THE HIGH COURT

FAMILY LAW

[2023] IEHC 700

IN THE MATTER OF ARTICLE 11(7) OF COUNCIL REGULATION 2201/2003/EC

AND

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND

IN THE MATTER OF D (A MINOR)

(CHILD ABDUCTION: RETAINED JURISDICTION FOLLOWING NON-RETURN ORDER, BEST INTERESTS OF THE CHILD)

BETWEEN:

H.

APPLICANT

AND

I.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on 5th December, 2023

1. Introduction

1.1 The child, D, is under 10 years old. D was removed to Poland from Ireland, then his country of habitual residence, in 2018. The parties are his parents and had lived in Ireland as a family. D has other siblings in both countries. This case began in Poland under the Hague Convention and Regulation

2201/2003/EC, where the Applicant father applied for the return of his child. The Polish courts ruled that D had been wrongfully removed but should stay in Poland as it would pose a grave risk to him, within the meaning of Article 13 of the Convention, to return him to Ireland.

1.2 D has been diagnosed as being on the autistic spectrum. In 2018, the Applicant father did not recognise this diagnosis or agree with it. He has since changed his view on the diagnosis and has worked hard to help D to overcome some of the challenges he faces in living with this condition. The Applicant's initial response to the diagnosis appears to have informed the Polish court's decision not to return D, a decision made in 2018.

1.3 If a Polish court decides not to return a child to his habitual residence in Ireland because of a defence of grave risk, under Regulation 2201/2003/EC, which governs cases arising before August 2022, the case must be reviewed in the Member State of his original habitual residence (Ireland) where, on the request of either party, the Court can make a final decision on return.

1.4 This procedure is explored in detail in *Z. v. Z.* [2021] IEHC 20, where Simons J. set out the rationale behind the provisions and reviewed the relevant case law. As that judgment makes clear, the request to conduct such a hearing is one which should be addressed urgently. This Applicant's motion, dated 2020, was launched over a year after the relevant decision of the Polish court. The Article 11(7) proceedings were instituted by the Minister for Justice on 6 September 2019 and there were subsequent difficulties finding legal representation for the Applicant and in serving the Respondent at the end of 2020. The case was further delayed due to the COVID-19 pandemic which meant that an assessment report on the psychological welfare of the child could not be obtained until the end of August 2021. Finally, there was a change of solicitors for the Applicant in Autumn of 2022. There was no objection to these delays from the Respondent, who represented herself.

The matter was only set down for hearing at the insistence of the Court when another adjournment to obtain reports was sought. The delay was not adverted to or argued as a bar to relief during the various hearings of this matter. Had it been, the Court would have been guided by the decision of Simons J. in that regard.

1.5 Leaving aside the strong procedural grounds to refuse the motion, the Court will address the issues raised and argued, lest there be a procedural unfairness in dismissing the application on grounds which were not raised. As will be clear from this judgment, it is unnecessary to reach a final view on whether delay defeated retained jurisdiction in circumstances where this Court would not have made an overriding order on the facts of this case.

1.6 The ultimate substantive issue is a decision on custody, based on the best interests of the child, not a decision on whether the child should now be returned under the summary procedure set out in Regulation 2201/2003/EC. The Court must decide, in accordance with the principles set out in the Guardianship of Infants Act 1964, if it is in D's best interests to stay in Poland with the Respondent or to move to be with the Applicant in Ireland.

1.7 D's parents are striving, each in their own way, to help him and to spend as much time as they can with him. Their relationship ended unhappily, but both are committed to caring for their son and both have a deep concern for his welfare. On the evidence, including crucial evidence in respect of services available in Poland and in Ireland, this Court has concluded that D's interests are best served if he remains in Poland. He will benefit enormously if the parties continue to agree generous access arrangements. Ideally, the parties should agree a parenting plan, with the help of a mediator if necessary, as suggested by the expert assessor.

