

THE HIGH COURT

FAMILY LAW

[2023 No.10 HLC] [2023] IEHC 421

**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 ESTHER, SAMUEL, AND OLIVA (MINORS)
(CHILD ABDUCTION: EXERCISE OF CUSTODY RIGHTS, GRAVE RISK,
SEPARATION OF SIBLINGS, VIEWS OF THE CHILD)**

BETWEEN:

O.S.

APPLICANT

AND

O.S.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 22nd of June, 2023

1. Introduction

1.1 The children at the heart of this case were brought to Ireland last Christmas and have not returned to England since then. The Applicant was alerted by a message from their school in January that they had not returned to classes.

- 1.2 The parties were married and have four children. They separated and all the children were taken into care. At a later stage, the Respondent father was given custody of the three youngest children, with access rights for the Applicant mother. The courts and social workers in England have had extensive dealings with this family.
- 1.3 The Respondent argues that the Applicant was not exercising custody of the children at the time they were retained here, he relies on what he submits are the objections of the older children to a return and combines this with a defence of grave risk on the basis that if any of the children are returned but the oldest child remains here (she is months away from her 16th birthday) the siblings would be separated which would create an intolerable situation for all the children. This is in addition to the argument that the children risk being left alone during the day while the Respondent goes to work if they are returned and given into her custody. He makes the point that they do not have stable accommodation in England.
- 1.4 Esther, Samuel and Oliva are the names used in this judgment and all are aged between 10 and 16 years. An older sibling resides with the Applicant.

2. Objectives of the Hague Convention

- 2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most recent information. The Hague Convention not only vindicates the rights of children and ensures comity between

signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

- 2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in contracting states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the resettlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.
- 2.3 The Convention requires an applicant to prove, on the balance of probabilities, that she has rights of custody, that she was exercising those rights and that the children were habitually resident in the relevant country at the time of removal or retention. If she succeeds in establishing these matters, the burden then shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence. Here, the Respondent argues that the Applicant cannot establish that she was exercising rights of custody and raises the defence of grave risk, which is coupled with an argument that the Court should exercise its discretion not to return the children due to the views they have expressed to an independent assessor.

3. Exercising Custody Rights: The Legal Test and the Facts

- 3.1 The case law suggests that proving the exercise of custody rights is a relatively easy task once a parent shows sufficient interest in the wellbeing of a child. As McGuinness J. commented in *M.S.H. v L.H.*, [2000] 3 IR 390, where the applicant was serving a prison sentence: *“There are many circumstances in which one parent may have a low level input into the day to day physical care of a child”*. She went on to hold that the monthly visit of the children to their father in prison was sufficient to establish that he was continuing to exercise these rights.
- 3.2 The children in this case were brought to Ireland for a holiday. Thereafter, the Respondent confirms that he decided to stay, in large part, he submits, because the children were happier here. Prior to this, the children had been habitually resident in England for several years, having spent about 5 years of their early lives here in Ireland. The Applicant has rights of custody in respect of all the children. At one stage, she moved to be nearer their home.
- 3.3 Family law proceedings were pending in England before the children were taken here. This is a very significant aspect of this case. There were care proceedings which culminated in a care order in 2018. Three of the children have been placed in the Respondent custody since then but the Applicant has joint custody and access rights. While the Applicant had not appeared for one hearing date in 2022, during which she was out of the country, she appeared on each subsequent occasion. The application, made to an English court by the Respondent in these proceedings, was for the removal of a supervision order in respect of the children, but he left for Ireland before the case concluded. When the Applicant discovered that the children had not returned from Ireland, she made an application within those proceedings to that English court. That application was heard in January. The Respondent did not attend, citing health difficulties. That court made

a declaration that the children were habitually resident in England and directed their return forthwith and in any event before the 3rd of February.

