



THE COURT OF APPEAL

APPROVED

**Record Number: 2024/49
High Court Record Number: 2023/30/HLC
Neutral Citation Number [2024] IECA 164**

Ní Raifeartaigh J.

Binchy J.

O' Moore J.

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT
OF CUSTODY ORDERS ACTS 1991
AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL
ASPECTS OF INTERNATIONAL CHILD ABDUCTION 1980
AND IN THE MATTER OF THE COUNCIL REGULATION (EU)
2019/1111
AND IN THE MATTER OF R & I MINORS**

BETWEEN/

JK

APPLICANT/ RESPONDENT

-AND-

LE

RESPONDENT/ APPELLANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 24th day of June, 2024

1. The appellant (“E”) and the respondent (“K”) have two daughters. For the purpose of this judgment the children will be referred to as Rachel and Isobel. E is the mother, and K is the father of the children. Rachel was born in May 2010. Iris was born in April 2012. E and K were divorced by order of a court in Sweden (where they both then lived) in May 2019. By order of another court, also in Sweden, the children were to reside with K, their father, but with E enjoying joint custody and “rights of contact”. The children were abducted by their mother in the Summer of 2023. By order of the 1st February 2024 the High Court (Gearty, J.) directed the return of Rachel and Isobel to the Jurisdiction of the Courts of Sweden “*unless agreed suitable living arrangements are arranged between the parties in Ireland...*” A stay was put on that order to allow such living arrangements to be agreed. At that time, there appeared to be some prospect of K, and therefore the children, moving to Ireland. Ultimately, no such agreement was reached. However, a stay on the order directing the return of the children to Sweden has continued pending the determination of E’s appeal to this Court. This is my judgment on that appeal. It is a dissenting judgment.

2. These proceedings should be seen in the context of earlier proceedings. The children had been abducted by E in 2022, and K had then also brought proceedings under the Hague Convention. In a judgment by the same High Court judge delivered on the 14th December 2022, the Court concluded (para 9.2):-

“The children were wrongfully abducted from Sweden, despite childcare proceedings which are ongoing in the relevant family courts. There having been insufficient evidence to establish a grave risk to the children or to conclude that they will be in an intolerable situation should they be returned, the Court is not required to consider the exercise of its discretion in this regard.”

3. The High Court then proceeded to make an order directing the return of Rachel and Isobel to their father in Sweden. In that earlier claim, the main argument raised by E in resisting the order for returning the children was that there was a grave risk to Rachel and Isobel should they be returned. At para 5.1 of her judgement in the first set of proceedings, the trial Judge noted that :-

“The parties have separated and proceedings in relation to the divorce and custody of the children are ongoing in Sweden. They have lived as a family since the children were born until the relationship ended, since which time the parents have had shared custody of the girls. There is no issue about the habitual residence of the children, who have lived in Sweden for a number of years. While both parents have family links with Ireland, the children only lived here at a time when they were very young. There is no issue in respect of exercise of custody; the Applicant was clearly exercising this right in respect of both girls”.

4. The judgment in the earlier proceeding, which bears the neutral citation [2022] IEHC 733, does not appear to have been appealed by E. The children were returned to Sweden in accordance with this order.

5. In the current proceedings, a number of what might be described as technical affidavits were sworn by the solicitor for K. A very lengthy affidavit was then sworn by E, resisting the application that the children be returned to Sweden. That affidavit runs to 92 paragraphs spread over 52 pages. In response, K swore an affidavit which is 38 pages in length, running to 112 paragraphs.

6. I have carefully considered all of the evidence in the affidavits put before the Court. It is with some regret that I have to note that the affidavits of E and K do not confine themselves

to evidence, but occasionally descend to ventilating their feelings about each other. One example, from the affidavit of E, is sufficient to illustrate this point. At para 4, she states:-

“I say that Applicant does not consider our daughters and their manifest wishes, only his own agenda. I say I will demonstrate that this is an actual fact about [one town in Ireland] versus [another town in Ireland], throughout this affidavit. I say this is a lengthy affidavit, to put into the record the full context and the reasons for the applicant’s legal application and his intransigence and refusal to compromise or stick to his word and moral obligations. His behaviour in refusing to compromise is set in Roman concrete. The type of concrete that grows stronger in sea water, not weaker.”

7. It is difficult to believe that the expression of feelings such as this is of any assistance to either Rachel or Isobel or to these proceedings. In certain places, too, the affidavit of K is emotional and argumentative. It is difficult, for example, to know what to make of the averment at para 82:-

“The respondent does not know what she wants and will not be happy until she gets it.”

8. One thing that is very evident from the affidavit is the chronic level of attrition between K and E. It is clear from the trial judge’s judgment that this factor was one which she fully took into account in the decision which she reached.

9. In addition to the aspects of the affidavits of K and E to which I have just referred, another feature of the evidence before the High Court judge is the attempt by E to resist the order sought by K on grounds which were utterly without foundation and inappropriate. For example, she made averments (at para 6 and 7 of her affidavit) seeking to cast doubt on the

original birth certificates of Rachel and Isobel and on her own original marriage certificate (all of which were exhibited by K's solicitor). It was neither helpful or realistic of E to seek to resist an order for the return of the children on the grounds that she disputed the veracity of her marriage certificate or, indeed, disputed the veracity of the birth certificates of her own children. This is particularly the case in circumstances where these issues had never been disputed in the earlier proceedings.

10. She also swore (at para 8 of her affidavit) that: -

“I say that the marriage may not be a valid marriage.”

E then sought to resist the making of an order directing the return of the children to Sweden on the grounds that her marriage was not a valid one, and that Rachel and Isobel were, to use her own language, “*born out of wedlock ...*”; para 8 of E's affidavit. On that basis, E argued that she should have sole custody of each of the children. In making this argument, she purported to give evidence of Austrian law.

11. The High Court judgment runs to 49 pages. The notice of appeal is particularly lengthy; there are 50 distinct grounds of appeal, many of which have sub grounds. In addition, in response to the standard questions in any notice of appeal as to whether a declaration of unconstitutionality was being sought, or a declaration of incompatibility with the European Convention on Human Rights was being sought, E appears to answer positively and, in respect of the European Convention on Human Rights, at some length. However, as was the case in the High Court these arguments were not seriously advanced on appeal.

12. E very helpfully in her written submissions confined the scope the appeal to three topics. They are as follows: -

- (a) Habitual residence;
- (b) Grave risk to the children;
- (c) The wishes of the children, and the voice of the children.

At the outset of the appeal hearing, E was addressed by the Court in these terms:-

“ Just to say to you that the three judges on this Court – I mean, unfortunately we have never seen a notice of appeal between us as long as the one that you put in. And we thought it only fair to explain to you at the outset that the purpose of an appeal is to review how the High Court approaches things in general, that you need to focus on specific and fundamental errors that she made in her judgment. The notice of appeal seems to be more in the nature of a line-by-line listing in our view, of all the ways she went wrong. But there needs to be a focus, and obviously the time constraint is going to dictate that. There needs to be a focus on what you say are the fundamental errors... do you understand all of that”.

13. E’s response was that she understood the approach to be taken in conducting and deciding the appeal. In opening K’s response to the appeal, his counsel identified the three issues which I have just listed as being the only three issues in the appeal. At no stage did E dispute this.