2. **Abduction Proceedings and Examination of Custody Hearings**

2.1 The child's father applied to the relevant Polish authority for return of the child pursuant to Article 12 of the Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention), which states:

> *"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."*

2.2 In the vast majority of Article 12 applications return of the child is ordered by the requested authority, as the purpose of the Convention is to provide fast and effective redress where a parent removes or retains a child without the consent of the other parent. Pursuant to Article 13 of the Convention, however, an authority is not bound to order return the child if:

> *"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."*

2.3 In the present case, the Respondent succeeded in establishing the 'grave risk' defence pursuant to Article 13(b), and the relevant Polish authority refused to order the return of the child to Ireland. Where this occurs, and where both the country of habitual residence and the requested state are members of the European Union, Article 11 of Regulation 2201/2003/EC comes into effect (in cases instituted before August of 2022) and the courts in the country of habitual residence examine the question of custody of the child. Article 11(6)-(7) of the Regulation governs the procedure:

"6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately… transmit a copy of the court order on non-return… to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention…

7.…the [] central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child."

2.4 Article 11(7) stipulates that the custody hearing be carried out in accordance with national law. The relevant national law in this jurisdiction is the Guardianship of Infants Act 1964, Section 3 of which provides:

"[w]here in any proceedings before any court the custody, guardianship or upbringing of an infant … is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."

2.5 This Court must examine the question of custody to determine whether it is in the best interests of the child to remain in Poland or to be returned to Ireland. The policy underlying such a welfare hearing differs from the policy underlying a Hague Convention hearing in fundamental ways. Whereas the purpose of the former is to determine the best interests of the child, the latter, as Whelan J. put it in *S.K. v. A.L.* [2019] IECA 177 [para 47] is "*to achieve restoration of the status quo ante leaving all considerations of welfare and best interests to the courts of the habitual residence of the minor in question*."

2.6 If return is in the child's best interests, such a decision is, under Articles 11(8) and 42(1) of the Regulation, recognised and enforceable in Poland. Article 10 of the Regulation provides that this Court retains jurisdiction

until the child acquires habitual residence in another Member State and "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."

2.7 The issue of habitual residence was not addressed in any detail in circumstances where D has now lived in Poland for several years, where he attends school, and where his extended family live. He speaks Polish and, while he enjoys holidays with his father and family here, there is no evidence to suggest that he remains habitually resident here. His habitual residence is now in Poland.

3. The Best Interests of the Child: the Law

3.1 The Court is guided by the detailed criteria set out in Section 31 of the Guardianship of Infants Act of 1964 (as inserted by Section 63 of the Children and Family Relationships Act 2015). These are:

"*(2)(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and … having sufficient contact with them to maintain such relationships;*

(b) the views of the child concerned that are ascertainable…;

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

(f) the child's social, intellectual and educational upbringing and needs;

(g) the child's age and any special characteristics;

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made …

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.

(3) For the purposes of subsection (2)(h), the court shall have regard to household violence … including the impact or likely impact of such violence on:

(a) the safety of the child and other members of the household concerned;

(b) the child's personal well-being, including the child's psychological and emotional well-being;

(c) the victim of such violence;

(d) the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child.

(4) For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."

3. Evidence of Early and Continuing Conflicts

3.1 D has an excellent relationship with both parents. He enjoys regular in-person access to both parents. He knows his half-siblings well. There is no evidence to suggest that he could not safely move to Ireland, the issue is whether it would be in his best interests to do so.

3.2 Mr. H is a dedicated father and one who has been conscientious and loving, as indeed he has been to his other children. He took full part in parenting this boy and was involved in every aspect of D's life. As the Polish courts found as a fact, the initial removal by his mother was unlawful and had a serious effect on the Applicant's other children. It was difficult for these children; D's removal came as a shock to the family.

3.3 There was an incident after the initial Hague Convention application for D's return which created further distrust between the parties. Access visits had taken place and, in brief and without comment as to fault, D was in Ireland for a holiday in early 2019 and was brought to Spain during that holiday. He then returned to Ireland. The Respondent travelled here to remove D from the Applicant's custody. Thereafter, there were no access visits between D and the Applicant for nearly a year. This incident, the global pandemic, and further problems with arranging access, together with disagreements as to what treatments the child should receive and what he should eat, have led to a deepening of that distrust.

3.4 In his notice of motion, the Applicant has exhibited text messages between the parties on dates in 2020. This exchange highlights the very poor relationship between them. The tone of the messages is hostile. The exchange begins with an accusation by the Applicant of "judges' offences" in respect of his son and ends with a demand that he see his son. The Respondent replies accusing him of being a psychopath. It is difficult to arrange for the care of a child in this atmosphere.