- 3.4 There have been several social workers involved with this family. One of these appears to have visited the family on at least one occasion when the Respondent was not home and in circumstances where he had specifically asked her not to visit at that time. This led to a complaint by him about this individual. It appears to be accepted that at least two other professionals have been assigned to the family since then.
- 3.5 This is relevant as the Applicant relies on a letter written on the 22nd of May 2023 for the purposes of these proceedings by the one social worker about whom the Respondent complained. The Respondent argues that the Court can place little or no weight on this letter.
- 3.6 The Court does not agree with this submission. While there is no doubt that the Court affords it less weight than it would have done had there been no complaint, this does not mean that the Court can dismiss its contents. In a case such as this one, heard on affidavit, it can be difficult to decide where the truth lies when there are contrary averments from the parties and no surrounding evidence. Here, as is usually the case, there are exhibits such as text messages (though remarkably few compared to other such cases) and two key letters: one from a school and this letter dated 22nd May 2023. I do not dismiss other exhibits by focusing on these, but note that there is usually more weight attached to exhibits not created or informed by the parents or their immediate family.
- 3.7 While the Respondent has complained of the author of the letter, the complaint arose initially out of his request about visiting times. His complaint (which is exhibited) continues with various specific examples of

rudeness and concerns about conversations which led him to the view that the social worker is biased against him. He requests a change of personnel.

3.8 The first point to note is that there have been at least two more social workers involved with this family since the author of the letter and it may be that the change was as a result of this complaint but that cannot be determined on the evidence before this Court. It is regrettable that the most recent professional was not asked to provide this information as the most appropriate contact. However, the social worker in question is a trained professional who is employed by the relevant government department in England and whose job consists of assessing and assisting with families such as this one. It does not seem reasonable to this Court to accept the proposition that, because a complaint was made about her, the social worker in question has sought to mislead the Court about the factual matters which are in her direct knowledge and, if not known to her, are easily ascertained from and, crucially, checked against the English court file.

3.9 The letter in question describes the history of the proceedings involving this family and, in the Court's view, it can be relied upon as evidence as it is produced by a person whose role is to assist the family as a whole. I cannot ascribe *mala fides* to the author as to the contents of the letter, insofar as she is describing that file, despite a perception of bias on the part of the Respondent. While it is a matter of concern that the Respondent has requested, and may have succeeded in obtaining a change of social worker, I cannot thereby conclude that the letter was written to unfairly influence the Court against the Respondent in a general way. This would be very serious conduct on the part of any social worker, and again it is significant that it would be easily detected. I cannot hold that she acted in bad faith because of the complaint, although it does affect the weight of the evidence.

- 3.10 In that letter dated 22nd May 2023, the family file is summarised. While the request was made to this social worker directly rather than to one of the other social workers, it was made and replied to at her professional address. There is no evidence of this being akin to a personal reference or testimonial nor is there any other basis to believe that the author has misstated the records or given an unfair account. The Respondent disputes the contents but it is broadly in line with other facts and with other evidence.
- 3.11 In this letter, there is some support for the averments in the Applicant's affidavit, namely that she left the shared family home after she made an allegation of assault against the Respondent. This did not result in any prosecution and I make no finding of fact in that regard. The Respondent father told police that the Applicant was no longer welcome in his home and, he being the tenant, they advised her to leave. She took her eldest daughter with her and went to a hotel, and then to a women's refuge. The other children remained with their dad.
- 3.12 This social worker goes on to state that the Applicant mother has had no contact with three of her children since July of 2022 and states that this is because the Respondent has not facilitated contact that was ordered by the relevant family court in England.
- 3.13 This information presents a very serious difficulty for the Respondent. The evidence on the question consists of his denial and the averments of the Applicant. Her version is supported by the letter of May 2023. The text messages exhibited contain very little material, comprising of a very small number of texts making it clear that the Applicant has tried to contact the Respondent, however infrequently. However, one text makes it clear that, in October 2022, the Respondent advised the Applicant by text that he would no longer facilitate her contact with the children. While he may have had reasons for this step, it did contravene the court's order.