14. In any event, having considered the written and oral submissions of E, there is no doubt that the three issues which I have set out at para 12 of this judgment are the matters which this Court has to decide. That is notwithstanding the range of arguments raised at an earlier stage.

15. Before considering any of the three issues making up the appeal, I should set out my approach towards the standard of review which applies in this case. Counsel for K submitted

that the court should follow the judgment of Murray J. in this Court in *AK v US* (2022) IECA 65, which itself was a decision in respect of habitual residence. At para 45 of his judgment, Murray J. observes:-

“45. The decision of a court of first instance as to the habitual residence of a child may –depending upon the case –be based upon the resolution of issues of law, findings of primary fact and/or inferences drawn from those findings of fact. In what should be a minority of such cases (and this is one) the findings of fact may be dependent upon the resolution of conflicting oral evidence, but in most cases they will involve determinations of fact based upon affidavit or documentary evidence and the application of the facts so found to the clearly established meaning of ‘*habitual residence*’.”

“46. Differing standards of appellate review fall to be applied to these different categories of finding. For this reason, the description of the issue of where a child is habitually resident for the purposes of the Convention as one of fact can confuse, as it risks the elision of the different standards of review that must be applied to distinct components of a trial court’s answer to that question in a given case.”

16. In the proceedings giving rise to the current appeal, there was no oral evidence placed before the High Court. Murray J. went on (para. 51 and following): -

“51. The third category is an intermediate one, and it is the standard of review under this heading that is most engaged in this case, as it will be in most cases of this kind. It arises where the appellate court is addressing alleged errors by a trial judge in inter alia (a) the findings he or she has based on affidavit or documentary evidence alone ... or (b) where the court is reviewing secondary findings of fact that are not dependent on oral evidence such as inferences from admitted facts or those proven

otherwise than by way of oral testimony Here the standard of appellate review is ‘somewhat deferential’ ... Henchy J. explained the position in *Northern Bank Finance v. Charlton* [1979] IR 149 at p.192:

‘If the question of fact that was answered in the court of trial does not depend on a choice of alternatives arising out of divergent oral testimony, but amounts to a conclusion in the nature of an evaluation of proved or admitted facts, the court of appeal will consider itself free to rely on its own judgment as to whether the evaluation made by the tribunal of fact is correct or not...’”

“52. As explained in *Ryanair Ltd. v. Billigfluege.de GmbH*, in cases of this kind the party appealing the decision bears the burden of demonstrating that the trial judge was incorrect in relation to the findings of fact which underpinned the decision so that *‘the appellant must establish an error in those findings that is such as to render the decision untenable’*” (per Charleton J. at para. 5). Charleton J. explained this further in *McDonagh v. Sunday Newspapers Ltd.* (at para. 163) as follows:

“... the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.”

“53. It follows that in cases to which this standard applies the appellate court is free to correct errors of fact as well as of law, and mistaken inference as well as erroneous application of principle. It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible

evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect. ... It is, in particular, the standard to be applied where the issue is whether the combination of a set of primary facts that are either agreed or deduced from affidavit or documentary evidence result in the conclusion that the child is or is not habitually resident in a particular place.”

17. It was submitted by counsel for K that this was the standard of review to apply not just to the issue of habitual residence but to all three issues in the appeal. There was no submission to the contrary made by E, notwithstanding the fact that the lengthy excerpts from the judgment of Murray J. in *AK v US* were set out in the written submissions of K’s counsel, delivered in advance of the appeal hearing. The absence of any contrary submission does not of course mean that the argument made on behalf of K on this point is correct. Having considered the submission, I have come to the view that the appropriate way to approach the habitual residence issue, and the second issue of risk of grave harm/intolerable situation, is as set out by Murray J. These are both factual matters. I therefore propose to begin my analysis of both of these issues with the “*firm assumption*” that the trial judge is correct in the findings made or inferences drawn, and interfering with these conclusions only where I am satisfied that the judge has clearly erred in a material respect in making such findings or drawing such inferences. I should make it plain that this deference is afforded the trial judge only in respect of factual matters. No such deference is to be afforded the trial judge on questions of law. The question of habitual residence is, of course, a question of fact: see, for example, Whelan, J. in *LO v MO* [2024] IECA 39, para. 56.

18. The relevant Swedish Court order was made on 25th May 2022, and is referred to as the Umgänge. This order is addressed to E and K, both of whom are stated to reside in Sweden. E and K are, on foot of the judgment, to continue to have joint custody of Rachel and Isobel. Importantly, it is provided that:-

“[Rachel] and [Isobel] should continue to live with [K].”

19. The judgment then provides for “*rights of contact*” permitting Rachel and Isobel to visit E, and to stay with E over certain holiday periods.

20. There is a separate provision to the effect that, in respect to some of the contact between the children and E, K “*shall hand over the children to and retrieve the children from E at [a named] Airport*”; point 5 of the judgment.

21. As already noted, in her judgment in the first set of proceedings Gearty J. recorded the fact that there was “*no issue*” about the fact that the habitual residence of the children was Sweden.

22. The question for the High Court in the current proceedings, therefore, was whether or not the habitual residence of the two girls had changed. Both before the High Court, and this Court, E relied upon a decision of Douglas Brown J. in the Family Division of the High Court in England and Wales. In that judgment, entitled *Re V.* [1995] 2 FLR 992 the Court decided that “*habitual residence can be lost in a single day ...*”. However, upon closer inspection this decision does not assist E in the argument which she makes.

23. *Re V.* was the case concerning two children, whose father was Greek and lived in Corfu and whose mother was English and lived in London. The children were very young at the time of the judgment. The father sought an order seeking the return of the two children to Greece. The application was resisted by the mother.

24. In his judgment, Douglas Brown J. referred to the earlier judgment of Waite J. in *Re B.* (1993) 1 FLR 993, summarising the principles as to habitual residence as follows: -

“1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration.

All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

*3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in *Re J ...* refrained, no doubt advisedly, from giving any indication as to what an "appreciable period" would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in *Re F (A Minor) (Child Abduction)* [1992] 1 FLR 548 the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country.”*

25. Having quoted this summary of the applicable principles, Douglas Brown J. went on to note that:-

“It is possible (and this was accepted by [counsel for the father]) for habitual residence to change periodically if that is the intended regular order of life for the parents and the children. There obviously would not in those circumstances be habitual residence in more than one place at the same time. I have considered the older cases cited and the dicta of the President in *V v B* ... and, of course, there are strong similarities between the concept of habitual residence and that of ordinary residence. However, concurrent habitual residence does not fit easily into the aims of the Convention.”

26. Having note of the preamble of the Convention, the judge concluded: -

“In my view there is, to use the phrase found in many of the habitual residence cases, a sufficient degree of continuity in the residence in London for habitual residence on the part of the parents to arise and an equally sufficient degree of continuity in their residence in Corfu for the same result to arise.”

27. The facts of *Re V*. were unusual, but at their height they involved the shifting of habitual residence where such an arrangement had been agreed between the parents. Of course, where there is such clear intention on the part of the parents then habitual residence can change at speed, even in the course of “*a single day*” as Waite J. observed in *Re B*. However, the facts of the current case are very different.