3.5 As noted above, D has special medical needs, and the diagnosis of autism is accepted by all parties in this case, but the Applicant had different views in 2018. The Applicant did not initially accept the diagnosis which the Respondent identified early and acted quickly to treat. The Polish courts appear to have been influenced by this. The Applicant, once the decision not to return D was made, applied for access to him and the same Polish judge allowed this, directing that D travel to Ireland. The Applicant argues that this contradicted the order of non-return. This is, however, not the only logical, or even the most likely, conclusion. Rather than contradicting his initial view, a judge is likely to find that a visit to his father might be very beneficial for D, even when his overall view is that D would be at risk if he were to reside with that parent full time. This was a case which began, although the Applicant does not appear to accept this now, at a time when he did not recognise the diagnosis of autism.

3.6 While the Applicant now accepts the diagnosis, this was not the case when the Polish court was considering D's interests and any risk to him on return to Ireland. If the diagnosis was not accepted by his father, and the evidence establishes that it was not, there was a grave risk that D would not receive any of the help he needed if he was living with the Applicant.

3.7 I am asked to consider the relevance of a finding that the Respondent wrongfully removed the child in 2018. I do not consider that this fact is

helpful in considering D's interests. If this is still relevant then, arguably, one of the reasons for her actions was the Applicant's failure to recognise D's needs. I think these factors are no longer relevant. Each party is capable of being an excellent parent to D. The Applicant has now changed his mind in respect of the diagnosis and the Respondent has begun to trust the Applicant to the extent that recent access has taken place. She has agreed to access throughout the course of these proceedings and both parties now know the expert assessor's views that their child will benefit enormously if they can agree a parenting plan.

3.8 The Applicant gave evidence that the Respondent told him she had consulted a doctor in Poland, and that she had concluded, referring to his autism, that D "*will grow out of it. That is what I understood from her*". I do not accept that she thinks so, even if the Applicant sincerely believes that he heard her say something of this nature. Nothing in the Respondent's evidence in Court, or in her actions over the past four years, suggests that she thinks D does not need assistance or will grow out of his condition.

3.9 D continues to have access to the Applicant via video link at present. D has also visited the Applicant several times over the past two years and the Applicant has visited him in Poland. To have good contact with video-link, D needs peace and quiet. Speaking with him can be difficult and conversations are usually not longer than 15 minutes. He is a lively child who loves movement, he likes to run and a video is not the best way to maintain a meaningful relationship with him; it is clear that access in person is essential for D to maintain his relationship with both parents.

3.10 The Applicant has raised several concerns, primarily about therapies, D's diet, and his progress in school. The Applicant gave evidence that he had been advised by doctors that D was suffering from a concentration of heavy metals in his body and that herbal cleansing remedies were recommended.

While he advised the Respondent to administer these remedies, he was concerned that this was not done.

3.11 As regards diet, the Applicant gave evidence about the type of milk and foodstuffs that D consumes in Poland and contrasted these with what he should be eating and drinking "*to improve his body and his immune system*." The Applicant also points to his having arranged for D to wear glasses as evidence of his care and concern for his son, contrasting this with the Respondent's reaction when he raised the issue. She did not appear to him to be concerned about D's eyesight.

3.12 The Applicant submits that D should be making more progress in school and is concerned that there is insufficient emphasis on ensuring that he can live independently. His evidence was that he does not receive any information about D's schooling and feels that D spends too much time on his mobile phone. In this regard, the Applicant referred to advice from a clinic in Dublin including advice regarding sensory therapies. There was no report from this clinic. Any progress the Applicant feels D is making in Ireland is lost, in his view, when D returns to Poland.

3.13 In his evidence, the Applicant concluded that his relationship with D will change if he is not returned to Ireland and, in respect of the key question of his treatment, he asked rhetorically: *"What will D's life look like? How much effort will I be able to put in, in Poland. As we know, the way it has been has not been enough."* This is his evidence as to the current position.

