set out the text of Article 13 of the Hague Convention now.
 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

DETAILED DISCUSSION

(1). GRAVE RISK OF PHYSICAL OR PSYCHOLOGICAL HARM

25. The provisions of Article 13 of the Hague Convention have been set out above. The following formulation of the threshold for the “grave risk” defence has been approved by Barron J. in the Supreme Court in *K (R) v. K (J) (Child Abduction: Acquiescence)* [2000] 2 I.R. 416.

“Although it is not necessary to resolve the present appeal, we believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to a zone of war, famine or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the Court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”

26. (The formulation is that of the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996)).

27. As appears from this formulation, one of the factors to be considered is whether the return would involve a child being returned to a zone of disease.
28. The approach to be taken by a court where the objecting party seeks to rely on an alleged grave risk of physical or psychological harm has been explained as follows by the Court of Appeal in *R. v. R* [2015] IECA 265, [40].
- “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.”
29. For the reasons which follow, I have concluded that an order directing the return of Jan to Poland would give rise to a “grave risk” that he would be exposed to physical and psychological harm. First, to require the child to engage in international travel during the coronavirus pandemic would expose him to a grave risk of contracting the disease. The Irish Government has advised against all unnecessary travel at this time. Indeed, there is no evidence before the court that it would be even possible to travel to Poland at this time. There is no evidence, for example, as to whether there are currently any commercial flights operating between Ireland and Poland. There is no evidence as to the immigration or quarantine controls, if any, being imposed on passengers travelling from Ireland to Poland.
30. Secondly, an order of return would place Jan’s mother in the invidious position of having to choose between (i) accompanying him to Poland (thereby creating a risk to her own health), or (ii) having him travel to Poland without her (thereby depriving Jan of his

primary carer at a time of significant change in his life). Whereas this is a choice which the mother must make herself, neither outcome is acceptable from Jan's perspective. The strength of Jan's relationship with his mother has been explained in the second report of the independent clinical psychologist. It is worth recalling the following finding (see paragraph 18 above).

“For [Jan] to return to Poland at this time where his father resides could be emotionally challenging and likely to harm his overall well-being. His father appears to have little current working knowledge of his son, no relationship and no experience, from the information available, of minding his son for nearly two years. For [Jan] to return to Poland solely in his father's care could have serious emotional consequences for him.”

31. It would present a grave risk of psychological harm to Jan, and would thereby place him in an “intolerable situation”, were the High Court to make an order directing his return to Poland in such circumstances. Jan would be confronted with a scenario whereby he would be uprooted from what has been his home for eighteen months. Jan would then either (i) have to be placed in the care of a father with whom he has no meaningful relationship and against whom his mother has made serious allegations, or (ii) have to travel with his mother in circumstances where her health would be put at risk.
32. Counsel for the father has cited case law which cautions against allowing the making of a threat, by an abducting parent, not to accompany the child on their return to their place of habitual residence, to be deployed as a weapon. More specifically, counsel cites the very recent judgment of the Court of Appeal in *C.M.W. v. S.J.F.* [2019] IECA 227. Whelan J., speaking for the court, put the matter as follows.

“61. Assuming that the appellant makes good on her threat not to return with the minors to Canada this will inevitably cause some distress and disruption to them. *It must be borne in mind that such a decision on the part of an abducting parent represents a very powerful weapon which can be deployed to overcome the summary return mechanism of the Hague Convention.** Nevertheless, the minors have since birth resided in the home with the respondent as well as the appellant. He is their father and is well known to them. The Courts of British

Columbia are actively seized of proceedings pertaining to their welfare. There was no evidence before the High Court of any risk of psychological harm befalling the minors in the event that they returned to the care of the respondent if the appellant elects to remain in this jurisdiction. It is appropriate to have due regard to the practical consequences and effect of a return order being made in circumstances where the appellant decides not to return with the minors, particularly minors of tender years as in the instant case.

62. Such a state of affairs will be more stressful for both minors than were she to return with them. The question arises, is it desirable for a mother to create a psychological risk and then seek to rely upon it for the purposes of Art. 13(b) of the Convention where no other ground of defence has been established which would warrant refusal of the summary return of abducted minors to the state of their habitual residence? These are very young children. Having reviewed all the papers once more in light of the stated intention of the appellant not to return, I am satisfied in the circumstances that assuming the appellant holds steadfast to her position as adopted for the first time in the course of the appeal that she does not intend returning to Canada in the event that an order for the summary return of the minors is made, nevertheless the practical consequences of such a course of action do not give rise to a grave risk that the minors will be exposed to psychological or physical harm or otherwise be placed in an intolerable situation such as would warrant this Court exercising its discretion pursuant to Article 13(b) in lieu of the High Court to refuse to direct the return of the minors. All aspects of the minors' welfare can be dealt with very expeditiously before the Courts of British Columbia in Canada in early course."