- 3.14 There was no authorisation by the English courts to relocate the children, despite the social worker's reference in her summary of the file to the Respondent's statements that he was considering relocation to Ireland. The independent assessor notes that the children reported having regular contact with their mum. Indeed, the children have the impression that there was more frequent access than the Applicant describes. The Applicant was in sufficiently regular contact with the children's school that she was contacted when the children did not attend in January.
- 3.15 In those factual circumstances, it is more likely than not that the Applicant had sufficient contact with and care of each child as to have been exercising custody rights for the purposes of this application. I note the Respondent's argument that contact with the children was not just sporadic but was very limited, in late 2022 in particular, and the submission that it was confined to the occasional appearance of the Applicant in court. This is explained, at least in part, by his refusal to allow contact as set out, above, in his text to the Respondent which finding is supported by the letter of May 2023. The responses of the children and her contact with the school align more closely with the Applicant's averments that she saw her children regularly, albeit not often, and this persuades me that she had more contact than is set out in the Respondent's affidavit.
- 3.16 Each of these factors, contact (however limited), attendance in the English court to respond to the Respondent's family proceedings and her prompt application in the English court in the context of those proceedings and in these proceedings confirm the children's own views, namely, that the Applicant cares, and throughout 2022 she cared, for the person of each of these children albeit that she did not have custody of them. I am satisfied that she was exercising her rights of custody in respect of her children.

- 3.17 While the comparator cases of prisoners who are prohibited from exercising their custodial rights are of limited assistance in circumstances where the Applicant appears to have been free to visit her children should she choose to do so, I also note that she was asked to leave the family home by the Respondent. Thereafter, while any allegation of assault is denied, the parties had a difficult relationship characterised by conflict. In those circumstances, it is difficult to determine how easy it may have been to arrange to see the children, particularly if the Respondent was not facilitating visits. The May 2023 letter and the Respondent's own text message support the finding that the Respondent probably thwarted this Applicant's contact with her children rather than seeking court assistance.
- 3.18 Taking these findings of fact into account, the Applicant has proven that she was exercising custody of her children at the time of their removal to Ireland and has established that the children were wrongfully retained here. The Respondent must establish one of the defences, or successfully argue that the children object to return and should not be returned, or both.
- 3.19 The Convention provides in Article 3 that custody rights may be attributed to a person, institution or other body in the country in which the child was habitually resident prior to an unlawful removal.
- 3.20 In *G.T. v. K.A.O.* [2008] 3 IR 567, [2007] IESC 55 the court held that rights of custody can adhere to a court, and it is arguable that the relevant court in England was exercising custody rights in respect of these children, the facts of this case establish that the Applicant was exercising her rights at the time of retention. This finding makes it unnecessary to consider institutional custody rights but that court's role is an important factor here. While this Court is not bound by any finding of that court, the general principles of the Convention and our experience of the integrity of the English court system make any such ruling a significant one for this Court.

4. Grave Risk: The Legal Test

4.1 The Convention provides, at paragraph 13(b), that:

“[T]he 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 ...

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.”

4.2 Ms. Justice Finlay Geoghegan set out the legal test for grave risk in *C.A. v. C.A.* [2010] 2 IR 162, at paragraph 21:

“[T]he evidential burden of establishing that there is a grave risk ... is on the person opposing the order for return ... and is of a high threshold. The type of evidence which must be adduced [must be] ‘clear and compelling evidence’.”

4.3 Case law establishes the kind of risk that has persuaded a court to refuse to return a child; a risk of violence to the child (usually based on evidence of previous violence), a risk of suicide to either the child or to the respondent, or evidence of an event such as famine or war which would render the child’s position unsafe, as set out by Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, at paragraph 57.

4.4 In *C.T. v. P.S.* [2021] IECA 132, Collins J. outlined a history of relevant cases as he considered the objectives of the Hague Convention. He concluded:

“...there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention.”

The burden of establishing a defence of grave risk is a heavy one and a discretion remains for the deciding judge even if a grave risk is identified. In *R. v. R.* [2015] IECA 265 Finlay Geoghegan J. noted that the risk in that case was of physical harm to a child and emphasised the trust to be put in

the courts of the child's habitual residence to protect the child even in such an extreme situation.