3.14 The issue is whether I should remove D from his home of the last several years and direct his return to Ireland. The Applicant has given evidence that he does not consider that D has any, or any appropriate, therapies in Poland. He has testified that D makes progress in Ireland and is frustrated by the fact that he understands, from doctors and the clinics to which he has turned

for assistance, that D must maintain access to such therapies to benefit from them; a short course of therapy in Ireland is of little benefit unless continued in Poland. There is no doubt that his father would do his utmost to arrange a suitable regime for D if he resided here but there are issues about the availability of such services in Ireland. The availability of services in Ireland is a significant issue in this case, as is the adequacy of the regime in place for D in Poland. This regime has not been criticised in the expert evidence, to which I now turn.

4. Two Experts

4.1 Mr. Michael Van Aswegen, a clinical psychologist practising in Ireland, was engaged by the Applicant and he provided reports on D and gave evidence to the Court. He was cross-examined by the Respondent, who represented herself throughout these proceedings. This expert has over 26 years of experience working in child protection and in health services in Ireland and in the United Kingdom. His expertise was not challenged.

4.2 A Polish psychologist, Dr. P, was asked by the Applicant to provide a more up to date report on D. She saw him at a visit facilitated by the Respondent and she prepared a written report. After arranging to take her evidence via video link, the witness was unavailable on three occasions and this Court agreed to accept the written report, noting that the Respondent did not object to this. The Respondent had no opportunity to cross-examine that witness. This leads to the conclusion that, if there is any dispute between the witnesses, the evidence of the witness whose account was tested by cross-examination is likely to carry more weight. As it happens, there was little dispute between the experts.

4.3 In direct evidence, the Irish expert confirmed that suitable support was available to D in Poland, contrary to the Applicant's beliefs in this regard. The expert confirmed that D has physiotherapy, play therapy and is in an appropriate school. He was not only repeating what the Respondent told him, he said, but has had sight of reports relating to the assessments of D, dating back to 2018, confirming that these therapies are, and have been, available to D and that he has benefitted from them.

4.4 Mr. Van Aswegen was sympathetic to the Applicant's initial reluctance to accept the diagnosis, saying that this is a common reaction, which arises because people process things in different ways and at different speeds. I note that the Applicant gave evidence that he had always accepted the diagnosis but this contradicts other evidence in the case and this expert appears to have been instructed on the basis that it took the Applicant some time to come to terms with the diagnosis. Insofar as it may be necessary to decide the issue, I am satisfied that the Applicant took some time to come to terms with, and accept, the diagnosis.

4.5 Asked about the Applicant's concerns, the Irish expert referred to D being distracted during video contact which contact, as all agreed, was not an ideal way to maintain a relationship with D. The expert went on to comment that the Applicant's evidence, which he had heard, demonstrated a fear for his role in the future care of his son once the proceedings come to an end. The concerns outlined by the Applicant in evidence also highlighted the lack of trust between the parties.

4.6 The Irish expert described his various meetings which led to two written reports. In particular, he attended a meeting in 2021, in person, between the Applicant and D in Phoenix Park in Dublin. He said, "*Qualitatively, in terms of his interaction with his father, my sense was that the relationship was very good, very close."* He described the Applicant as a very responsive parent.

4.7 Later in his evidence, this expert noted that he had only been able to observe the Respondent on a video call with her son and, therefore, found it very difficult to comment on her relationship with D as he did not have the same depth of observation as he had enjoyed during the visit with his father, described above. Despite this lack of opportunity to observe her in person, he did not question the Respondent's ability to parent D.

4.8 My note of two key passages of his evidence is as follows:

Q: There is no reason to doubt that [the Applicant] would be an excellent primary carer for D? A: Yes, I think it corresponds with Dr. P, who notes both parents have the correct parental competency.

Q: So if the Court orders [that D] come to Ireland, he would miss his mother and have to get used to a new environment but the relationship [with his father] is strong enough to sustain him?

A: Yes, I think the challenge in parenting is weighing up the accessibilities of services in Poland and in Ireland.

4.9 One issue arises in respect of the two experts. Dr. P summarised Dr. Van Aswegen's reports by saying that he "*does not see any contraindications to the boy's change of residence*", meaning that there was no reason not to move D to Ireland. However, specific contraindications were set out by Mr. Van Aswegen in his testimony to the Court.