*Emphasis (italics) added.

33. The facts of the present case are distinguishable from those under consideration by the Court of Appeal. First, there can be no suggestion that the mother's reluctance to accompany Jan in the event of his return being ordered is tactical, i.e. in the sense of being designed to frustrate the making of an order. Rather, the concerns in respect of travel are well founded given the mother's history of miscarriages in previous pregnancies and the threat posed by the coronavirus pandemic. Secondly, the strength of the relationship between Jan and his mother and father, respectively, is very different from that of the children in the case before the Court of Appeal. As appears from the passages cited above, the children in that case had resided with their father and he was

well known to them. This is in marked contrast to the relationship between Jan and his father which is almost non-existent.

34. In truth, the facts of the present case more closely resemble those considered by the High Court (White J.) in *M.L. v. J.C.* [2013] IEHC 641. On the facts of that case, the High Court refused to make an order for the return of the children by reason of the fact that the mother's mental health might break down were she to accompany them to their state of habitual residence, the United States of America.

“68. The respondent has been the primary carer of the children. If her mental health were to break down on a return to the USA that would be an intolerable situation for the children. There is no guarantee that her mental health will remain stable in Ireland but the present position is positive, and the Irish doctor is of the opinion that it will remain so in her present environment. It is very difficult to predict the degree of risk if the Court ordered a return, but the Court would certainly regard it as grave based on her mental health history. There is no doubt that a refusal to make an order for return is an injustice to the applicant, and will mean a much more restricted relationship with his children. The Court is faced with a finely balanced decision which it makes by refusing an order of return.”

35. Thirdly, some weight must be given to the fact that Jan has been living in Ireland for eighteen months now. This is a significant period of time in the life of a young child.
36. Counsel on behalf of the father submits, first, that the return of a child cannot be refused on the basis of the child being “settled” in circumstances where the proceedings for the return of the child commenced within a period of one year from the date of the wrongful removal (Article 12 of the Hague Convention); and, secondly, that much of the delay in the proceedings is attributable to the mother.
37. The first submission is correct insofar as it goes. Nevertheless, the fact that a child has, as on the facts of the present case, been resident within the jurisdiction for eighteen months is nevertheless potentially relevant to the court's assessment of whether there is a “grave risk” of psychological harm.

38. The second submission tends to overstate the culpability of the mother for the delay in the progress of these proceedings. Most of the delay is attributable to external factors, such as the delay in obtaining legal aid; the time taken to obtain an updated report from the clinical psychologist; and the logistical difficulties presented by the coronavirus pandemic. The only period of delay which might squarely be laid at the door of the mother is that between mid-October and mid-December 2019. It will be recalled that the case had been listed for full hearing on 18 October 2019, but had been adjourned at the request of the mother to seek clarification as to the effect of the order of the Polish Court. This request was not unreasonable given the importance of establishing the precise custody rights of the mother and father, respectively. The two-month delay also has to be seen in the overall context of Jan having been resident in Ireland for eighteen months now.
39. Counsel for the father also submitted that even if the “grave risk” defence had been made out—and his client says it has not—the court would still have to consider the policies underlying the Hague Convention before exercising any *discretion* not to return the child. In particular, the objective of deterring child abduction would have to be considered. It is submitted that the requirement to have regard to the policies of the Hague Convention when exercising discretion under Article 13(b) is not exclusive to cases where the court is considering a child’s objections. Rather, the obligation is also said to arise in respect of the “grave risk” defence (citing the judgment of the Court of Appeal in *C.M.W. v. S.J.F.* [2019] IECA 227, [65]).
40. These submissions appear to me to overstate the extent of the court’s discretion, if any, in cases where a grave risk of physical and/or psychological harm has been made out. It is difficult to envisage that a court, having found that there is a grave risk, would nevertheless order the return of the child. (*See Re D (A Child) (Abduction: Rights of*

Custody) [2007] 1 A.C. 619, [55] where it was suggested that it was “inconceivable that a court which reached the conclusion that there is a grave risk that the child’s return would ... place him in an intolerable situation would nevertheless return him to face that fate”. The general policy of the Hague Convention is that a child should not be returned in such circumstances.