28. In her judgment, the trial judge considered the question of habitual residence at section 7. She began, correctly, with a proposition that habitual residence was a question of fact. She then considered the judgment of Whelan J. in *Hampshire County Council v CE and NE*

(2020) IECA 100, and in particular paragraph 77 of that judgment which sets out the “*non exhaustive list of factors identifying where a child is habitually resident ...*” (see para 7.1 of the judgment of Gearty J).

29. The trial judge then proceeded to make a finding that the habitual residence of Rachel and Isobel had not changed. She found that there was no agreement to move permanently to Ireland. At no stage had the girls been told that they were to settle in Ireland permanently; on this issue, the trial judge referred to the reports of the independent assessor, to which I will return in the context of the wishes of the children.

30. In response to the reliance of E on the judgment in *Re V.*, the trial judge correctly observed (at para. 7.3):-

“The Respondent submitted that habitual residence can be changed in a day, which is the case. But this has occurred in families where there was unequivocal consent, at least initially, and where the children were either so young as to immediately adopt the habitual residence of their primary carer or where they were old enough to understand that they were moving permanently. None of these factors arises in this case. The girls are old enough to understand that. As one child told the Assessor in January 2024, “she wished to go home but ... she did not know where home was.” This is the antithesis of settling into a new country and mirrors what is set out in the parties’ exchanges throughout 2023: a failure to settle on a plan.”

31. The trial judge then went on to set out further evidence showing that there was no consent to change of habitual residence. These included contemporaneous messages by E making it clear that there was no such consent to a move to a particular town in Ireland, the forging of K’s signature in order to facilitate the enrolment of the girls in particular schools, and “*messages referring (K) to the GDPR consequences to revealing basic information*

about his children ...” which the trial judge found created an impression that E had “acted in defiance of a joint plan and not in furtherance of that plan.”

32. I have earlier referred to the provision in the Umgänge to the effect that the two children were to be handed over and collected by K at a named airport in Sweden, in order to facilitate certain “*cases of contact*” with E. In respect of one such collection of the children by K, the trial judge made the following findings (at para. 5.4): -

“5.4 In June and July of 2023, as is outlined in more detail elsewhere, the plan to move to Ireland fell through. The Applicant was in Ireland at that time, as was the Respondent with the two girls. When the Applicant had decided that a permanent move to Ireland was no longer feasible, the Respondent insisted that the handover in July happen in [the named airport], although all parties were in Ireland. She travelled to that airport, ostensibly to hand over the girls, and then travelled back to Ireland. The Applicant did not follow to meet the girls at the airport with their mother.”

33. This extraordinary episode formed the basis of an argument made by E that K had forfeited his custody rights as he did not attend the airport in question for the formal handover. It is unnecessary, for the purpose of this judgment, to comment further on the peculiar behaviour of E in refusing to hand over her daughter in Ireland, and instead bringing them to an airport in Sweden in order to hand them over to their father, who was not in Sweden at all. In deciding on the issue of habitual residence, the trial judge referred to this episode not for the purpose of criticising E but rather to make the following finding at para 7.5: -

“Her own actions contradict her argument that this family had moved to Ireland as their habitual residence from the 12th of June. Her messages confirm that she and

the girls knew that talks were ongoing and that the return to Ireland was temporary unless their plans worked out. Their plans did not work out.”

34. Accordingly the trial judge found, as a fact, that the children remained habitually resident in Sweden at the date of their abduction. In her written submissions, E is critical of the trial judge in not taking into account the degree of continuity of E’s ordinary and habitual residence in Ireland. However, E was resident in Ireland at the time of the first proceedings. Despite this, it was not disputed by E in the first case that the children were at that time habitually resident in Sweden. In any event, even if that were not the case it is the habitual residence of the children which is at issue here. In that regard, E goes onto say that the trial judge fell into error in that she did not consider “*the pattern of the children’s days with the respondent at her residence in Ireland ...*”; para 35 of the written submissions. As is plain from *Re V.*, as is submitted by counsel for K and conceded by E, the concept of “*concurrent habitual residence does not fit easily into the aims of the Convention.*” However, in as much as the children were resident in Ireland during the summer of 2023, and even if (as E argues) this was extended from a period of 5 weeks to a period of 11 weeks as K wanted to meet his children in Ireland during that holiday period, this does not mean that at the time the children were abducted by E their habitual residence had switched to Ireland. The trial judge’s reasoning in that regard is unimpeachable. I am not satisfied the judge has erred at all in her findings with regard to habitual residence, let alone that she has “*clearly erred ... in a material respect*” to repeat the standard set up by Murray J. in *AK v US*. I would therefore dismiss this ground of appeal.

(b) Grave risk.

35. Counsel for K made two preliminary submissions on this point. Firstly, it is argued that the onus lies on E to establish that a grave risk of harm or an otherwise intolerable

situation exists. In that regard, counsel refer to the judgment of Fennelly J. in *PL v EC* (2009) 1 IR 1, from para. 55 onwards. The relevant portion of the judgment of Fennelly J. reads:-

“55. 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.

56. In her judgment of in *AS v PS (Child Abduction)* [1998] 2 IR 244, Denham J. cited from a judgment of Hale J. She said, page 261: -

‘The underlying philosophy of the Convention and the heavy burden required to be proved to meet article 13(b) was set out in Re HB (Abduction: Children's Objections) [1997]1 FLR 392. Hale J held that since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be decided by the appropriate authorities there, it followed that article 13(b) carried a heavy burden of

satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned.”

36. Fennelly J. then went on to note fact that, in the same judgment, Denham J. had referred with approval to a judgment of Wall J. in *Re. K (Abduction: Child's Objections)* [1995] 1 FLR 977 in the following terms:-

“The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course, to be equated with consideration of the paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future speedily to be decided in that jurisdiction.”

37. Finally, at para. 58 of his judgment, Fennelly J. referred to the judgment of the United States Court of Appeals Sixth Circuit in *Friedrick v Friedrich* [1996] 78F 3d 1060;

“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.”

38. The judgment of the United States Court of Appeals was itself quoted with approval, as Fennelly J. notes, by Barron J. in *RK v JK (Child Abduction: Acquiescence)* [2000] 2 IR 416, at 451.

39. The role that the court in the country of habitual residence may play leads to the second legal proposition put forward by counsel for K. It is to be found in the judgment of Finlay Geoghegan J. in *R v R* (2015) IECA 265 at para. 40 as follows: -

“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: AS v PS... 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 ...”

40. I accept both of these propositions, on the basis of the authorities cited. Neither proposition was seriously contested by E. The burden placed on E on establishing grave risk was accepted by the trial judge at paras. 8.2 and 8.3 of the judgment, in the course of which she expressly referred to the judgment of Fennelly J. in *AS v PS*.

41. In considering this issue, the trial judge noted that the defence of grave risk had been argued in the earlier proceedings. She noted that there had been *“a modest change in the circumstances of the children since then.”* However, the trial judge concluded that the unhappiness on the part of Rachel, and in particular the risk of self-harm, appeared *“to relate*

as much to her parent's conflict as to the country of which she is living." In support of this conclusion, the trial judge quoted from the report of Mr. Aswegen, the Assessor, to which I will shortly turn.