4.10 Dr. Van Aswegen commented, in his direct evidence, on the availability of services in Poland, saying: *"having seen the reports from 2018 onwards, there is access to a multi-disciplinary team and of interest, what we do not have in Ireland, is the use of canine therapy. An interesting intervention, it is also very helpful with children with a variety of challenges. Based on the reports only, it appears that the services to children with ASD in Poland are appropriate."*

4.11 When asked if there was any reason to think he would not get appropriate services here in Ireland, he replied that in respect of "*services for children with*

autism with his specific profile, some get access to specific autism classes, however facilities are scant on the ground. The waiting list can be a challenge. For children with low profile of need, access to resource teaching in normal classroom at the moment, and Special Needs Assistants, can also be a challenge to access."

4.12 Counsel asked if he would be as familiar with potential weaknesses in the Polish availability of services and he replied: *"I'd say in defence of Ireland, the issue is not quality of service, once accessed, the issue is really accessibility. Of course I cannot comment on challenges in Poland."*

4.13 The witness confirmed that one recommendation had been to ensure that D had access to a multi-disciplinary service in Ireland but that the Applicant had been pursuing this option for two years.

4.14 In Dr. P's report, the focus is on the parenting skills of the two parties, mainly those of the Applicant as she has not met the Respondent. It was submitted that this report corroborated the Applicant's evidence that the services in Poland were insufficient for D's needs. This is not correct. The report repeated the Applicant's concerns, voiced to this expert, that these services were not adequate but does not endorse those views. This shows only that the Applicant's view has been consistent, but there is no expert support for his view. The Polish expert concludes in her report that the Applicant would be an appropriate carer and that she agrees with the Irish expert. There is no indication that the Polish services are inadequate, and Mr. Van Aswegen confirmed that they are appropriate. Mr. Van Aswegen went somewhat further in his oral evidence in that he noted that the multi-disciplinary team in Poland was necessary for D's welfare and that he would be concerned if D moved to Ireland without immediate access to a similar level of care from a therapeutic team.

4.15 It was submitted by the Applicant that there was no evidence of services provided to the child in Poland but this is not correct as the above exchange makes clear. Two professionals have assessed the child, one in Ireland and

one in Poland. While the Irish expert could not comment on the availability of services generally in Poland, he made it clear that, in his view, this child was being treated appropriately, was receiving good care and, since 2018, has had access to suitable therapies. The Polish expert did not suggest otherwise in her report, which focused on the suitability of the Applicant as primary carer rather than on the services available to D in Poland.

4.16 For the reasons outlined above, I place significant weight on the evidence of the witness who was in Court: his reports were explained, his replies were carefully considered, and his account was tested by cross-examination to which he responded reasonably and thoughtfully. Both experts were put forward for the assistance of the Court by the Applicant, both had access to reports on the child going back over the past 5 years and neither one expressed any concern about the level of services in Poland.

4.17 The cross-examination of the expert who gave evidence was very focused and illuminating on the key questions which faced the Court. Asked if he had any sense if D's development could be better if he was in the Irish system, the witness thought carefully before replying: *"My instinct would be, I do not believe that his overall presentation would be better than what we see."* This is crucial evidence as the Applicant appears to believe otherwise. He gave evidence that the current treatments were not working, which directly contradicts his own expert on this topic.

4.18 The expert went on to consider a question as to whether the child would be better off in Ireland if he had access to a multi-disciplinary team. He concluded that: *"If he had access relatively quickly [to a team], I would say on balance they would be on a par"*, referring to the services in both countries.

4.19 This evidence goes to the core of the case and highlights the difficulty for this Applicant. His relationship with his son is excellent and nobody doubts that he is a good father who is now more sensitive to D's needs. Equally, the

Respondent has an excellent relationship with D. Both families love D, and he has siblings in both countries, leaving aside the more extensive family connections in Poland. The services available to him in Poland are appropriate. But, if he were to move to Ireland, there is no guarantee that he would be treated by a multi-disciplinary team. This is a significant barrier for the Applicant. It is not in his gift to ensure that D will have appropriate treatment in Ireland, but the evidence establishes that D is currently receiving appropriate treatment in Poland.