4.5 Thus, importantly, the Court must consider the facilities available in the requesting State to assess or mitigate the risk presenting. To paraphrase Fennelly J. in the Supreme Court decision in *P.L. v. E.C.* [2008] IESC 19, [2009] 1 I.R. 1, the real issue for this Court is whether, given that the English courts have already embarked on proceedings, there is evidence to suggest that those courts are unable or unwilling to protect Esther, Samuel or Oliva if they are at grave risk of harm.

4.6 There is a related argument about the separation of these children from each other. This is a complicated issue in this case as the siblings have already been separated from an older child who lives with the Applicant.

4.7 Looking at the facts said to ground the defence of grave risk, the height of the submission in its narrowest interpretation is that the children were left in the care of an older sibling, for hours at a time, while in the home of the Applicant as she went to work. The risk identified is that this may be repeated if the children are returned and contact resumes. Leaving aside any consideration of the truth of the allegation, this alone could not be the basis for a refusal to return the children. There is nothing in this allegation that could not be addressed by the relevant English court.

4.8 Further, it is clear that this was not the reason for the removal of the children. This alleged neglect occurred, if it happened at all, months before the trip to Ireland and the Respondent himself concedes that they remained in Ireland because the children wanted to stay, not because there was a grave risk presenting at home, whether in the family or otherwise.

4.9 The application before the English court is one brought by the Respondent father to lift a supervision order in respect of his custody of the children. It

is argued that, in this context, the Applicant could have but did not litigate to enforce her contact order with the children and that she has been neglectful of the children generally. The letter dated 22nd May 2023 addresses some of these arguments and has already been considered and analysed above. For the same reasons, its contents reassure the Court that this Applicant does not pose an immediate or grave risk to the children that the courts in England cannot address.

- 4.10 If the children are returned but the eldest remains here, there is an argument that the children would be separated from each other at a vulnerable stage of their young lives. It appears that they have always shared a home. This argument is complicated by the fact that a separation has already occurred in respect of their older sibling, a situation which can only be exacerbated by the proposed move to Ireland without that sibling. It is difficult to accept the proposition that returning the children to England would create an intolerable situation for them when a return would facilitate not only contact with their mother but contact with their sibling also. This argument is considered further in the context of the views of the children.
- 4.11 Finally, the Respondent argues that his situation in England is more precarious than that in Ireland. There are no exhibits addressing this line of argument and it is hard to accept at face value. If, as he deposes, he intended returning to England until the children expressed a preference for Ireland, it is clear that he had means and a home to which they could return. There is no indication of obstacles to finding accommodation in England.
- 4.12 The defence of grave risk is for the Respondent to prove. The risk identified in submissions is that the children will be forced into overnight access with the Applicant, who cannot be trusted to care for them. The Respondent adds that there is a risk that a non-compliance with the access order will result in the children being taken into the care of the State. Not only is this argument

speculative, it displays a profound mistrust of the authorities in England which is not born out by the exhibits nor indeed does either party provide evidence that the courts or social welfare system has failed this family in any specific, significant way. The facts fall short of the proof of grave risk required for a court to consider not making a return order.

- 4.13 Considering the allegations of neglect and the capacity of the English authorities to address such risks, and the lack of evidence in respect of residence, the Respondent has not successfully established a defence of grave risk in this case in respect of these arguments. The Court will revisit the separation issue in considering the views of the children, as it is a factor to weigh in the balance when determining how their views might affect the order the Court should make.

5. Views of the Children

- 5.1 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if a child does in fact object and, if so, what weight attaches to the objection, given the maturity of the child. Finally, if established and when assessed in that way, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention. Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child, and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is very important to consider the views of the child and whether they may influence the Court to take the exceptional step of refusing to return a child.

- 5.2 In *A.U. v. T.N.U.* [2011] 3 IR 683, Chief Justice Denham commented that: “A court, in deciding whether a child objects to his or her return, should have regard

to the totality of the evidence.” The weight to be attached to views of a child increases as the child gets older, as set out in *M.S. v. A.R.* [2019] IESC 10.

