THE COURT OF APPEAL

UNAPPROVED
Appeal Number: 2024/114
Neutral Citation Number [2024] IECA 214

Whelan J.
Faherty J.
Allen J.

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

AND IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND IN THE MATTER OF ARTICLES 11(6), 11(7), 11(8) and 42 OF COUNCIL REGULATION (EC) 2201/2003

AND IN THE MATTER OF J AND K (MINORS)

BETWEEN/

W.A.

APPLICANT/
APPELLANT

- AND –

A.T.

RESPONDENT

-AND-

THE MINISTER FOR JUSTICE ACTING AS A CENTRAL AUTHORITY

NOTICE PARTY

JUDGMENT of Ms. Justice Máire Whelan delivered on the 2nd day of August 2024

Introduction

1. This is an appeal by the father of two children now aged 11 and 9 respectively who were wrongfully retained in Poland by their mother since 6 January 2017 in breach of orders of the Irish District Court. The father has had minimal contact with the children over the intervening seven years. This has occurred despite exhaustive efforts on the father's part to maintain contact with the children and to foster a relationship with them. Proceedings seeking the summary return of the children to Ireland were ultimately unsuccessful and a non-return order on Article 13 grounds was made by the courts of Poland. That being so, he invokes Council Regulation (EC) 2201/2003 *("the Regulation")*, Article 11(6) - (8) that the High Court make orders for their return to this jurisdiction pursuant to the Guardianship of Infants Act, 1964 for the purpose of giving effect to an order made by the District Court on 10 November 2016 *("the District Court Order")* granting him access or in the alternative, an order granting him custody of the children or in the alternative orders for access by the father to the said children whether in Ireland and/or in Poland. He seeks alternative orders outlined below.

2. The application was instituted by notice of motion issued on behalf of the father on 13 October 2022 pursuant to an order giving directions made Gearty J. on 14 July 2022 on *ex parte* application on behalf of the Minister for Justice, acting as the Central Authority. It was ultimately disposed of by an order of the High Court made on 9 April 2024 (perfected on 24 April 2024) refusing the reliefs sought based on the children's current best interests as outlined in a judgment of Gearty J. of 13 March 2024. It was ordered in accordance with Article 10(b)(iv) of the Regulation that the proceedings having concluded without an order returning the children to Poland, the courts of this State cease to retain jurisdiction in respect of the children as of the date of the taking effect of the order.

3. The father appeals the judgment and order, contending that the matter ought to be disposed of solely in the context of the mother's wilful breach of the District Court order and that the trial judge had erred in not simply enforcing the 2016 District Court order. He contends that the High Court erred in finding that changes in the circumstances of the children over the past seven years had any relevance to the application to enforce the District Court order. The judgment is best understood in the context of the complex domestic and procedural background.

The background

4. Neither of the parent are of Irish origin. They met in this jurisdiction and married in 2012. Both children were born in Poland, that being the wish of the mother. The older child remained with her in Poland until aged nine months. The father continued throughout to live and work in Dublin. In February 2014 when the older child was aged fifteen months, the mother took him on a visit to Poland and failed to return to Ireland. The father instituted Hague Convention proceedings seeking his return which were resolved by agreement when the parents reconciled. The mother returned with the boy and remained in Ireland thereafter for about eighteen months.

5. In or about March 2015 by agreement the mother travelled to Poland where she gave birth to their second child. She remained there until May 2016 returning to Ireland with the two children then aged about three and a half and fourteen months respectively. It is common case that the children were habitually resident in this jurisdiction. The relationship between the couple irretrievably broke down circa October 2016. The mother brought an application in the District Court in Dublin seeking a protection order and subsequently obtained a barring order against the father. The father appealed that order. The mother failed to attend. The order was ultimately set aside by the Circuit Court.

6. On 10 November 2016 the mother brought an application before the Dublin District Court seeking leave pursuant to s.11 of the Guardianship of Infants Act, 1964 to permanently relocate with the two children to Poland. The court refused the order sought and directed that the children not be removed from the jurisdiction of the courts of Ireland by either parent without a court order. The mother was permitted to visit Poland with the children for a number of weeks during the Christmas period of 2016. It was an express provision of the order that they were to return to Ireland no later than 6 January 2017. The District Court made comprehensive orders providing for access by the father to the children. At the date of their removal to Poland by the mother they were aged four years and eighteen months respectively. The mother has never returned the children to Ireland and they have never set foot in this jurisdiction thereafter. Over the ensuing seven and a half years, the mother has all but extirpated the relationship between the father and the children.

The Hague Convention proceedings

7. On 27 February 2017 the father signed the necessary authorisation pursuant to the Hague Convention seeking the summary return of the children. Proceedings were commenced in Poland on 20 April 2017.

8. The various labyrinthine procedural steps and hearings in Poland between 2017 – 2021 are considered in greater detail hereafter. Briefly put, the matter was in the first instance dealt with by the relevant Polish District Court which held that the children were habitually resident in Ireland and that their retention after 6 January 2017 was wrongful and in breach of the father's rights of custody pursuant to Article 2 (11) of the Regulation. The judgment of the Polish District Court is comprehensive. Defences raised by the mother pursuant to Article 13 of the Hague Convention including grave risk and consent were rejected. The Polish District Court placed reliance on the report of a court appointed expert who, having carried out an assessment, had concluded that there was no significant risk of grave harm or

an intolerable situation in the event that the children were returned to Ireland. Assertions by the mother that the older boy was afraid of his father were rejected by the court. The court was satisfied that no ground was identified which would warrant acceding to the mother's application to refuse the summary return or to facilitate the adducing of a supplementary report. The court order directing the summary return of the children to Ireland was made on 23 November 2017. The order directed that the children be returned to this jurisdiction by 7 December 2017.

9. From that decision two appeals were brought, one by the district prosecutor, the other by the mother, seeking a reversal of the orders for the summary return of the children to Ireland. The Polish Circuit Court carried out a comprehensive review of the lower court and found no fault with its approach or analysis, particularly that the "*centre of life*" of the parties and the children was based in Ireland. It was the permanent place of residence of the children at the date of their wrongful retention. Various defences advanced by the mother were rejected as nothing more than bare assertions, the court being satisfied that the assertions of grave risk were not established. The court had regard to the expert's report but considered it only a subsidiary element in the overall assessment of the defences being raised.