4.20 This is not my conclusion from listening to the Respondent alone, it is the conclusion of the Applicant's expert. The only services in Ireland which might be as good as the therapies he currently receives (on a par with them, not better than those services) are services which he would only receive if he had access to a multi-disciplinary team relatively quickly. As set out above, the Applicant has been attempting to avail of this service for over two years and the expert acknowledged that accessing services in Ireland is a challenge. The services D needs are being supplied in Poland.

5. Parenting Plan

5.1 The Irish expert's evidence was very clear on the one issue of concern in relation to services being offered to this child. My note of his evidence is this: *The therapeutic modalities, given what I have seen from Polish reports, suggest that they are appropriate to support and scaffold his needs. One thing we need to keep in mind in either context for consistency, [is that] clinical teams should speak to each other around where they are and the intervention strategies currently in place. I have one concern, that we have difficulty in communications between mum and dad which in itself is the foundation stone for trying to manage a child, with or without special needs. If so, that is a second problem: it is unlikely that the communications between parent and clinical team is that robust, so my concern is*

that we have a clinical team in Poland that is taking an interventive pathway and we are in danger of a situation [developing] where, in Ireland, we have another parent who is, with all good intentions, going to source services, which may or may not be running in parallel with what is being done in Poland.

5.2 This is the core difficulty for D: his parents do not communicate in respect of his care. This means that the help he has in place in Poland is not aligned with the services he receives in Ireland. This makes efforts in Ireland counterproductive and also undermines what is otherwise an appropriate regime in Poland. Both parents must address this urgently.

5.3 It was suggested that the Respondent gave an unsatisfactory answer when asked why she did not share sufficient information about the services available to D. My interpretation of her answer was that the Applicant does not communicate with her or ask directly for information but comes into court and complains that he has no information. His view is that his concerns are clear and that she should be providing this information. In other words, he does not ask as he expects her to know what he wants, and she does not give him information as he does not ask for it. This short description should make it clear that there is work to be done on both sides in this regard. It is not reasonable or practical to expect that one parent tells the other everything about a child's life and day, nor is it reasonable that the other parent should have to ask for all important information. Here, if another reason was needed, is further support for the proposal that a parenting plan be agreed, as a matter of urgency, to agree the level of information to be shared, how it should be supplied and by whom.

5.4 On future contact, wherever the child is living, the expert advised four separate and considerable blocks of time with the non-resident parent was the ideal solution, per annum, acknowledging that logistical and financial capabilities would affect the prospect of achieving the ideal in each case.

5.5 In respect of the use of his mobile phone, Mr. Van Aswegen was not aware of any specific research that would suggest that D was at risk due to his phone use, but he did emphasise, yet again, the need for a parenting plan around use. Consistency of approach was as important as any other factor in his view and the only risk he warned about was unsupervised use. In particular, he noted that any child of D's age was vulnerable and that his online profile had to be monitored by his parents. This evidence was, essentially, uncontested and I accept it as sensible and in line with the other evidence. There is no evidence to support the Applicant's allegation that D uses his phone too much or that the Respondent is irresponsible in this regard. It appears that, again, a parenting plan to agree and monitor use is the practical answer and not a decision to limit or prohibit phone use.

5.6 As regards communication by video, the expert advised a 5-minute alert system whereby D would know that one activity would finish shortly and the next would begin. Calls should be short but of good quality, and he gave the example of telling a short story or asking about one of his interests. This confirms the importance of parents sharing information, as the parent who is not present understands less about what the child's current interests are. Again, this evidence was compelling in its logic and I agree with the expert's conclusions: the parties in this case must agree all elements of their communication, ideally with an independent party, for D's benefit.

5.7 The Applicant voiced concerns about parental alienation. The expert's view was that father and son had an excellent relationship when he observed them in Ireland and that D continues to respond to the Applicant very positively when in Poland. This continuing relationship would be unlikely to have developed or survived if the Respondent was actively alienating, or attempting to alienate, D from his father.

5.8 The Court is conscious of the Applicant's fears that his contact with his son will be reduced or eliminated when these proceedings are over. A practical way to avoid this will be to agree to a parenting plan, if necessary, a plan negotiated by a mediator.