41. Lest I am incorrect in my understanding of the nature of the court’s discretion, however, I propose to consider whether the refusal to make an order for return would have the effect of undermining the general policy objectives of the Hague Convention, including in particular the objective of deterring child abduction.
42. The Supreme Court has recently summarised the obligations of a court in exercising its *discretion* to refuse a return under Article 13 of the Hague Convention in *M.S. v. A.R.* [2019] IESC 10. The principles are set out at paragraphs [58] to [64] of the judgment, and the conclusion is then stated as follows.
 - “65. Overall, a court, in exercising its discretion where child’s objections are made out under Article 13 of the Convention, must be careful to weigh in the balance the general policy considerations of the Convention which favour return and the individual circumstances of the child who objects to return, in order to determine what is, in the limited sense used, in the best interests of that child at that moment. The weight to be given to the general policies of the Convention which favour return and to the objections to return which were made and to other relevant circumstances of the child may vary with time. As has been said, the further one is from a prompt return, the less weighty the general Convention policies will be. In exercising its discretion, a court must take care that it has regard to the fact that the jurisdiction to refuse return is an exception to the general policy and provisions of the Convention. The discretion must be exercised with care, and in the best interests of the child, but not so as to undermine the general policy objectives of the Convention, including deterrence of abduction.
 66. In applications to which the Regulation applies, regard should be had to Articles 11(6) - (8) and the practical consequences of a refusal to return for the resolution of continuing custody disputes.”

43. It should be reiterated that these comments were made in the context of a defence based on the objections of a child, and may not necessarily apply to the “grave risk” defence under Article 13. At all events, I am satisfied that the refusal of a return on the facts of the present case will not undermine the general policy of the Hague Convention. The facts of the present case are very unusual, involving a coincidence of circumstances, i.e. the delay in obtaining legal aid; the need for an updated psychological report; the mother’s pregnancy and previous history of miscarriages; and the coronavirus pandemic. The case does not stand as a precedent which might encourage other parents to engage in the wrongful removal of children. Moreover, the decision on whether to order a return must ultimately be made in the best interests of the child, and not to “punish” or “sanction” the party responsible for the wrongful removal. A return in the circumstances outlined above presents a grave risk of physical and psychological harm to Jan.
44. In summary, therefore, I have concluded that a defence has been made out under Article 13(b) of the Hague Convention, and that the court should exercise its discretion to refuse to direct Jan’s return.

(2). BEST INTERESTS OF THE CHILD

45. For the reasons set out under the previous heading, I have concluded that a defence has been made out under Article 13(b) of the Hague Convention. This is so even allowing for the high bar applicable to such defences. For the sake of completeness, however, it is necessary to address an alternative argument advanced on behalf of the mother.
46. Counsel on behalf of the mother submits that the court must have regard to the “best interests” of the child. The implication being that this consideration might, in some instances, justify a decision to refuse to return a child in circumstances which might not strictly speaking fall within Article 13 if that provision were to be considered in isolation.

47. Counsel cites a line of authority from the European Court of Human Rights to the effect that a child's return cannot be ordered "automatically or mechanically" where the Hague Convention is applicable. The obligation of a national court has been described as follows in *X. v. Lativa* (2013) 59 EHRR 100.

"[106] The court considers that a harmonious interpretation of the European Convention and the Hague Convention (see para [94] above) can be achieved provided that the following two conditions are observed. First, the factors capable of constituting an exception to the child's immediate return in application of Arts 12, 13 and 20 of the said Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Art 8 of the European Convention (see *Neulinger and Shuruk v Switzerland*, at para 133).

[107] In consequence, the court considers that Art 8 of the European Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a 'grave risk' for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Arts 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Art 8 of the European Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see *Maumousseau and Washington v France* (Application No 39388/05) (2010) 51 EHRR 35, [2007] ECHR 1204, at para 73), is necessary. This will also enable the court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it."

48. These principles have, it is said, been applied recently in this jurisdiction. The judgment in *V.R v. C.O'N.* [2018] IEHC 316 is cited in this regard.

"28. Having regard to the above authorities setting out the general principles, it is clear that in a case where the article 13(b) defence is raised, the various policies underlying article 13(b) of the Hague

Convention may be to a degree in conflict with each other. The threshold for establishing a grave risk of an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child. The decision as to the appropriate balance between the various interests and policies is a nuanced and delicate one which will depend upon the particular facts of each case.”