10. Presciently, as events transpired, the Polish Circuit Court voiced concerns at the conduct of the mother in seeking to delay the appeal process particularly in light of the importance of expeditious hearings under the Hague Convention. There was a comprehensive analysis of the conduct of the mother including her efforts to excise all knowledge of the father from the children and a failure to ensure that they spoke English in circumstances where he did not speak Polish.

11. On 12 July 2018, over one year and seven months subsequent to the wrongful retention by the mother of the children in Poland, the Polish Circuit Court dismissed the mother's appeal. The children were not returned to Ireland, however.

Events subsequent to 12 July 2018

12. The mother went into hiding with the children. It proved impossible to enforce the orders of the Polish courts directing the summary return of both children to Ireland.

February 2020

13. Over a year and a half later on or about 13 February 2020 the Polish Attorney General filed an extraordinary complaint with the Polish Supreme Court in respect of the order directing the return of the children to Ireland. That application canvassed a wide variety of grounds. The Polish Children's Ombudsman participated in the said appeal and supported the application that the said orders be reversed.

14. On 2 March 2020, a regional court in Poland made an order suspending enforceability of the orders directing the summary return of the children to Ireland.

April 2021

15. The Polish Supreme Court gave its ruling on 21 April 2021. The court noted that the events which led to the breach of the Hague Convention was the mother's failure to comply with her obligation to return both children from their temporary visit to Poland on or before 6 January 2017. The court rejected most arguments advanced by the Attorney General/ Public Prosecutor General of Poland and the Polish Children's Ombudsman, *inter alia*, that Polish procedural laws had been violated.

16. In one net regard the court considered it necessary to have the matter remitted for re-hearing to the regional court. This pertained to Article 13(1)(b) of the Hague Convention, in particular to address the issue of grave risk. There was – it was said – evidence that the father had engaged in conduct in Ireland which warranted the mother seeking and obtaining a barring order. There was no reference to the fact that the said order had been set aside on appeal; a fact that had been specifically acknowledged by the Polish Circuit Court in its judgment of 12 July 2018.

17. In essence the Supreme Court concluded that the Circuit Court on appeal had erred in its analysis of Article 13(1)(b) of the Hague Convention and the defence of grave risk insofar as it applied to the circumstances of the case. The Polish Supreme Court concluded that the Circuit Court had failed to attach sufficient weight to complaints of violence asserted by the mother against the father which it considered had been made out. The court expressed the view that where there is a causal link between acts of violence perpetrated on an abducting parent and the objectively wrongful act of removal or retention of children by the affected parent, the abducting parent's ability to effectively enforce legal protection in the state of habitual residence is an important consideration which ought to be taken into account when construing Article 13(1)(b) Convention and the relevant cognate provisions of Article 11 of the Regulation. The Polish Supreme Court held that the matter required to be remitted to the Circuit Court for re-consideration, including of the children's views, emphasis being placed on the older child whose views and preferences should be afforded proper weight.

September 2021 Rehearing

18. Upon remittal the matter was re-considered by the relevant Polish Circuit Court. On 1 September 2021 an order was made reversing the earlier orders from 2017 and 2018, and refusing the summary return of the children to Ireland on grounds of grave risk. The judgment considers in detail allegations of the mother that violence was perpetrated upon her by the father. The Circuit Court considered the "*voices of the children*" by hearing evidence from a psychologist, whose evidence was that both wanted to remain in Poland and did not wish to return to Ireland claiming they were afraid of their father. The court concluded that a summary return could potentially cause very serious harm to both children. It held that the likelihood was the mother would be unable to provide the children in Ireland with any sense of security since she continues to fear the father. This was the final decision

in the abduction proceedings and was made over four years and a half years after the wrongful retention.

Council Regulation 2201/2003/EC *("Brussels II (bis)")*

19. Traditionally such an order would have been the end of the matter from an abduction perspective. The children would remain in the state to which they were abducted and it was incumbent on the abductee to obtain orders to re-establish contact and/or custody as the case may be. However, Council Regulation 2201/2003/EC *("the Brussels II (bis) Regulation")* which became operative in this jurisdiction on 1 March 2005 by virtue of S.I. 112/2005 European Communities (Judgements in Matrimonial Matters and Matters of Parental Responsibility) Regulations, 2005 governs the situation in all cases where courts of a requested state ultimately decline to order summary return of children under the Hague Convention/Brussels II (bis) Regulation on Article 13 grounds. Article 60(e) of the Regulation which governs the circumstances of this case, provided that as between Member States the Brussels II (*bis*) Regulation takes precedence over the Hague Convention insofar as concerns matters governed by the said Regulation.

20. The Regulation provides that in all cases to which it applies, courts must first determine whether "*a wrongful removal or retention*" has taken place in the sense of the Regulation i.e. by the application of Article 2(11) of Brussels II *bis* rather than by applying Article 3 of the Hague Convention. The Regulation governs the position in cases where the courts of a requested state refuse to make a return order under the Convention on Article 13 grounds.

21. The Brussels II *bis* Regulation introduced a wholly novel provision to operate when the courts of a requested state refuse the summary return of an abducted child. By virtue of Article 11(6), once a court has refused to order the return for a reason based on Article 13 of

the Hague Convention (but not under any other provision) a new process is engaged. Article 11(6) provides:

> *"If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, 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, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order."*

Procedural timeline under Regulation

22. Under Article 11(6) the non-return order was sent to the Irish Central Authority by the Polish Ministry of Justice on or about 11 October 2021. On 24 November 2021 in response to queries from the Irish Central Authority, the Polish Ministry of Justice confirmed that the order of 1 September 2021 refusing the return of the children was final and binding.