42. On the question of supports available in Sweden, the trial judge found (at para. 8.5) that:-

"... any risk that presents for Rachel can be met by the relevant professionals in Sweden. It is difficult to change my view on this issue given the resources still available to Rachel there."

43. The trial judge then found that there was no evidence "*at all*" with regard to the treatment being afforded to Rachel in Ireland. She concluded: -

"Despite my concerns for this child, to refuse to return a child requires a finding that the perceived risk cannot be accommodated by the country in which she is habitually resident."

The trial judge found that it was not open to her to make such a finding.

44. The trial judge summarised the position as follows, at para 8.7: -

"For many of the reasons set out in the first judgment, including that those findings appear to have been borne out by events since then, the Respondent has not proven that there is a grave risk to either child which cannot be met in Sweden if the children are returned there. The risk that persists in respect of Rachel emanates, in part, from the Respondent and this is noted by the Assessor who comments on Rachel's history of self-harming, her low motivation to engage with services and the inability of her parents to allow adult matters to remain in the adult domain. I repeat my concern that

the latest reference to such self-harm was as late as April 33 or May of 2023 and thus at a time when Rachel knew that her parents were actively considering a move to Ireland, long before talks broke down completely in July.”

It is clear from this last portion of para. 8.5 that the differences between K and E, and the exposure of the children to these disputes, were what the trial judge felt had led to the most recent distressing episode with regard to Rachel. It was not an episode which arose from her being resident in Sweden.

45. In her written submissions, E refers to grave risk on a number of occasions. At para. 17, E states: -

“17. The Court erred in failing to consider the evidence regarding the future of Rachel’s education, and how it may draw to an abrupt conclusion on the 15th May 2026 if she is returned to Sweden. This will place Rachel in an intolerable situation where her future potential as a human being will be stifled and suffocated by her return.”

46. This submission relates to an assertion by E that Rachel will be free to leave Sweden on her 16th birthday, and this will result both in her leaving education at an early age and, indeed, Isobel doing the same when she reaches the age of sixteen on the 14th April 2028. This presupposes, of course, that Rachel and Isobel will be of the same view about remaining in Sweden when they reach the age of sixteen. There is no reason to believe that there will not be schooling available to them at the age of sixteen in Sweden, should they wish to continue in education at that time. Equally, while E refers to the possibility that either Rachel or Isobel will not be able to access education in Ireland when they reach the age of sixteen there is no evidential basis for believing that this is a real possibility. Certainly, the heavy burden placed upon E to establish such a potential situation has not been discharged. Even

if neither of these fundamental obstacles existed to these arguments made by E, there would remain the question as to whether or not a possible disruption to a child's education caused by the child's own decision at the age of sixteen not to continue at school in their country of habitual residence could possibly constitute either a grave risk or an intolerable situation as contemplated by article 13 of the Convention. While it is not necessary to decide this issue, my provisional view is that it would not.

47. At para. 18 of the written submission, E refers to an assertion that Rachel's school in Sweden refused to inform E about Rachel running away from the school and having the police looking for her. Having regard to the authorities, I do not think that this is the sort of grave risk contemplated by article 13.

48. Finally, at para. 28 of her written submissions E maintains that:-

“The court must consider what a child finds intolerable, and not what it would find intolerable. There objections made out. Therefore, returning them is intolerable to them”.

This objection is one best considered in the context of the child's wishes, and the voice of the child. This part of the appeal will be addressed in the next portion of this judgment. However, in that context it is clear from the authorities that the views of the child are not “*always determinative or even presumptively so*”; Hale J. in *Re M* (abduction: rights of custody) [2007] UK HL 55, as approved by Denham C J. in *AU v TNU* [2011] 3 IR 683. The argument made by E, namely that it is not reasonable to expect children to tolerate being returned to a country to which they object being returned, and that therefore the children should not be returned a country under those circumstances, effectively gives children a right of veto their return. That is not the law. Were this the case, it would transform the ‘grave risk’ defence – which requires the application of an objective test – into a defence governed

by the subjective views of the child. In any event, I will now turn to the oral submissions of E on the issue of grave harm.

49. In her oral submissions, E again referred to the question of grave risk of harm or an otherwise intolerable situation. At the outset, there was what E referred to as the theme of Rachel being bullied in school, the delay in diagnosing her dyslexia, and the treatment available in Ireland as opposed to in Sweden to deal with that condition. Specifically, E referred to a report from Swedish social services from 2020, which recalls Rachel saying that E does not like Sweden, that she (Rachel) *“has a hard time at school”*. Rachel recorded that she was alone at recess, felt left out, and wanted to change schools. The report also records Rachel as saying that she misses the family living together, that she does not like living in Sweden, and wants to live in Ireland, misses her mother and wants to live with her. It also records Rachel as saying that it *“doesn’t feel very good”* not to have seen her grandparents and cousins in Ireland for a considerable time. The report goes on to describe an interview with K, in which he said that Rachel was *“withdrawn”* and that there had been problems at school *“based on [Rachel] seeking attention.”* K. has also noted as stated that E thinks that Rachel has learning difficulties, and that she is bullied; according to K, however, the teachers say otherwise and this creates difficulties for Rachel when she receives conflicting messages from father, school and mother. E also referred to a portion of the same report in which E herself stated that Rachel had had a hard time in school, and had previously been bullied, but had switched to the same school as Isobel and *“things have improved there.”*

50. While E also referred to the sections of the 2020 report which, she claimed, showed K being untruthful about her, I do not intend to go into that submission as it does not assist the

court in determining whether or not there is a grave risk should either girl be returned to Sweden.

51. E was very critical of the trial judge in that she had failed to refer to these reports. E stated: -

“And I don’t believe that Justice Gearty read these reports because she has not mentioned them, to the best of my reading, in her judgment.”

52. Having referred to a further section of the report, concerning Isobel, E stated: -

“This ... I think, is extremely important and does not mention anywhere in either judgment in either year.”

53. The fact that these reports were not mentioned expressly by the trial judge in the judgment does not mean that they were not considered by her. In any event, even taken at their height they do not suggest that there is any grave risk of the type contemplated by the Convention awaiting Rachel or Isobel should they return to Sweden. The reports do sustain Rachel’s view that she does not want to be returned to Sweden, but the more important analysis of that view is to be found in the Assessor’s report. I say this for two reasons. Firstly, the Assessor’s report is a 2024 report as opposed to the 2020 reports which were prepared when the children were significantly younger. Secondly, the Assessor’s reports are more focused on the precise reasons for the children objecting to return to Sweden than the 2020 reports are.

54. In her oral submissions, E submitted (at p. 13 of the Transcript) the following: -

“[Rachel’s] dyslexia has not been addressed in Sweden in the same as it was being addressed - as it is now being addressed in Ireland. [Rachel] has five resource classes

each week. She is thriving in school. Doing really well. In Sweden she had no allocated resource classes. A teacher would occasionally come into the classroom, but it was not a set pattern. She was given a pen to record classes, but she was not given any assistance in things like SNIP programmes Rachel also has synaesthesia. So, she sees letters as colours as she uses numbers as colours and when she is listening to music, she sees colours. She describes people's names as appearing in colours. It's a very interesting neurological pattern when two parts of your brain are stimulated and..."