- 5.3 In considering whether objections to return are made out, the expression of a mere preference is not sufficient; the word “objection” imports strong feelings as opposed to a statement of preference on the part of the child, to use the words of Ms Justice Whelan in *J.V. v. Q.I.* [2020] IECA 302.
- 5.4 In a recent decision of the Court of Appeal in *M. v. M.* [2023] IECA 126, Ms. Justice Donnelly considered the following analysis of Ní Raifeartaigh J. in *Z.R. v. D.H.* [2019] IEHC 775 to be helpful in resolving the issue of when a stated preference goes beyond a “mere preference” and becomes an objection:

“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.”

- 5.5 Donnelly J. emphasised that *“It is a truism that each case turns on its own facts.”* Thus it *“would border on an insult”* to say that the clearly stated objection of the 14-year-old boy in *M.* was the statement of a mere preference.
- 5.6 The Court of Appeal in *M.*, relying on the decision of the Supreme Court in *M.S. v. A.R.* [2019] IESC 10, reiterated the principles set out therein related to the exercise of discretion. These refer to the policies of the Convention, the exceptional nature of the refusal to return, the balancing act required between those policies requiring return and the individual circumstances of the child who objects to return. This balancing act is required to determine *“what is, in the limited sense used, in the best interests of the child at that moment”*. The Court of Appeal endorsed the principle in *M.S.* that the weight to be given to the Convention policies favouring return and to the objection of the child may vary with time, stating *“The further one is from a prompt return, the less weighty the general Convention policies will be.”*
- 5.7 As set out by Donnelly J., the reference to return as an *“exception to the general policy”* ought not to be seen as importing any test of exceptionality into the exercise of the discretion.
- 5.8 Returning to the facts of *M.*, Donnelly J. said, at paragraphs [87]-[90]:
- “The task of the judge in the exercise of her discretion is not to weigh the child’s views against the Convention principles or objectives that favour prompt return but to assess the individual circumstances of the objecting child in light of those principles and objectives which require return. This exercise must be carried out in light of all of the evidence. When one considers the exercise in that light it becomes clear why the child’s views are not determinative. Those views are but one part of the assessment of the child’s individual circumstances which must be considered against the background of the Convention’s policies and objectives...”*

The particular objective of the Convention/Regulation which is to deter child abduction rightly weighs heavily in the balance of the discretion here as does the policy of prompt return. The child's objection also has to be considered. All those things are of undoubted importance in the balancing exercise, but they are not the only matters. In one sense, it can be said that they form the outer ends of the balance beam, but a judge is required to move inwards from those set parameters and consider all of the relevant circumstances that need to be considered. Sometimes the relevant factors may be those factors which form part of the child's objections but, on many occasions, the relevant factors may include issues to which the child has not adverted. Either way it is important for a court to articulate the relevant circumstances that are being considered in the exercise of the discretion...

The upper age limit for return of a child under the Hague Convention is 16 years and the closer one gets to that, the weightier the objection becomes. Maturity as well as age must also be taken into account, however."

- 5.9 The case of *J.K. v L.E.* [2022] IEHC 733 is comparable in many ways to this case. There, the respondent father had taken two children on holiday, initially, and decided to remain when they appeared to be happily settling in Ireland. However, the family had been in the middle of proceedings after the parties separated. Despite the strongly expressed objection of the eldest child, which involved a threat of self-harm, this Court ordered that both she and her sister be returned to Sweden. This was in circumstances where the child's objection did not counterbalance the factors in favour of return, particularly when considering her best interests:

"Rachel's objections arise in circumstances where there has been ongoing evaluation and support for her in Sweden. Any risk to her will require professional evaluation beyond the contents of the Assessor's report in this case, and what is contained in that report is insufficient to sustain a defence that

Rachel will be at grave risk should she be returned. There is no evidence that the relevant authorities in Sweden are unable or unwilling to treat and mitigate any risk arising."