23. Notwithstanding that the process pursuant to Article 11 Rules 6, 7 and 8 of the Brussels II *bis* regulation was triggered, the mother proceeded to institute family law proceedings in Poland seeking to reduce the rights of the father in respect of both children. She obtained orders in Poland on 14 January 2022. The father's case is that he was not served with those proceedings, was not aware that the hearing was going ahead and was not afforded an opportunity to be heard or give evidence on the question of his parental rights to the children. The Polish court made orders restricting the father's parental rights vis-à-vis both children save his entitlement to access medical records of the children and to obtain information about their education and *"... schooling situation".*

24. It appears that on 21 January 2022 the father made an application to the court in Poland seeking interim contact with both children. The court dismissed the application. The father appealed those orders and his appeal was heard by the relevant Polish appeal court which on 28 June 2022 dismissed his appeal. At the hearing of this appeal, it was not disputed by counsel for the mother that notwithstanding the very restricted order made on 21 January 2022, she never complied with its terms and he has not received information either as to the children's schooling, education or health at any time thereafter. The mother had sought to assert that by intervening against the welfare orders made by the Polish District Court on 21 January 2022, the father had lost his right to pursue remedies pursuant to Articles 11(6), (7) and (8) of the Brussels II *bis* Regulation. However, the father had expressly brought the appeal *without prejudice* to his rights and that assertion was unsustainable.

25. Article 11(7) provides:

> *"Unless the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or 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 the national law, within three months of the date of notification so that the court can examine the question of custody of the child.*
>
> *Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit."*

26. The father made Article 11(7) submissions to the High Court by the notice of motion dated 13 October 2022 seeking in substance to override the non-return order made by the Polish courts and seeking an order affirming the welfare order originally made on 10 November 2016 in the Dublin District Court or in the alternative an order granting him

custody of the two children jointly with the mother. He sought an order for the return of both children to Ireland in accordance with Article 11(8) of the Brussels II *bis* Regulation. In the alternative, he sought orders for access to both children in Ireland and/or in Poland together with other ancillary orders.

27. It is a matter of no little concern that notwithstanding that the Polish Ministry of Justice confirmed the relevant Polish ruling as being final and binding as long ago as 24 November 2021, the father's application pursuant to the Brussels II *bis* Regulation continued to remain outstanding some two and a half years later. This, unfortunately, does not accord with the spirit and intendment of the Regulation which anticipates reasonable expedition. It is very evident that in the first instance when the matter came before the High Court, the judge sought to address matters by establishing a pathway towards the restoration of a relationship between the father and his children. That approach had much to commend it.

28. The High Court made an order appointing an expert social worker with a qualification is psychotherapy and child forensic psychology to prepare a report pursuant to s. 32 of the Guardianship of Infants Act, 1964 (as amended) and inserted by s. 63 of the Child and Family Relationships Act, 2015. The father was dissatisfied with this report and it does contain significant factual errors in connection with details of the background and the history of events. The court had made interim orders in respect of access between the father and children on 23 February 2023. In two affidavits of 7 June 2023 and 17 July 2023 the father set out in great detail how efforts to operate the said arrangement failed. The affidavits point to conduct on the part of the mother that thwarted and impeded the satisfactory operation of the said order. The mother in an affidavit of 3 July 2023 presents her version of events. Each blames the other for the failure of the process. The father had sought an order pursuant to s. 32 for a further welfare report. The High Court delivered its judgment on 13 March 2024. For the reasons and findings set out in that judgment, Gearty J. refused to grant any of the

reliefs sought in the father. All interim and/or interlocutory orders previously made and all undertakings given in the proceedings were vacated.

29. What the father had sought under Article 11(8) of the Regulation was the recognition and enforcement of the access order made in his favour by the Dublin District Court on 10 November 2016 which had afforded him access to both children. He sought other alternative permutations outlined above, including an order for the return of the children to this jurisdiction to enabling him to maintain a relationship and contact with both children.

Judgment appealed against

30. The judge sets out the salient facts including the litigation history between the parties noting its *" long and unusual history".* Arising from submissions and arguments on the part of the father, the judge noted at 2.5:

> *"It appears that the Minister for Justice in Poland initiated new proceedings in 2020. In a process which is hard to comprehend, a differently constituted Polish Supreme Court repealed the initial orders and directed yet another hearing in 2021. That case came before the Polish Circuit Court for a second time. That Court held that there was a grave risk if the children were returned to their father. The Court heard from both boys and was told that they objected to being returned. There was an inexplicable reference to allegations which had not been proven, or even pursued, in the courts in Ireland in terms of a failure to 'have the Applicant punished for his crimes' and reliance on an Irish District Court Barring Order without reference to the successful appeal to the Irish Circuit Court, overturning that Order."*

31. The High Court Judge noted that the father had listed several inconsistencies in the findings made by the Polish Circuit Court on 1 September 2021, which was the final Polish order in the child abduction proceedings. She observed that inconsistencies identified by the father included*"... give the tenor of the reasoning deployed in this case, from a theory on*

repression to a list of catastrophic effects that are listed as potential effects if these children are returned to their erstwhile home. The Polish court had held that*:*

> *'The fact that the children do not remember their staying in Ireland does not mean that this period was not threatening in their emotional experience. Because if it were so, they would have said that they had been in Ireland, that they have some positive memories. It can be assumed with a very high probability that staying [there] in their experience was difficult and what had happened was repressed."*

The Polish court had concluded:

> *"'Forced return of the children to Ireland would result in a loss of confidence in mum and dad, impaired self-esteem, impaired self-confidence, loss of belief that it is possible to express one's opinion and that this opinion would be respected. Consequently, this could lead to aggressive behaviours towards both the father and mother, oppositional and rebellious attitude escape into socially unacceptable environments, or the use of stimulants in order to cope.'"* (2.7 of High Court judgment)

The judgment of the High Court under appeal noted at 2.8:

> *"The Polish courts of first and second instance in 2018 had not apprehended any such risks. But the grave risk defence appears to be the reason for the reversal of the findings previously made by all the relevant courts, both in Ireland and in Poland. There appears to be no reference to the capacity of the authorities in Ireland to meet any risk presenting, which is another key factor to be proven before the grave risk defence can be established, as a matter of law, such as to justify not returning the children to their habitual residence."*