49. This passage has been cited with approval by the Court of Appeal in *V.R v. C.O’N* [2018] IECA 220, [13], and by the High Court (Donnelly J.) in *A.A. v. R.R.* [2019] IEHC 442.
50. For the reasons set out under the previous heading, I am satisfied that a defence has been made out under Article 13(b). It is not necessary, therefore, in the particular circumstances of the present case to have recourse to the overarching requirement to have regard to the “best interests” of the child. Rather, the refusal to order Jan’s return by reference to the “grave risk” defence operates to secure the child’s “best interests”.

(3). WHETHER THE CHILD “OBJECTS” TO BEING RETURNED

51. Article 13 of the Hague Convention provides that a court may refuse to order the return of the child if it finds that the child “objects” to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of its views. It should be noted that the Article 13 defence based on the child’s objections, and the “grave risk” defence are separate defences, which must be considered separately. See *M.S. v. A.R.* [2019] IESC 10, [72].
52. In the present case, it is also necessary to comply with Council Regulation (EC) No 2201/2003 (“*the Brussels II Regulation*”). (This is because the case involves an alleged wrongful removal from an EU Member State). Article 11(2) provides as follows.

“2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.”

53. A court is required to apply a three-step test in this regard: see *M.S. v. A.R.* [2019] IESC 10.

“61. The court should then consider the issue of child’s objections in accordance with the three stage approach identified by Potter P. in the English Court of Appeal in *Re M. (Abduction: Child’s Objections)*. The first question, as to whether or not objections to return are made out, is a question of fact to be determined by a trial judge on all the evidence adduced. The objection to return must, in general, be to the State of habitual residence and not to living with a particular parent. However, in a limited number of factual situations the two questions may be so inexorably linked as to be incapable of separation. The second question, as to whether the age and maturity of the child are such that it is appropriate for a court to take account of his views, is also a question of fact to be determined by the trial judge. The trial judge should make clear findings of fact in relation to the first two questions and, where feasible, also make findings as to the reasons for and bases for the child’s objections.”

54. The nature of the “objection” required, and the distinction between an “objection” and a mere “preference”, have been stated as follows by the High Court ((Ní Raifeartaigh J.) in *Z.R. v. D.H.* [2019] IEHC 775, [17].

“17. Does what the boy stated about his wishes amount to a ‘preference’ or an ‘objection’? Sometimes the difference between the two can be a fine one, but fundamentally it should not be an exercise in semantics; it seems to me that the difference between a preference and an objection is not so much about the type of words the child uses to the assessor but rather about the strength of the child’s views. At one end of the spectrum, a child might have a fairly mild view that he or she does not wish to return, which would amount only to a preference, while at the other end of the spectrum, the child might have a very strong view that he or she does not wish to return, which could properly be described as an objection. The Court’s focus should be on ascertaining the true will and desire of the child (and the strength or firmness of that desire) and should not become unduly fixated on the actual words used, because this could become an exercise in semantics which might focus too much on the words the child used. A child does not speak with the Hague Convention terminology in mind but rather is using language appropriate to his age, intellectual ability, articulacy and so on.”

55. The procedure established by the High Court for ascertaining the views of a child is to make an order directing that a child be interviewed by an independent expert and for that expert to prepare a report on the interview for the court. The matters which are to be

addressed in this interview and report are set out in standard form in the order. This order is accompanied by an “information note” which sets out general information for the assistance of an interviewer who may not be familiar with applications made to the High Court under the Hague Convention.

56. As noted earlier, an order in this form was made on 1 July 2019 by the High Court (Ní Raifeartaigh J.), and Jan was first interviewed on 18 July 2019. I made an order on 30 January 2020 directing that a further report be prepared to set out the up-to-date position.
57. The report of the clinical psychologist indicates that Jan expressed no view on returning to live in the jurisdiction of Poland. It seems, therefore, that the first of the three-steps has not been met: Jan has not expressed an objection. Accordingly, no weight is attached to this consideration in the determination of whether or not to order the return of the child.

CONCLUSION AND FORM OF ORDER

58. The application for the return of the child is dismissed for the reasons set out herein.
59. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

“The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.”

60. In circumstances where both parties have availed of legal aid, it does not seem that it would be appropriate or necessary to make any costs order. In the event, however, that either party wishes to make submissions as to why the court should make a costs order against the other party, short written submissions should be filed in the Central Office within fourteen days of today's date, and a copy of same emailed to the Registrar assigned to this case.

Appearances

Alan D.P. Brady for the applicant father instructed by Grainne Brophy of the Law Centre (Smithfield)
Alex Finn for the respondent mother instructed by David MacMunn of the Law Centre (Newbridge)

Approved
Gemma S. Moss