- 5.10 There is a comparable threat here but it received relatively little focus during arguments. As the parties do not agree as to its genesis, it is impossible for the Court to determine that issue. However, this is clearly an ongoing issue and not one that has been resolved by moving here. The assessor notes his concerns about this child also. As in *J.K.*, court proceedings are ongoing and I consider that the risk to this child can best be addressed in that context. I note that therapy appears to have been recommended (though this is disputed) but not commenced. Even if this was not recommended, the assessor in these proceedings recommends it.
- 5.11 All three children have raised what I consider to be objections to returning to their home in England, even describing their town as a dangerous one. The eldest would prefer to remain in Ireland. She stated: *"I was unhappy in England. I didn't like the school or the place where I was living. The environment was bad, people were shouting, things were broken and cars stolen."* She stated that she felt unsafe in that environment. Regarding the circumstances in which she came to Ireland, she said: *"We came on holiday and I didn't like my life. I told Dad I wanted to stay and he said he had to some paperwork (sic)."* Regarding future care arrangements, she said: *"I would like to stay here, get a proper house and go to school. I would like to live with Dad."*
- 5.12 The second child wants to remain in Ireland in the care of her father. She expressed a wish not to return to England. The reason she offered was that: *"I don't like the place. I don't like the country. There are bad people, killing people."* Speaking of circumstances in England, she said that her experience of school was *"not the best"*. There were frequent fights and the people were *"bad"*.

- 5.13 The third child expressed a preference for remaining in Ireland in the care of his father. He did not want to return to England, stating that he would feel *“very annoyed and not happy”* if made to return. The reason for his objection was that *“I never liked it there.”*
- 5.14 As a matter of fact, all three children appear to have stated objections to a return for various reasons. The language used expresses feelings which, in my view, go beyond preferences and amount to objections. This requires a further consideration as to what weight should attach to them. Two of the children are not in school as their mother did not consent to them being enrolled. The third child is in school and doing very well.
- 5.15 The oldest child in particular has expressed views that I take very seriously. She is of sufficiently maturity that I am reluctant not to act on her views. She has specified her unhappiness at school, but as noted above, she has no comparator in Ireland to date. She makes no mention of her older sibling and I consider this to be a factor which weighs in favour of her return. While she may not yet value this relationship, she has already spent a long time separated from this older sibling, with whom she used to share a home. Apart from general unhappiness at school, the issue appears to be one of danger. The basis for this belief is stated in this child’s case to be people shouting, things being broken and cars stolen. There is no evidence of any incident occurring to any one or more child or member of this family which might explain the view expressed though the specified type of danger is worrying. There is no doubt that the child wants to remain here but her life here is currently restricted to spending time on her phone. She has made no friends here yet as she has not attended school.
- 5.16 The second child is not only younger, but has articulated less specific objections. There are references to people being killed, which of course happens in Ireland as well as in England. There is no suggestion of this

having occurred in any proximity to the child, nor is there any context given for the objections. I attach less weight to this objection than to that of the older child due to the child's age but comment that there is no specified incident which might form the basis for the child's view that their home was dangerous. In respect of school, this child refers to frequent fights as a basis for preferring to remain here. Again, it must be noted that there has been no schooling for this child here and no way to compare the two experiences. She has made some friends locally.

- 5.17 Finally, the youngest child will be annoyed if a return order is made and never liked it in England. There is no context for this objection and I cannot afford it more than minimal weight given the age of the child and the circumstances in which his father and older siblings clearly want to remain here. While he is mature enough to know his own mind, and to state his views, without any indication of deliberate influence, it is entirely normal that such a young child would be influenced by the views of his dad and siblings. This child is happy in school which also explains his views.
- 5.18 In terms of balancing these views against the objectives of the Convention, all the facts are relevant and of particular importance in this context are the following matters: these children had not lived in Ireland for over 6 years; even the eldest had spent well over a third of her life in England with the youngest having no memory of Ireland. They have no family here, or at least none that was mentioned to the Court. While one is doing well in school, the others have not yet attended school here and spend most of their time on their phones. One appears to have made no friends yet. Their mother and older sibling live in England, in the town that was their habitual residence until recently. Perhaps most significantly, the courts in England are actively processing a case brought by the Respondent in respect of a

court order. Instead of pursuing that application, he has brought three of his children here and now seeks to legitimise that step, effectively.