5.9 It is likely that both parties, now that they have heard the expert evidence to the effect that D would benefit from such an arrangement, will be willing to engage in such work. I am reassured in this conclusion by the evidence that both parties appear to have agreed the plans for birthdays and big events, despite their difficulties in communicating with each other.

6. The Views of the Child and the Effect of a Move to Ireland

6.1 Mr. Van Aswegen gave evidence in respect of D's views. He said that he had considered the question and concluded in his report, when D was considerably younger, that it was unlikely that D's views could be ascertained. He told me that this was still his opinion: D does not have the cognitive capacity to make a decision regarding his future on the basis of his developmental trajectory. He concluded that D had insufficient ability to work in sequential thought or to make logical determinations.

6.2 He added to this explanation, on the issue of D's condition, his being on the autistic spectrum with a potential intellectual disability, that it is more difficult to establish whether such a child's response is fully understood and is not determined by another driver, such as wishing to present positively with the individual who is asking the question. This meant, he explained, that even if D expressed a preference, given his cognitive level, he would not treat this as a considered, reflective decision. I accept these expert views as correct, given that there was no challenge to this evidence and no reason to doubt its reliability.

6.3 When asked in cross-examination about the effect of moving D away from his school and his friends, the expert replied that when making changes one has to take into account the child's capacity to adjust. He added: *"it is incumbent on parents to assist the child and support them as they adjust to a new environment. Whether a new school or community or country. Children with special needs profile have more of a challenge and the issues [are] more complex because you would have to have the therapeutic team's information being transferred from one country to another for consistency of care."*

6.4 As for D's response to such a move, Mr. Van Aswegen commented that it was difficult to know how he would react to living with his father full time, adding: *"by all reports it seems that he spends time with [his] father without showing signs of distress. This suggests that if he is placed here, he wouldn't be extremely distressed by the placement in itself."* He concluded: *"The very significant difficulty is if he is placed with a parent and there is no therapeutic team to scaffold the child. Without a therapeutic team in place, it will break down."*

6.5 This is strong evidence against the proposal that D should move to Ireland. Every expert agrees that the Applicant is a competent parent. Equally, the experts agree that the Respondent is competent. The difference is that she is currently supplying all his needs, including an appropriate regime of treatment. Insofar as the Applicant has challenged this regime, his own experts do not agree with his submissions to this effect.

6.6 Insofar as the Applicant has put forward specific therapies and diets, no expert has supported these proposals to the extent that they consider he must move to Ireland to benefit from them. On the contrary, the treatment arranged by the Respondent has been endorsed by both experts. The only country in which the child has a multi-disciplinary therapeutic team in place is Poland; he has no guarantee of continuity of treatment in Ireland.

6.7 While the Applicant may hold the sincere view that he has better treatment in mind for D than the therapies he currently receives, he has not produced

evidence that his plans would benefit D, nor has he proven that his proposals would be in D's best interests. Even if his proposed treatments and diet were more appropriate, and there is no such evidence, there is no evidence of an Irish team to replace the team working for D in Poland and this has been identified by the Applicant's own Irish expert as a probable barrier to a successful return to Ireland.

6.8 The inability of the parties to support one, stable, regime is actively harming their son. The treatment available in Poland has been endorsed by the experts, even those chosen by the Applicant, and he should now support D's treatment rather than countermanding or undermining these arrangements. This is not for the Respondent's sake, but for D's sake.

6.9 When asked about the prospect of moving back to Ireland, Mr. Van Aswegen took the view that it would probably not cause D "*extreme distress*." There is no reason to move a child unless it is in his best interests. This guarded view, that it would not be extremely distressing, confirms my conclusions in this regard.

6.10 It seems clear that, if not extremely distressing, it would probably be the cause of some pain or distress if the child was uprooted from his home of the past five years to make a more permanent home in Ireland and visit Poland only occasionally. While it is clear that D settles well with both parents when on holidays, or on returning home to Poland, this does not establish that there would be no distress caused to D by a move to Ireland, particularly if it meant that his primary carer would change.