55. When asked by the Court if any of this was in evidence, E replied: -

"I did mention dyslexia and it was also in evidence on her application that it was reported she was dyslexic."

56. However, the comparison between the facilities available to help Rachel in Ireland as opposed to in Sweden does not appear to have been put in evidence and it was impossible therefore for the trial judge (or this court) to have regard to these alleged differences. In any event, the court is entitled to act on the basis, as set out by Finlay Geoghegan J. and noted in paragraph 41 of this judgment, that a condition such as dyslexia will be properly catered for in the education and health systems of Sweden, an EU country.

57. E made submissions about Rachel cutting herself. In that regard, E had not seen the report of the Assessor (though she said that it had been read to her). On this issue, and indeed on the whole question of grave risk, I have had regard to the two reports of the same Assessor, which have been made available to us. The first report was prepared in the context of the first set of proceedings, and bears the date of the 24th November, 2022. The second report, prepared on the 10th January, 2024, relates to the current proceedings.

58. On the question of self-harm, in the more recent report the Assessor says: -

“[Rachel] advised that she harboured feelings of anger and regularly experienced thoughts that she wished to die, adding *‘If I was holding a knife, what would I do with it? Stab myself? I speak to mum about it. I told dad and he doesn’t seem to care. Does not think I am serious, but I was cutting myself.’* Rachel stated that she believed that neither of her parents were listening to her plight and, instead spent their time arguing. Rachel stated she had previously also self-harmed by banging her head against a wall and burning herself with a lighter. Rachel advised that she had last cut herself in April or May 2023.”

59. This part of the Assessor’s report vividly shows the distress that Rachel is in. It makes very troubling reading. Quite independently of the contents of the judgment of Gearty J., and having considered the Assessor’s report in some detail, I think that Rachel’s tendency to self-harm is produced not by her living in Sweden but rather because of her unhappiness at the conflict between her parents, and the break up of the family that this has caused. As the trial judge observed, Rachel last cut herself in April or May, which is a time when it looked as though she and her sister might be returning to Ireland, and that the entire family would at least be living in the same country. That consideration is not definitive, but it does support the conclusion that E has not shown that self-harm to Rachel is likely to occur because she returns to Sweden. As the trial judge recognised, the risk of self-harm exists no matter what country Rachel is in. That is why the assessor *“strongly advised that Tusla maintain an active involvement with this family...”* even if Rachel were to remain in Ireland, with her mother and sister.

60. The emphasis, both in the submissions of E and in the analysis in the High Court, has focused on Rachel. No doubt that this is, at least in part, because of the potential for Rachel

to harm herself. Thankfully, there is no such indication with regard to Isobel. There is no real reason to believe that Isobel will find herself in an intolerable situation should she return to Sweden, or that there is any grave risk with regard to her physical or psychological wellbeing.

61. Were I to approach this issue on the basis set out by Murray J. in *AO v US*, I would not find any suitably significant error on the part of the trial judge in considering the question of grave risk or intolerable situation. However, even approaching it afresh (and without giving to the trial judge's analysis the limited deference referred to by Murray J.), I would similarly conclude that E has not discharged the burden on her to establish that there is a grave risk facing the children should they be returned to Sweden. That is particularly so in light of the fact that with regard to the education of the children, the tendency of Rachel to self-harm, and the provision of appropriate supports to the family, there is no reason to believe that the facilities available in Sweden will be any less effective than those available in Ireland.

(c) The wishes of the children/voice of the child

62. At the outset, I should address the possibility that only one of the two girls would be returned to Sweden. Both parents were asked at the appeal hearing whether the return of one girl and not the other was something that should be considered by this court. Both E and counsel for K could not have been plainer. E stated (at p. 69 of the Transcript) that: -

“It would, in my opinion, it would cause an irretrievable or irrevocable chasm between them, and it would lead to huge issues... if they were separated.”

63. Once E had stated her position, counsel for K was invited to take instructions from his client. That was done, in open court. Understandably, and helpfully, K's position on this point was exactly the same as that of E.

64. For the sake of completeness, I should say that I agree that a further fracturing of the family unit would appear to be quite undesirable. Both Rachel and Isobel have clearly been seriously adversely affected by the fact that their parents are constantly at war. Loosening the bond between the two girls by returning one but not the other to Sweden would, in my view, be very damaging to two children who have already seen enough disruption in their lives.

65. The appeal on this issue is not an appeal against a finding of fact by the trial judge. It is, instead, an appeal against the exercise by the High Court of its discretion to return the children, notwithstanding any objections that they may have. As such, it is not sufficient that this Court would have come to a different view as to how this discretion is to be exercised. This court will exercise a discretion, or remit the matter back to the High Court, if it is satisfied that the discretion of the High Court has not been properly exercised. The grounds of appeal emphasise factors allegedly not taken into account by the trial judge which vitiate the decision which the High Court made. In particular, it is submitted by E that the High Court did not take into account the views of the children, did not sufficiently take into account those views, gave excessive weight to the aims of the Convention (in particular the swift return of abducted children) and overemphasised the friction between K and E. This is a broad summary of the submissions made, both in writing and orally, by E. on this issue. I have carefully considered all of these arguments advanced by E.

66. Before dealing with the meat of this issue, I shall deal with the subsidiary issue raised by E on appeal under the heading “Childrens’ Voice”. In this passage in her written submission (paras. 38 - 42 inclusive) E appears to argue that separate representation should have been afforded to Rachel and to Isobel for the purpose of these proceedings. I am conscious of the fact that, in *MS v AR* [2019] IESC 10, Finlay Geoghegan J. emphasised the

need, in proceedings such as this, to hear from the child. At para. 60 of that judgment she said: -

“60. Where, as here, the application for return is from a Member State of the EU, the court is obliged, pursuant to Art. 11 of the Regulation, to give a child an opportunity to be heard during the proceedings ‘unless this appears inappropriate having regard to his or her age or degree or maturity’. Where evidence is put before a trial court that a child objects to return, then the judge should immediately consider whether that evidence is sufficient to enable the court to determine the issue of the child’s objections. If not, it should take appropriate steps to enable appropriate evidence be obtained and given to enable the court decide all relevant issues. Such proceedings are not purely *inter partes* adversarial proceedings between the parents. The court owes a duty to the children who are the object of the application to hear the children and potentially to take into account their views subject to age and maturity.”

67. Finlay Geoghegan J. then goes on to refer to the three stage approach, which I will set out at paragraph 73 et seq of this judgment.

68. In this case, even on appeal, the position taken by E. with regard to any further information to be provided by children is tentative, to say the least. Paragraph 38 of her written submission reads: -

“38. The views of the children were represented in the report of Dr. Van Aswegen. However, not everything he said was recorded, Rachel spoke to Dr. Van Aswegen for 80 minutes and Isobel for 50. It is perhaps to a child’s disadvantage that there is no recording of an interview or a translated account of an interview available to the

Court in addition to the written report. The court can't listen to what was said, or the tone of voice used from expressing views.”

69. However, notwithstanding her contact with Rachel and Isobel, E does not indicate (even in the most general of terms) what further information or opinion she believes either child might have been able to give to the High Court. While E has not got a copy of the Assessor's report, she has had it read to her. As will be seen, the views of the children are set out with great clarity by the Assessor, often using verbatim the words of the relevant child.