32. The judge noted that the father had relied on various decisions of the European Court of Justice in a bid to persuade the High Court to override the Polish non-return order. The

judge noted that he had relied on decisions which had been critical of the Polish legal system in particular *European Commission v. Republic of Poland,* (Case C-619/18 of 24th June 2019), where the CJEU had commented on *"the erosion of judicial independence in Poland"*. The High Court judge remarked at 2.10: *"The independence of the judiciary is a fundamental value for those nations which claim membership of the European Union, which is based on adherence to the principle of the separation of powers. That principle can only be supported by maintaining the separation of government, legislature and the judiciary. The judiciary must be committed to the rule of law and must be independent of government."* She observed at 2.11 that the *"unusual procedural history ... make this a case which is difficult to explain…".* The judge however acknowledged that *"…it is also important to note the actual evidence before the Court, to assess the Applicant's submissions and recognise the limits of this Court's ability to investigate or assess the process or the result."*

"This Court must be careful not to reach conclusions which are not supported by evidence, assessed after a fair hearing. What the Court was invited to do involves an assessment of the Polish legal and political system, based on the outcomes in this case. Any such conclusion is beyond the power of the Court in these proceedings." (2.11) She noted that what was being relied upon ultimately was an adverse decision to the father with a reasoned basis which contradicts *"another court of the same jurisdiction, coupled with an unusual second reference of the same case to the courts by a political actor, rather than by a judge. It is a leap of logic to move from this factual position to a conclusion that the final decision was a political one, or one that was not made independently, which, if I uphold it, constitutes an attack on the rule of law."*

33. The High Court noted it had been invited to consider a reference to the ECJ as to how the case might be decided *"taking this unusual history into account".* She declined to make such a reference for two reasons, firstly, that there was:

> *"... strong evidence that the children must remain in Poland. The Irish law is very clear on the basis for my decision, which must be dictated by their welfare. While this includes their right to a meaningful relationship with their father, even if that has been deliberately frustrated, practically every other factor under the relevant statute requires that they remain in Poland. That being the case, the Court does not need the assistance of the ECJ to clarify any matter of EU law insofar as the correct outcome of this case is concerned."*

Secondly, the judge observed that there had been a change of government in Poland, concluding:

> *"Where, as here, there is insufficient evidence to substantiate any finding of fact on my part that there was a lack of judicial independence in the most recent findings in this case, the clear legal test to be applied by me under national law and the change in the legal environment in Poland both confirm that this is a case in which no such reference is required."*

The judge explained her function under the Brussels II *bis* Regulation Article 11 *"is not a review of the courts of any other signatory state. The responsibility of this Court is to decide whether, under the Regulation, these children ought to be returned."* At 2.16 she distilled the substance of the appellant's claim to be *"an application to override a non-return order made in another Member State".* The judge noted *"The test is not to signal disapproval of the process used, or to re-assess the substantive decisions made, in that other state."*

At 2.17 she observed:

> *"The test I must apply here is set out clearly in Article 11 of the Regulation... If this Court orders the return of the boys, that decision is one based on their best interests, under Irish law, and is enforceable under the Regulation."*

She cited the decision in *A.O'K. v M.K. (Child abduction)* [2011] 2 I.R. 498 which emphasised that Article 11(7) requires the court to *"examine the question of custody of the child ".*

34. In Part 3 of the judgment, the High Court judge considered the procedural history and Article 11 delays which were substantial, noting that aspects of the delay had been caused by the COVID-19 global pandemic. She indicated her concerns with regard to delay, stating: *"This Court will direct earlier hearing dates in comparable cases in future, given that the nature of the cases appears to encourage a less urgent approach from the parties. As the children's welfare must remain the most [important] consideration in these cases, it is not in any child's interests for a case such as this to remain in the list for long periods, with consequent and ongoing uncertainty as to the child's future."* (3.5) She further indicated *"Final orders in future cases under Article 11 will be made within 6 months of first appearing in the list, unless there are exceptional circumstances."*

35. The judge then turned to an assessment of the best interests of the children, having regard to the domestic legal order and in particular the Guardianship of Infants Act, 1964, as amended. At 4.3 she observed:

> *"While I take the view that the Respondent has shown no regard for the rule of law, it would stray into speculation if one extrapolated, from her attitude to the law, a risk that the boys will learn a similar disrespect for the rule of law, or for authority, as was suggested in the Applicant's submissions."*

She then considered the expert assessor's s. 32 report, noting that thorough no fault of the assessor's, email communications with the father's Irish lawyer had been diverted to the

latter's junk email. The assessor had no knowledge of this. The judge noted; *"Due to a dearth of information, the conclusion that the threshold of evidence had been reached to conclude that there was household violence (with reference to the barring order) is not supported by the evidence."* The judge noted that the assessor had specifically acknowledged that *"she has no independent corroboration of the Respondent's history."* For all its deficits with regard to outlining the history of events between the parties, the judge noted that:

> *"... I found the report to be professional and appropriately balanced in its tone. Once the conclusions are assessed in light of the full information available to this Court, they are helpful and otherwise well founded. It is important to note that the expert assessor issued the disclaimer that much of what the Respondent told the assessor was unsupported assertion, so the assessor did not err in her report, insofar as she based her conclusions on the evidence available to her. Once the Court notes the correct position, the report can be used with the caveat that there was insufficient evidential support for a finding of physical violence in the home."* (para. 5.5)

She concluded:

> *"... that there appears to be evidence of deliberate alienation on the part of the Respondent mother."*

The judge notes at 5.7 that the Irish assessor *"not only not only interviewed the boys and their parents but contacted her Polish counterpart, a psychologist retained by the Respondent to assess the boys."* The judge noted the limitations of the Polish psychologist's report, noting; *"She also accepted the Respondent's account of her marital history without hearing from the Applicant. Her conclusions were similar to those of the Irish expert which are set out below, namely, that the boys are afraid of their father and perceive these proceedings as a mechanism for him to take them away from home and away from their mother."* The Polish expert had concluded that therapy for the boys could not be effective

unless these proceedings were over. The judge noted of the Irish assessor that she had interviewed both boys online. The judge noted that descriptions by the older boy of events such as *"witnessing an assault on his mother and of being hit himself contradict the account he gave years earlier. It is difficult to attach any weight to J's narratives. I note that one submission made to me, by way of legitimate criticism of the Applicant was that he had not learned to speak any Polish so as to communicate more easily with his sons. This makes J's account of him arriving at a school and speaking Polish unlikely."* (5.9)