6.11 Whatever the reason for it, the response is a guarded conclusion that the move would not cause *"extreme"* distress, and it stops short of offering the view that moving would not cause any distress to D. More importantly, this expert concludes that, without a team waiting to continue D's care, the placement would break down. This must cause concern to the Applicant as

it does to me; a breakdown of the placement would cause significant distress to both families, but primarily to D.

6.12 One point made by Dr. P was that D "*finds it very difficult to tolerate changes in routine*." Later in the same report, she comments, under the heading: *"Rigidity in behaviour - average score. No problems in this area. [D] does not have above-average difficulties in tolerating changes in his daily order and routine."* These conclusions contradict each other and there was little other evidence to shed light on the true position.

6.13 I did not hear evidence to reassure me that it would be in D's best interests to permanently change his primary carer or his home, even if he could visit his former home and former carer regularly. More importantly, and as already set out above, even if he could tolerate such a change, it would not be in his interests unless there was a team waiting to take over his care and aligned with the team in Poland. Even then, only comparable treatment would be available, not better treatment.

6.14 It should also be noted that while D does not yet speak in full sentences, the language in which he has communicated for most of his young life is Polish. While the experts did not express views in this regard, in that D can communicate with his family in both countries, whatever limited language skills he has are primarily in the Polish tongue. This much is conceded in written submissions by the Applicant. While the Applicant has the understandable hope that D will, someday, live independently, I did not understand any expert to endorse this view. That said, his best chances of flourishing will be facilitated by his remaining in the country where he speaks the native language.

7. **Conclusions**

7.1 The provisions of the Guardianship of Infants Act 1964 are set out above. Looking at these factors, it is clear that in most cases there is little to choose between D's life in Poland and his potential life in Ireland. Where there is any difference in the circumstances the child might enjoy in either country, without exception, the child's best interests lie in Poland. Both parents play a part in his life. There is no reason to expect this to change if D were living in Ireland. There are family members in both countries but his extended family, his mother, maternal siblings and grandparents are all in Poland, with only the Applicant's immediate family in Ireland. He speaks only Polish. His multi-disciplinary team is in Poland and there is no guarantee that he will be offered these services in Ireland, still less that a team would be in place immediately on his return.

7.2 D should continue to reside in Poland but the current access to the Applicant should continue. It is in all parties' interests that he spends time with his father and, primarily, this is in D's best interests.

7.3 This conclusion does not legalise what was an unlawful removal. This process is entirely separate from the initial application for a summary return under the Hague Convention. The hearing, as this judgment makes clear, involved detailed evidence as to D's current life in Poland and his prospective life in Ireland, his capacity and his relationships, in particular with his parents, and the ideal treatments for him. As outlined, the evidence establishes that he is happy and well cared for in Poland, where he speaks the language and where the majority of his extended family reside. My conclusion is that his best interests require that he remain in Poland, receiving treatment from a multi-disciplinary team which would not be immediately available in Ireland.

7.4 An important support for D is one which this Court cannot direct or enforce. This is to improve communication between these two parents. They are both concerned to do their best for their child. They can achieve this if they agree to a parenting plan, as a matter of urgency. The most damaging thing for D is to have parents pulling in different directions and therapies started in one country and ignored in another country. The expert evidence made this clear: both parents are arranging suitable therapies but, to be effective, the therapies must be consistent. The regime in Poland is appropriate and D would not make more significant progress if he moved here. Changing his regime is damaging to D. He needs the stability of an appropriate and structured regime, such as that in place in Poland. This regime should be supported, not undermined, by his family in Ireland. This can be done if therapeutic, medical and school reports are shared by the parties pursuant to a parenting plan, as a matter of routine.

7.5 The Court accepts the assurances given by the Respondent that she will continue to agree generous access for the Applicant. As a matter of common sense and given that both parents love their son and want him to thrive, if the Applicant does not launch new therapies which contravene D's current regime of treatment, there are unlikely to be obstacles to access. If the Respondent shares more information with him, the Applicant will have less reason to become frustrated and will be better able to continue D's care in Ireland in an appropriate way.

7.6 The Applicant was legally aided, and the Respondent represented herself. The issues arising were of importance to the family and any costs order could reduce the money available to the family for D's care and for family visits. The Court proposes making no order as to costs but will hear the parties on the issues of costs and any consequential orders arising out of the decision not to order D's return to Ireland.