70. On the facts of this case, no convincing reasons were provided by E as to why the High Court should have heard directly from Rachel or from Isobel. On E's second point, the Assessor appears to have communicated faithfully the views of Rachel and Isobel.

71. In considering the wishes of the children, the approach to be taken has been comprehensibly described by Denham CJ. in *AU v TNU* [2011] IESC 391. In setting out the law, Denham CJ began by reciting the terms of Art. 13 of the Hague Convention and emphasising the following provision: -

“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 obtained an age and degree of maturity at which it is appropriate to take account of its views.”

72. Denham CJ then went on to refer to the judgment of Baroness Hale in *Re D (a Child) Abduction: Rights of Custody* [2007] 1 AC 619 at para. 57: -

“But there is now a growing understanding of the importance of listening to the children involved in children cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand

that they often have a point of view which is quite distinct from of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adult may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parent's views."

73. In the final section of the judgment, headed "*Decision*", Denham CJ firstly stated (at paras. 27 and 28) that: -

"27. A Court in deciding whether a child objects to his return shall have regard to the totality of the evidence.

28. The range of considerations may be wide. As was stated in *RM (Abduction: Zimbabwe)* [2008] 1 AC 1288 at paragraph 46:

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

the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.'

I agree with this analysis.”

74. Denham CJ concluded: -

“35. The Hague Convention provides that in normal circumstances children should be returned after a wrongful removal to the country of their habitual residence. This fundamental principle is in the best interests of the children and is applied generally.

36. It is also the case that in interpreting and applying Article 13 of the Convention the Court should not likely exercise a discretion to refuse to return a child to his or her country of habitual residence as that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country. Furthermore those Courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance. However, as already pointed out, the Court has discretion pursuant to Article 13(b) in having regard to objections of a child to being returned to his or her country of habitual residence, as outlined above. The circumstances in which children will not be returned are exceptional. As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the Court may take account of information provided to it from a competent authority concerning the child's social background. As I have pointed out in the case of *RM (Abduction: Zimbabwe)* 1 AC 1288 the extent to which the child's objections

'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant...

37. The balance between the policy of summary return and the operation of the exception may alter with time. In this case the children have been in Ireland for a considerable time. I would endorse the acknowledgement of Baroness Hale in *Re M.* [2008] 1 AC 1288 where she states at paragraph 43:

'But the further away one gets from the speedy remedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'

A Court should at all times seek to expedite cases arising under the Hague Convention, but circumstances which as have arisen in this case are the exception.”

75. As recently as August 2022, the judgment of Denham CJ in *AU v TNU* was described in this court as authoritative: see para. 92 and following in the judgment of Donnelly J. in *DM v VK* (2022) IECA 207. In that judgment, Donnelly J. explained the reference to “*exceptional*” in the judgment of Denham CJ in the earlier decision. At para. 102, Donnelly J. held: -

“I am not persuaded that the trial judge in the instant case was inserting a test of exceptionality as such into a requirement for the exercise of a discretion to refuse return. She was merely pointing out that a refusal is an exception to the general rule that children who are wrongfully removed must be summarily returned to the country of their habitual residence; she was not adding an *'additional gloss'* to use the language of Baroness Hale.”

76. In her submissions, E has consistently referred to the current situation being an exceptional case. I respectfully agree with the view of Donnelly J. that there is no test of “*exceptionality*” in these cases.

77. Donnelly J. stressed the following: -

“As Denham CJ stated in *AU v TNU*:

‘The policy of the Convention should be viewed in the context of the totality of the evidence and of the best interests of the children.’

(Emphasis added)”

78. While the sentence in the judgment of Denham CJ must be seen in its proper context, it is helpful guidance as to how both the High Court and this court should approach the exercise of discretion in this case.

79. I will now consider the High Court judgment. At paras. 9.1 to 9.5 inclusive, the trial judge refers to the judgments of Denham CJ in *AU v TNU*, of Whelan J. in *JV v QI* [2020] IECA 302, the judgment of Donnelly J. in *DMV v K*, and the judgment of Finlay Geoghegan J. in *MS v AR*.

80. It is also clear from the judgment that the trial judge has considered in some detail the objections of the children to returning to Sweden. At para. 1.6 she says: -

“The message from the assessments is clear: it does not matter as much where the parties live as how their parents behave. The girls object to Sweden and would prefer to be in Ireland but what affects them most is that their parents cannot agree on anything. For example, in exchanges about schooling, and the form of textbook that

their child uses is a matter of dispute, let alone where they go to school or where they live.”

81. At paragraph 1.7, the trial judge continued: -

“The history of chronic conflict between these parties remains a major cause of distress upon Rachel in particular. This comment was addressed to both parents and the court does not accept that it is a particular country that is causing anxiety for either child but the high level of parental conflict, and both parties’ inability to protect their children from the effects of this conflict. The crux of Rachel’s objection appeared to be contained in this statement:

‘It’s harder to deal with my parents fighting in Sweden. Here I have supports if they fight. I feel alone there. They fight often. I’m the only one dealing with it in between, I’m always in the middle of everything. They complain about each other.’ ”

82. At paragraph 1.9, the trial judge noted the fact that the children object to being returned to Sweden, as they did in the earlier proceedings. However, she observes that: -

“Following that [earlier] return, the relationship between the parties appears to have deteriorated, but both children remain on excellent terms with their parents despite this. There were no obvious physical effects on the children after that return, but the ongoing parental conflict has clearly had continuing effects. Further, the lack of evidence in respect of effective treatment arranged by the Respondent, for the children, means that the reassurance which it should provide is minimal.”

83. At paragraph 1.16, the trial judge finds: -

“The children object to returning to Sweden. But more importantly they want their parents to stop fighting. One of the reasons Rachel stated for preferring Ireland was that she has family support from extended family here. The focus of the parties on their finances suggests that these parents are not prioritising the children’s welfare but are more concerned about who will get what property in the pending divorce case. The girls are aware of these disputes and the nature of them. The assessors made this point with even more force on this occasion than on the last. Unless the parties can learn to set aside these differences in matters of custody and access, they are creating a serious risk that their daughters will suffer the lifelong effects of living with chronic conflict. They must arrange for assistance with a parenting plan as a matter of urgency.”

84. I am not convinced by E’s argument on appeal that the High Court judge overemphasised the conflict between the parents. The evidence of both K and E is replete with examples of bitter and sometimes repeated disputes between the two adults. The effect of these disputes on the children, and the exposure of Rachel and Isobel to the conflict between their parents, was correctly found by the trial judge to be a matter of acute distress to both of the children. I will return to that when considering the Assessor’s report on the two girls.