Views of children

36. In response to queries as to whether he wished for any sort of contact with his father the older boy emphatically said "*No"*. The younger boy said of his father *"I don't know him, I don't want to know him".* (para. 5.12) The judge noted that that boy had no interest in meeting his father. The assessor had concluded as much noting *"They want to remain in Poland with their mother and regard their father as a threat to that status quo."* (para. 5.14)

37. At Part 6 of the judgment, the judge considered the evidence of fear of violence and of parental alienation. She noted that the assessor had concluded that both children had acquired information about their father from external sources rather than being in a position to report to the Irish assessor their own lived experience. It was on the basis of that information that they feared their father. *"This should explain why the expert's conclusions can be relied upon by the Court, despite the gaps in information given to her. Whatever the basis for their beliefs, they clearly fear their father and fear being removed from Poland."* (6.1)

"The issue of how their fear developed is not the point, although it is otherwise relevant in balancing the requirements of the 1964 Act. It seems to me that this case cannot be resolved without an intermediary and that, if the Applicant wants to restore a relationship with his sons, he must do so with the assistance of a third party such as a family therapist, as

recommended by the assessor. In oral submissions, it was accepted that the Applicant's primary concern now is to salvage a relationship with these boys." (6.2)

38. Assessing the circumstances, the judge concluded at 6.3 that whereas it was unlikely that either of the children had any personal memory of the violence and that such was never suggested in the original 2017/2018 Polish Hague Convention proceedings: *"Nevertheless, the boys would be traumatised, in my view, if they were now ordered to return to Ireland. The sad fact is that the sheer duration of their stay in Poland, having been wrongfully retained there throughout two separate sets of proceedings, has effectively moved the centre of all their interests to Poland. From their accounts in the most recent Polish court case and the Irish expert assessor's report, they view their father with fear as a man who wants to take them away from home."* The judge noted that over the years the children had lost contact with their paternal family including the father. *"Notwithstanding these huge losses, it seems to me that it would add to their trauma, both now and in a lasting sense, if I direct that they leave everything they know and move to live with or near a man that they currently fear."* (6.4) The judge concluded *"A better vindication of the Applicant's rights is to help to rebuild the relationship rather than to impose a relationship on them, thereby inviting inevitable failure."*

39. Of the children's views, the judge considered that same were likely to have been influenced by their mother. She observed (para. 6.5) the fear the children expressed in regard to their father: *"The factual circumstances of their impression of their father, as described to the Irish assessor, and the conclusion of the Polish psychologist that they cannot move on until this case is resolved, weigh heavily in the balance against ordering their return and thus effectively transferring the case to the relevant, local Polish court. It is not in the interests of these children that they be forced to spend time with, or live with, a man they have learned to fear."*

40. The judge found that the mother had damaged the relationship between her sons and their father and that *"what she has done may be irremediable."* However, the judge cautioned that *"It is important that this Court act only on the evidence provided, however and there is evidence only of her assertions in this case, with no independent support or sworn testimony which has withstood critical examination."* (6.6)

41. The High Court was cautious not to go so far as to make a finding that the mother's allegations of a history of violence was fabricated, considering rather that *"…the Court can say that the Irish authorities may have been in a position to make orders to protect the Applicant* [sic.] *if any of this was true, but the issue of her protection was never raised or addressed by the more recent decisions of the Polish courts or by any evidence put forward by the Respondent."* The judge remarked that it was not her function to punish the mother, *"but to act in the best interests of her children, even if she continues to actively ensure a lack of trust between father and sons."* The judge noted that there was an acknowledgment in the mother's submission that access with the father is in the best interests of the boys. The judge noted however at 8.1 that the mother had refused to reveal where she and the children are living. The judge observed that whatever the mother's views, *"there is no evidence to support a view that there is a risk to the boys in sharing school and medical reports with the Applicant. This will be an issue for the Polish courts to resolve."* The court concluded that the best interests of the children now require that they both remain in Poland despite the significant damage done to them by the dismantling of their relationship with their father. The court refused the reliefs sought by the father.

Notice of Appeal

42. In his notice of appeal, the father identifies 20 grounds of appeal, key among them;

1) That the judge erred in *"not resolving the matter"* simply based on the mother's wilful breach of the Irish District Court order from 2016 which had refused her

application to relocate with the children to Poland. It was contended that the judge was in error in finding that changes in circumstances which had occurred subsequent to 2016 *"had any relevance to the application*".

2) The judge erred in finding that the court was *"constrained in its ability to investigate or assess the process or the result of the unusual procedural history and the stated basis for contradictory decisions in the Polish courts…"*.

3) The father was critical of the judge's treatment of the issue of delays before the Polish courts.

4) It was contended that the judge had erred in not upholding the *"contemporaneous reasons and findings of the Polish courts"* from 2018 when an order for the summary return of the children to Ireland had been affirmed.

5) The judge erred in finding that there was *"strong evidence that the children must remain in Poland"*.

6) The appellant is critical of the s. 32 expert assessor's report and the judge's treatment of same and various aspects are the subject of appeal including at grounds 5, 6, 8, 10 and 11. It was contended, *inter alia*, at grounds 9, 18 and 19 that the judge had erred in not granting a further adjournment.

7) It was contended that the judge had erred in determining that it was not in the interests of the children that they be forced to spend time with or reside with the father in the circumstances and, at grounds 16 and 20, that their best interests required them to remain in Poland.

Legal Principles

43. As referenced above, by Council Regulation 2201/2003 the Irish High Court retains jurisdiction in respect of the issue of the custody of the two children until such time as, in the instant case, the condition identified at Article 10(b)(iv) is satisfied. Same provides:

"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."

The father's contention was that the only order open to the High Court to make was one in substance enforcing the terms of the order for access made in the District Court on 10 November 2016. Pursuant to same, the father was granted joint custody of the children and detailed access was provided for. The High Court was also urged to direct the return of the children to Ireland. It was contended that were they to be the subject of an order for their return to Ireland for the purposes of giving effect to the father's rights under the District Court order, the mother was likely to follow and reside with them.

44. Under the Irish legal system of family law, no order in respect of custody or access is irrevocable or permanent in nature. Section 12 of the Guardianship of Infants Act, 1964 provides:

"The court may vary or discharge any order previously made by the court under this Part."