- 5.19 The various social workers who have had contact with this family have recommended that the children remain in the custody of the Respondent, with continuing access for the Applicant mother. The letter of 22nd May 2023 confirms that this Respondent has actively prevented the Applicant mother from having the court-ordered access to which she is entitled. Despite not having seen her as often as might have been ideal, one of the children told the assessor about missing mum and all wanted contact with their mum. Further, and notably in a case marked by conflict, none of the children has criticised their mother in any respect in outlining their views to the assessor.
- 5.20 The Respondent criticises the Applicant for not agreeing that the children can be enrolled in school here but this Court cannot agree that this should affect the balancing of these factors: it was the Respondent's choice to move here without the Applicant's knowledge or consent and it does not assist his case to suggest that she should have consented to a change of school when she did not consent to a change of residence to another jurisdiction. He has chosen to move the children to a country in which he had made no school or living arrangements, effectively highlighting why it is so important for parents to discuss such a move and agree it with the other parent or guardian, if that is possible. If not and if it is in the best interests of the children, the relevant courts can usually be trusted to consider and grant a relocation application, thus allowing the moving parent to arrange schools and other matters once he has the authority of the relevant courts.
- 5.21 This Court has read and considered the views of each of the three children in this case. As noted, insofar as they expressed a dislike for their school in England, two of the children cannot comment on whether they might be happier in Ireland as they have yet to attend school here.

- 5.22 In particular, I note the age of the oldest child and might have made a different order had this child been the only child of the parties. However, I must consider and balance all factors and the importance of the objectives of the Hague Convention and the rule of law issues which arise when a court case is already in progress in another jurisdiction and where there is an issue about what therapy may be required in her case. I have considered also the family circumstances and the family ties in each of the jurisdictions. All of these factors convince me that this is a case in which, despite their stated objections, the two youngest children must be returned.
- 5.23 While the oldest child will be able to make up her own mind shortly, for the moment it seems to me that it remains in her best interests to return and live with or near all her siblings, in England. This is particularly so when the relevant social workers have been working with this family and are more familiar with their needs than this Court can be after this focused and summary enquiry which is all that the Hague procedure can accommodate.
- 5.24 In this context the guidance of the Supreme Court in *P.L. v E.C.* [2009] 1 IR 1, [2008] IESC 19 (at paragraph 55) is instructive and it binds me:

"The correct approach to the treatment of this issue is very well established in the case law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the

child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

- 5.25 While I have a discretion to refuse to return each of these children and I am particularly loathe to act against the stated wishes of a child who is nearly 16, in the circumstances of the case and where my concerns include her vulnerability, keeping the siblings together and ensuring that the courts in England continue their careful assistance to this family, where social workers are clearly competent to vindicate their best interests, I am persuaded that all three children should return home. This is particularly so given their relatively recent arrival here and the very low level of integration in their new community.
- 5.26 I have not addressed some of the allegations made by the parties herein as they did not appear to be determinative of the issues here. It is important to note that the chronic conflict between the parties is damaging their children and both parents, who clearly love their children, should consider the assessor's advice to obtain help and create a parenting plan. The Court notes the urgent need for therapeutic intervention in the case of Esther.
- 5.27 Finally, the Court notes that this is a case in which a relocation application may be appropriate. Children should not be uprooted and moved without reference to those who have rights of custody and without notice to those professionals who have worked hard to accommodate and help them, at least one of whom, as set out in the Respondent's letter of complaint, has been thanked for the quality of his work and advice. This decision is made to vindicate the rights of the children, including their right to a relationship with both parents and with each of their siblings. In a relocation application, all of these matters can be considered in much more detail.

6. Conclusions

- 6.1 The children were retained in Ireland without the consent of their mother who was exercising her rights of custody at the relevant time.
- 6.2 There is no grave risk to the children in the event of their return, whether by neglect, inadequacy of the courts or separation from each other. The reverse is the case in that there are four children in this family who should live within close proximity to each other insofar as that is possible.
- 6.3 The views of the children amount to objections to returning but, in all the circumstances, the Court must return them to their habitual residence where their interests may be more carefully examined and accommodated by the authorities, with more information than is available to this Court.