85. At paragraph 9.6 to 9.14 of her judgment, the trial judge summarised the views of the children as set out in the report of the Assessor. She then set out her conclusions on this topic. Having noted that the children are old enough and mature enough for their views to be taken into account, and that both children objected to being returned, the trial judge then moved to the exercise of her discretion. She found that “*the real problem for both children*

appears to be parental conflict and not the fact that they were living in Sweden”: para. 9.18 of the judgment. The trial judge went on: -

“9.19 This does not end the matter, however. While the overarching objectives of the Convention are to prevent child abduction, to encourage comity between courts and to return children swiftly to their country of habitual residence, there are countervailing arguments in this case. These are that the welfare of the children is being seriously affected by the chronic conflict that they witnessed between their parents. They have a sufficiently good relationship with both evidenced by the fact that the girls want to see both parents as much as possible. That is also very clear. I have already noted the support Rachel receives from her extended family in Ireland. This has helped to inform the exercise at my discretion in this case.”

86. This passage from the judgment, which I have just quoted, does not come down one way or another as to the best interests of the children. On one view, which I think is the correct view, the court has decided that the real cause of distress and difficulty to the children is not where they live but rather the conflict between their parents. On that basis, the welfare of the children would be served by a reduction in the pointed and visible conflict between K and E; where the children actually live is of significantly lesser importance. However, the trial judge does not expressly say this. At para. 9.20, following on from the earlier section in the judgment, the judge says: -

“The court cannot dictate where the parties will live, nor can the court make a detailed access order of any kind. What the court can do, however, is to order the return that the Convention makes mandatory but seek to hear the children and to mitigate the potential harm to them by putting a stay on that order and requiring undertakings

from the parties to hand when a move to Ireland will take place. Failing that agreement, the children will be returned to Sweden.”

87. This section of the judgment suggests that the trial judge was operating on the basis that the return of the children is mandatory (notwithstanding their objections), that there is a potential harm caused to the children by directing their return to Sweden, and that this harm can be mitigated by facilitating a move by the applicant back to Ireland. Such a move would, of course, mean that the return to Sweden of the children would not occur.

88. In the concluding section of the judgment, the judge again returns to the views of the children. At para. 11.2 she notes that the children object to returning to Sweden. The trial judge goes on to say that she is “*very conscious of their strong objections but equally conscious that their views mirror, closely, the views of the respondent.*” At para. 11.3, the trial judge decides: -

“Taking all this into account, including the objectives of the Convention (to prevent the abduction of children generally and to vindicate the rights of parents and children), and the context in which the children’s views have been expressed (they have been moved three times in the past year and I would like to hope that they would remain here) and taking into account that their father does appear serious about his intentions to move in the longer term, the court is not inclined to return the children to Sweden immediately without giving the parties a final opportunity to arrange for suitable living arrangements for their daughters.”

89. In the following paragraph, the trial judge makes it clear (as she had earlier in the judgment) that absent an agreement between the parties about a return by K to Ireland, and having stated that “*the court has continuing concerns about the current circumstances of the children ...*” Rachel and Isobel would be returned immediately to Sweden. However,

the trial judge added the caveat that the return of the children to Sweden “*will be a damaging result for the future relationship of [K] with his children.*”

90. As in *DM v VK*, the trial judge did not express that she had regard to the current version of the Regulation, namely Article 29 of Regulation 2019/1111, which provides that (in this case) the courts of Sweden would retain jurisdiction to decide upon custody notwithstanding any refusal to return. As Donnelly J. pointed out in *DM v VK* (at para. 105): -

“Those provisions were of relevance in this case as a refusal to return because of the children’s objections would not preclude a future return order following a decision in the courts of habitual residence. Those provisions would allow for a full welfare consideration in the courts of habitual residence, if an application is made in that regard by the applicant.”

91. Notwithstanding the reference by the trial judge in this case to this judgment of Donnelly J., there was no express consideration of this issue.

92. More importantly, the trial judge did not overtly carry out the required exercise of assessing the policy of the Convention in the context of the totality of the evidence and in the best interests of the children. While one could surmise it from the judgment, the finding of the High Court as to where the best interests of the children lay is not set out with the necessary clarity.

93. In these circumstances, this court is left with the difficult choice as to whether to send the matter back to the High Court or alternately to substitute its own discretion for that of the trial judge. Given the purpose of the Hague Convention (“*to secure the prompt return of the children wrongfully removed to or retained in any contracting State...*”; Article 1) I believe the court should exercise its own discretion in determining whether or not the

objections of the children mean that they should not be returned to Sweden. In doing so, it is essential to consider in some detail the Assessor's report on the views of the children.

94. At the time of the report, Rachel was 13. She is now 14. Isobel was 11, and she is now 12.

95. Rachel was the more trenchant in her view that she did not want to return to Sweden.

96. Firstly, Rachel was negative about her experience of school in Sweden. However her particular problem with school was confined to a fellow pupil who had frequently picked fights with her, stolen her notebook and passed it around the class. This is hardly a systemic problem, and could occur in any school in any country. In contrast, Rachel liked her school in Ireland.

97. Secondly, Rachel consistently talked about her desire to live with both of her parents. In that respect, her statement that "*she wished to go home but that she did not know where home was*" is very significant. Rachel clearly wishes to have the sort of settled home life that any child desires. However, given the conflict between her parents this is simply not available to her. By the same token, she stated "*that when she was with her mother she would miss her father*" and that similarly, when she was with her father, she would miss her mother. This speaks of the same desire to have what is regarded as an ordinary home life. This is made plain by Rachel when she said, when asked about her future care and living arrangements: -

"I would like to live in [a town in Ireland] with both of my parents."

98. At school in Sweden, Rachel said that she did not socialise much with other children but did participate in activities such as scouts, swimming and acting classes. When asked about returning to Sweden she said: -

“I don’t want to go back to Sweden. My worst nightmare. I don’t want to relive my horrible experiences. I want to stay where I feel safe and stable. I don’t want to go to International School or go back to the school I was in. I’m worried about my mental health.”

99. However, her reasons for not wanting to go back to Sweden are instructive: -

“It’s harder to deal with my parents fighting in Sweden. Here I have supports if they fight. I feel alone there. They fight often. I’m the only one dealing with it - in between, I’m always in the middle of everything. They complain about each other.”

100. This answer was highlighted by the trial judge, for obvious reasons. As the trial judge found, the fundamental reason for Rachel’s unhappiness and stress is the conflict between her parents.

101. When asked about when and how she might return to Sweden, Rachel said: -

“In 100 years. Never. But if I had to maybe in two years, so I can return to a safe state of mind.”

102. As I have set out, the trial judge came to the view that the responses of the children echoed the views of E. I have come independently to that conclusion. That is not to say that E improperly influenced her children, or that these are not truly the views of the two girls. However, any problems that Rachel is undoubtedly having with school in Sweden cannot have been helped by the intervention of E. In a significant and surprising part of her evidence to the High Court, E swore (at para. 12): -

“I say the girls did not settle properly in Sweden having returned there manifestly against their own wishes. I say [Rachel] in particular was very angry to be back in

Sweden. I say that in an effort to empathise with [Rachel's] feelings, and in fear of her self-harming again, I mentioned to [Rachel] that perhaps as way to exhibit her feelings about being in Sweden, would be to only speak English while she was in Sweden. I say that [Rachel] herself took this to a whole other level and refused to participate in Swedish lessons in school.”

103. While E goes on to say that this tactic of only speaking English was to avoid alternative forms of protest by Rachel such as refusing to eat, cutting herself, or locking herself in her bedroom, this advice by E to her daughter was in my view unhelpful and unlikely to assist Rachel with any problems she might have in taking part in school activities in Sweden.