Therefore, it is fundamentally erroneous to contend that a party in whose favour an order in respect of access was made in excess of seven years ago is entitled to have the said order enforced without regard being had to relevant intervening events and the current best interests and welfare of the children.

45. Rather, the starting point for the High Court where proceedings pursuant to Article 11(6)-(8) of the Brussels II *bis* have been initiated is that the application is to be treated as one concerning the welfare of the child involved. This necessarily follows from s. 3 of the Guardianship of Infants Act, 1964:

"(1) Where, in <u>any proceedings</u> before any court, the—

(a) guardianship, custody or upbringing of, or access to, a child, or

(b) administration of any property ….

is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V." (Emphasis added.)

47. The original provision was substantially amended by s. 12 of the Children Act, 1997 and by s. 45 of the Children and Family Relationships Act, 2015. Thus, the trial judge was constrained in her approach to bear in mind that the best interests of the children was to be her paramount consideration and that in determining their best interests, the factors specified in Part V, s. 31 of the 1964 Act had to be taken into account:

"31. (1) In determining for the purposes of this Act <u>what is in the best interests</u> of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family." (Emphasis added.)

Section 31 was inserted into the Guardianship of Infants Act 1964 by s. 63 of the Children and Family Relationships Act, 2015 and was brought into force by S.I. No. 12/2016 with effect from 18 January 2016. It is noteworthy that the present tense is used throughout.

46. Section 31(2) identifies eleven distinct factors and circumstances which briefly encompass the following factors:

"(a) the benefit to the child of having a meaningful relationship with each of his ... parents … <u>except where such contact is not in the child's best interests</u>, [and] of having sufficient contact with them to maintain such relationships;

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and the 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 …;

(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 …;

(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 …;

(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 …;

(k) the capacity of each person in respect of whom an application is made under this Act—

(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." (Emphasis added.)

47. It is very evident that the factors and circumstances to be taken into account are child oriented. The said factors identified in s. 31(2) must be evaluated by the trial judge as at the

date the court is called on to determine the best interests of the child. Thus, any assessment that concluded that the terms of the District Court order made in November 2016, when the children were aged four years and a year and a half respectively, should now be deemed to be in the best interests of the welfare of the children without any updated evaluation of the factors and circumstances identified at s.31(2)(a) – (k) inclusive would fail to vindicate the rights of the children and could not result in a determination by the court as to welfare of the children's original habitual residence as contemplated by Article 11(6)-(8) of the Brussels II *bis* Regulation. The sheer passage of time in and of itself and the very dramatic changes in the children's circumstances since November 2016 to the date of delivery of the High Court judgment on 13 March 2014, being a period of over seven years and four months, and the fact that they have had virtually no contact with their father in the intervening years, (irrespective of the reasons why this state of affairs came about and the substantial blamelessness of the father in relation to same), nevertheless necessitated that the trial judge approached the application in strict adherence to the provisions of the Guardianship of Infants Act as outlined above. It is evident that she did so, including by ordering a s. 32 report in advance to establish, *inter alia*, the views of both children.

48. The arguments on behalf of the father that a different approach was required is fundamentally erroneous. It is not compatible with the natural and imprescriptible rights of children affirmed by Article 42A of the Constitution and unsurprisingly the appellant has identified no authority for such a proposition. Further such an approach is incompatible with the principle that children have the right in this jurisdiction that their best interests be of paramount consideration at the point in time when any determination is being made with regard to their welfare and interests.

49. Notwithstanding the unassailable fact that the original retention of the two children in Poland breached the order made by the District Court as and from 6 January 2017 does not

entitle the father to assert that the High Court was not now entitled to carry out a full *de novo* welfare assessment based on current circumstances or that the High Court was obliged to make an order now directing the return of both children to the jurisdiction of the courts of Ireland for the purposes of giving effect to the District Court order without any inquiry into the current best interests of both children based on s. 31 of the 1964 Act. This line of argument is wholly misplaced. In fact, the High Court was obliged to carry out such a *best interests* assessment.

50. The primary objectives of Article 11(6)(vii) and (viii) of Brussels II *bis* is firstly to prevent the courts of the requested state (in this case, Poland) from assuming jurisdiction following a refusal by the said courts to return the children and further to give the parents the opportunity to have determined a custody application on its merits in accordance with Irish law in the home courts of the children's habitual residence (in this case, Ireland).

51. A welfare assessment under Article 11(8) is not subject to any specific time limit prescribed under the Regulation. That said, it is important that such decisions are dealt with reasonable expedition to create clarity and certainty not least for the children affected. If, following such a hearing, the court of the state of original habitual residence orders that children be returned, then by virtue of the operations of Articles 11(8), 40(1)(b) and 42 of Brussels II *bis*, such an order is automatically enforceable without any need for a declaration of enforceability and without any possibility of opposing its recognition. All that is required is an Article 42(2) certificate from a judge of origin i.e. a judge of the Irish courts in this instance.

52. Article 42(2) of the Regulation specifies that such a certificate can only be issued if the children have been given an opportunity to be heard, unless such a hearing is considered inappropriate having regard to their ages or degrees of maturity. The parents also are entitled to be given a full opportunity to be heard and the court must consider and take into account

in issuing its judgment the reasons for non-return of the children pursuant to Article 13 of the Hague Convention on International Child Abduction and the evidence underlying the non-return order made in the requested state (Poland in this instance). Thus, it is the order last made in the Hague Convention proceedings on 1 September 2021 by the relevant Polish Circuit Court that is the only order that has to be taken into account by the Irish judge. That is the import of Article 42(2) (a), (b) and (c) of Brussels II *bis*.

53. Although the provisions of the Guardianship of Infants Act, 1964 have been substantially changed since the judgment of the *AO'K v. MK (Child Abduction)* [2011] IEHC 360, nonetheless its overarching analysis still is correct. In particular the observations of Finlay Geoghegan J. where she observes at para. 30:

> *"The common starting point is that pursuant to Articles 8, 10 and 11 (6)-(8) of the Regulation, the Court, in 'examining the question of custody', is conducting a full hearing in relation to the custody dispute between the parents. In so doing, the Court is exercising its full jurisdiction pursuant, in particular, to s. 11 of the Guardianship of Infants Act 1964, in that it is determining a question affecting the welfare of the Child and it has a general jurisdiction to make such an order 'as it thinks proper'. The Court is directed by s. 3 of the Act of 1964, to regard the welfare of the child as 'the first and paramount consideration'...."*

54. Thus, the obligation of the trial judge in this case was to *"examine the question of custody of the child"* within the meaning of Article 11(7) of the Brussels II *bis* Regulation in respect of each of the children. That is precisely what the trial judge proceeded to do. That exercise in light of the constitutional mandate in Article 42A of the Constitution, as given effect to by the provisions of the Guardianship of Infants Act 1964 as amended, and in particular in light of s. 31 fell to be carried out based on the evidence gleaned and collated by the judge as to their contemporaneous circumstances and welfare.

55. As Finlay Geoghegan J. observed in *A.O'K v. M.K. (Child abduction)* [2011] 2 I.R. 498 at para. 36:

> *"First, it appears that the ultimate substantive decision which must be taken by the court of habitual residence in proceedings pursuant to Article 11(7) where submissions are made is a decision of the custody of the child. This appears implicit from article 10(b)(iv) and 11(a). It follows, in practice, from the making of a non-return order that at the time of proceedings under article 11(7), the child will still be in the member state in which it was wrongfully removed or retained. The purpose of the notification procedure in article 11(7) is that, if submissions are received, the court of prior habitual residence examines the question of custody of the child. It must be implicit in a court being required to examine the question of the custody, that it will ultimately make a decision on the question of custody, following such examination. Further, such a decision appears necessary to create certainty in the scheme of the Regulation as to which court will henceforth have jurisdiction in relation to matters of parental responsibility concerning the child. Where parties take the trouble to make submissions to the court, pursuant to article 11(7), it is probable that one parent remains residing in the country of prior habitual residence and the other in the member state to which the child has been removed or retained. A decision on custody, therefore, will either require the return of the child to the member state of its prior habitual residence, or be a decision that does not entail the return of the child. If it is the former, then the courts of the habitual residence will retain jurisdiction and the order for return will be enforceable in the other member state, provided the court of habitual residence is in a position to issue a certificate referred to in article 42(1) of the Regulation. If it is the latter, then, in accordance with article 10(b)(iv), the*

jurisdiction will be transferred to the court of other member state, provided the other conditions in article 10(b) are met."

As was pointed out by Finlay Geoghegan J. in *O.K. v. K.* [2011] IEHC 360:

"Welfare is defined in s. 2 of the Act as comprising 'the religious, moral, intellectual, physical and social welfare of the child'. This requires the court to consider the welfare of the Child in the widest sense and consider the entire picture presented by the evidence before it. See, inter alia, Walsh J. in O.S. v. O.S. [1976] 110 ILTR at 57, and Flood J. in E.M. v. A.M. (Unreported, High Court, 16th June, 1992)." (Emphasis added.)

56. Of further importance is the observation of Finlay Geoghegan J. at p.520 para. 54 (ii) – (vi) of *A.O'K v. M.K. (Child abduction)* where she observed:

"...(ii) in determining that substantive issue [namely custody of the two children] the court has the full jurisdiction it would have in accordance with Irish law, pursuant both to its inherent jurisdiction and the Guardianship of Infants Act 1964, as amended;

(iii) the exercise of its jurisdiction, including in relation to any interlocutory application, must be informed by the provisions of Council Regulation (E.C.) No. 2201/2003 [Brussels II bis] and, in particular, articles 11 and 42 of the Hague Convention on Child Abduction 1980;

(iv) its jurisdiction includes the power to make, on an interlocutory application, an order for the return of the child to Ireland. In determining any such application, the court will apply a welfare test in the relevant factual and legal context, but will not conduct a full welfare inquiry of the type which would be done prior to the determination of the substantive custody dispute;

(v) in determining any interlocutory application for the return of the child, the court must comply with the minimum procedural requirements of article 42(2), including

giving the child an opportunity to be heard, unless a hearing is considered inappropriate, having regard to her age or degree of maturity; and,

(vi) the court retains its full jurisdiction to make interim orders for access and custody."

57. As was noted by Ní Raifeartaigh J. in *D.M.M. v O.P.M.* [2019] IEHC 238 at para. 17 the Article 11(6) - (8) procedure has also been the subject of ECJ consideration. For example, in *Povse v. Alpago* (Case C-211/10) [2011] 3 W.L.R. 164, the court emphasised the broad scope of the powers of the "*court of origin*" (which in the present case is Ireland) which include the power to make interim orders for return:

"61. Further, as the European Commission has correctly observed, the court which is ultimately responsible for determining rights of custody must have the power to determine all the interim arrangements and measures, including fixing the child's place of residence, which might possibly require the return of the child.

62. The objective of the provisions of Articles 11(8), 40 and 42 of the regulation, namely, that proceedings be expeditious, and the priority given to the jurisdiction of the court of origin are scarcely compatible with an interpretation according to which a judgment ordering return must be preceded by a final judgment on rights of custody. Such an interpretation would constitute a constraint which might compel the court with jurisdiction to take a decision on rights of custody when it had neither all the information and all the material needed for that purpose, nor the time required to make an objective and dispassionate assessment.

63. As regards the argument that such an interpretation might lead to the child being moved needlessly, if the court with jurisdiction were ultimately to award custody to the parent residing in the Member State of removal, it must be stated that the importance of delivering a court judgment on the final custody of the child that is

fair and soundly based, the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail."

58. In *H v. I* [2023] IEHC 700, Gearty J. noted that:

"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.'"