104. In the assessment portion of his report, Mr. Van Aswegen concludes (with regard to Rachel): -

“[Rachel] expressed a preference for living in Ireland with her mother and father in a shared care arrangement. Consistent with her account in the report dated 24th November, 2022, [Rachel] gave account of her negative experiences of school in Sweden. [Rachel] appears to have developed an idealised view of environments that have seemingly been withheld from her (the longstanding dispute regarding domicile in Ireland and the newly developed issue resulting in her removal from [an Irish] school) and similarly struggles to engage with any aspect of her life in Sweden. [Rachel's] difficulty is exacerbated when [Rachel] is advised by one of her parents to refrain from speaking Swedish when returning to her school in Sweden. [Rachel] has voiced her own confusion regarding her predicament, stating that she did not know where her home was.”

105. A number of things are very clear from that paragraph. Firstly, the assessor has formed the view, as did I, that the advice given by E to Rachel about not speaking Swedish at school

was unhelpful and misplaced. E tried to pull away from the contents of her affidavit, which were quite clear, in her submissions to this court. She informed us that she advised Rachel to just speak English between classes, and had never said to her daughter not to speak Swedish in classes. That is, of course, not what her affidavit says. It is also not what Rachel said to Mr. Van Aswegen. In any event, whether the advice to Rachel took either of the forms described by E, it was likely to be detrimental to Rachel's smooth integration in the Swedish educational system either way.

106. The second thing that is plain from the Assessor's analysis is that Rachel's preference, in large measure, is based on "*an idealised view*" of living in Ireland and of the school in Ireland which she attended. An idealised view is, by definition, not a realistic one. When taking into account Rachel's preference for Ireland, the court must take into account the fact that this preference is based, to a great degree, on an unreal view of what living in Ireland would involve, according to the Assessor who interviewed Rachel.

107. The third point is a related one. Rachel's struggles to engage with life in Sweden seems to result from her idealised view of what she is missing as a result.

108. The fourth point is that Rachel's preferred option is to live in Ireland with her mother and father. Unfortunately, that is simply not going to happen.

109. In considering the objections of Rachel, it is clear from the Assessor's report that these arise from an unreal view about what living in Ireland and going to school in Ireland would involve. The existence of these idealised scenarios, perhaps precisely because they may be withheld from her, has created difficulties for Rachel's integration in Sweden. Rachel's preference for staying in Ireland, by not being returned to Sweden, is not therefore in the main based upon any meaningful or grounded assessment that she would be better off in Ireland, or that her welfare is served by remaining in this State.

110. With regard to Isobel, while opposed to moving from Ireland her opposition is less dogged than that of her sister. Isobel says that she while was in school in Sweden that it was good, that she had friends and that she liked it. When it looked as though she might be moving to Ireland, she was happy because she really wanted to live in this country and that all her family (except for one cousin) lived in this country. When the move to Ireland fell through, Isobel was very upset and “*really wanted to stay here*”. While positive about her schooling in Ireland, she remained in contact with her friends in Sweden. Isobel also referred to the conflict between her parents. When asked about her wishes, she said: -

“To stay in Ireland. I don’t really want to go back to Sweden. I want my parents to stop arguing. I want half the month with mum and half with dad. I don’t want to go back to Sweden.”

111. Isobel also said that she would be very, very upset if she was sent back to Sweden, and she wanted to stay in Ireland because of her family. She has three surviving grandparents, to whom Isobel described herself as “*feeling close*”. In his conclusion on Isobel’s situation, Mr. Van Aswegen described the reasons why Isobel objecting to returning to Sweden in this way: -

“[Isobel] stated that she valued having access to her extended family system in Ireland. It would appear that her priority concern is to conserve a shared care arrangement with her parents.”

112. On the question of influence, the Assessor said: -

“Whilst there is no direct evidence of influence, [Isobel] does seem to have developed an idealised perspective of Ireland and family life.”

113. With regard to Rachel, on a question of influence the assessor repeated Rachel's comments about be better able to cope with the conflict between her parents if she lived in Ireland, and concluded: -

“[Rachel's] objections are shaped by her environment.”

That environment is one of ceaseless and bitter conflict between Rachel's mother and father.

114. Like her sister, Isobel's preference for her staying in Ireland is, in the main, because of an idealised view about what life and education here would involve.

115. One consistent theme on the part of the two girls is their desire to be in touch with their broader family, including their surviving grandparents. That is entirely understandable. It should also be possible to accommodate, albeit to a more limited extent, in the context of the arrangements for access by E already set out in the Swedish court order.

116. I have come to the conclusion that the appropriate order to make is to return the children to Sweden. I have done so having considered the totality of the evidence put before me, not only in affidavit form but also with particular emphasis on the report of the Assessor. Isobel was considerably more settled in Sweden than is her sister. Perhaps as a result, Rachel's objection to returning to Sweden is more extreme. However the objection of both girls to returning to Sweden is based upon an unreal view as to what life in Ireland for them would be like. The main problem facing the two children is the conflict between their parents. Their exposure to that conflict has undoubtedly been exacerbated by the fact that, on two occasions, their mother has refused to return them to their father in accordance with her legal obligations. The consequent court cases, and interviews with the Assessor, sporadically over a period now of almost two years cannot have been easy for either child particularly on top of the pre-existing and continuing conflict between their mother and

father. The welfare of both girls is best ensured by having an orderly and predictable set of arrangements in place and honoured by both of their parents. This will give Rachel and Isobel some certainty and confidence about who they will be living with, and when, and what educational arrangements will be made for them. In coming to this view, I am not carrying out a full custody and welfare analysis or anything close to that. I am merely considering the nature of the children's objections and whether a return order should be made given those objections.

117. I am conscious of the fact that, were return not to be ordered, the Swedish courts would nonetheless retain seisin of issues such as the custody of the children and related matters. However, that is no reason to refuse to order return of the children at this time. To permit the children to remain in Ireland, in the belief that further hearings in Sweden as to their welfare would advance matters, would be to deny the children the level of certainty that the operation of the current regime provides. It is difficult, in all of this, to overlook the plaintive statement of Rachel that she does not know where her home is. Operating the current legal arrangements will at least allow her to know where, and at what time in the year, she can call her home.

118. My conclusion that the children should be returned to Sweden is reached having considered the objections of the two girls, the objectives of the Convention, the totality of the evidence, and the best interests of Isobel and Rachel. While this is not been a deciding factor, I have also had regard to the fact that a refusal to order the return of the children, notwithstanding their abduction on two occasions by E, would not serve the aims of the Convention in that parents would not be deterred from attempting such multiple abductions. In considering the totality of the evidence and the submissions I have taken into account matters urged upon the court by E, such as the age of the children, the level of freedom that

children of a similar or slightly older age had in Sweden with regard to a number of matters, and the fact that Rachel is coming up to the age of 16. None of these, even taken collectively, persuade me that the proper course of action is to permit the children to remain in Ireland. With regard to the objectives of the Convention, the order I propose accords with these as it involves a return of the children to Sweden in as swift a way as is possible given the need for these proceedings to be brought, heard by the High Court, decided by that court, and then be subject to a full appeal process.

119. I would therefore dismiss the appeal.