ECHR

59. It is to be borne in mind also that as the decision in *Sneersone Kampanella v. Italy* (Application No. 14737/09) the European Court of Human Rights has indicated, a domestic order made pursuant to the Brussels II *bis* is subject to human rights consideration. The court noted that the task of assessing the best interests of children in each individual case is primarily one for the domestic authorities and that *"the child's best interest must be the primary consideration".*

60. The European Court of Human Rights had to consider whether the courts of Italy had dealt properly with the question of best interest and ultimately found that Italy had violated the father's Article 8 rights in ordering the child be returned following the refusal of the father's Hague Convention return application by the Latvian courts. The ECtHR emphasised that:

"it is … not its task to take the place of the competent authorities in examining whether there would be a grave risk that [a child] would be exposed to psychological or physical harm, within the meaning of Article 13 of the Hague Convention, if he

returned to Italy. However, the Court is competent to ascertain whether the Italian courts, in applying and interpreting the provisions of that Convention and of the Regulation, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests (see Neulinger and Shuruk…)… It is essential also to keep in mind that the Hague Convention is essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis. (see Neulinger and Shuruk…)." (para. 92)

61. The Strasburg court was particularly critical of the Italian court insofar as it had failed to address the risks which had been identified by the Latvian authorities as arising in the event that the child were to be returned to his father in Italy. The Italian courts had not attached sufficient weight to the Latvian custody courts reports or the contents of decisions which had identified reasons for refusing the summary return. The ECtHR was critical of the approach of the Italian courts particularly on the facts of that case in that there was a failure to appreciate the seriousness of the difficulties which the boy in question was likely to encounter in Italy were he to be ordered to be returned to the care of his father. The court was particularly concerned about the impact that the orders would have had on the child in directing that he be returned to Italy in circumstances where the mother would not be travelling with him. The court (para. 96) considered that the arrangements in place were:

"… a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child. In the opinion of the Court, the order to drastically immerse a child in a linguistically and culturally foreign environment cannot in any way be compensated by attending a kindergarten, a swimming pool and Russian-language classes. While the father's undertaking to ensure that [the child] receives adequate psychological

support is indeed laudable, the Court cannot agree that such an external support could ever be considered as an equivalent alternative to psychological support that is intrinsic to strong, stable and undisturbed ties between a child and his mother."

Analysis of key arguments

Contention that Irish Court should review decisions of the Polish courts

62. The appellant argued at length that the High Court ought to have engaged in an investigation or review of the process whereby initially orders for the summary return of both children were made at first instance in November 2017 and on appeal in July 2018, but thereafter, subsequent to the intervention of the Public Prosecutor General and acting Polish Attorney General, the matter was sent to the Polish Supreme Court which remitted the case ultimately to the Polish Circuit Court, it having initially vacated the order for summary return. This argument is entirely misconceived. The Irish court has no function in carrying out a review or analysis of the manner in which the Hague Convention/Regulation case was conducted before the Polish courts. As stated above, the order which the High Court is concerned with is the non-return order made by the Polish court refusing the summary return of the children pursuant to Article 13 of the 1980 Hague Convention for the reasons specified in the said judgment. That judgment was delivered on 1 September 2021. The terms and reasons are considered elsewhere in this judgment.

63. It is clear that the father is dissatisfied with the outcome of the proceedings. That is understandable. Merely because the initial order made in 2017 (and as affirmed on appeal in 2018) was reversed did not entitle the High Court (or this Court) to go behind the operative non-return Order of 1 September 2021) or to express any views as to the merits, practice or procedural steps taken in the course of that lengthy litigation. Such a step would amount to engaging in an appellate type review for which the courts in this State have no jurisdiction.

64. Calling upon or inviting the High Court to impugn the orders finally made refusing the summary return of the children for reasons identified pursuant to Article 13 of the Hague Convention would be contrary to the norms of international law and no authority was identified for such a proposition.

65. It is not clear whether the father had any further right of appeal against the order made on 1 September 2021 by the Polish Circuit Court pursuant to Article 13 refusing the summary return. Presumably not. Either way, that decision was outcome determinative in relation to the litigation and it does not avail the appellant to point to the earlier decisions made on 23 November 2017 and 12 July 2018, the import and effect of which was reversed by direction of the Polish Supreme Court and the subsequent rehearing. It is not open to the Irish court to selectively choose to recognise orders of the courts of a foreign jurisdiction which have ceased to have any legal effect and to decline to recognise the order finally made in the proceedings. To do so would fundamentally undermine the spirit and intendment of the Hague Convention and the Regulation and the appellant identified no authority for such a proposition.

66. Inviting this Court to wade in and express views in regard to domestic Polish events is unrealistic and unorthodox. This Court notes the decision *European Commission v. Republic of Poland* (Case C-619/18 of 24th June 2019) which the father sought to rely upon in an effort to persuade this Court to override the non-return order. However, that is to misunderstand the ambit of appropriate considerations available to the High Court before making a subsequent order requiring the return of the children to Ireland pursuant to Article 11(8). Such an order would only be warranted if High Court was satisfied that the summary return of the children to Ireland was warranted in light of their welfare and their best interest.

Adjournments

67. The appellant father had contended that it was incumbent on the High Court judge to grant further adjournments of the matter on various grounds, including grounds 9, 18 and 19. The appellant contends that the High Court ought to have granted him an adjournment *"in order to improve the applicant's access arrangements".* He further asserted that an adjournment order ought to have been granted to the father *"so that a more comprehensive report could be obtained"* – ground 18. And at ground 19, he asserted that the High Court erred in refusing to adjourn the matter in order to facilitate a process which might help rebuild the relationship between the father and the two children.

68. Generally speaking, a decision to grant or refuse an application for an adjournment is the exercise of a discretionary power by the High Court judge. As was held by the Supreme Court (MacMenamin J.) in *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6 that:

> *"Although great deference will normally be granted to the views of a trial judge, this Court retains the jurisdiction to exercise its discretion in a different manner in an appropriate case."* (para. 4)

69. This Court in *Promontoria (Oyster) DAC v. Greene* [2021] IECA 93 at para. 63 observed that the test to be applied in reviewing a decision of the High Court to refuse to adjourn a hearing is whether it was significantly unfair to the affected party and the assessment of unfairness must not focus unduly narrowly on the interests of the party who sought the adjournment but should also have regard to the interests of other parties to litigation and the wider considerations of the proper administration of justice. A like view was taken by this Court in *Meath County Council v. Hendy* [2023] IECA 55 at para. 131. In any case involving the welfare of a child an additional consideration where an adjournment

is sought is that the judge have regard to the risks of adverse impact on the child's welfare that any adjournment is likely to have.

70. In fact, the trial judge had engaged in significant efforts to foster a resolution to the impasse between the parties and in particular had put in place a regime providing for interim access and made an interim order on 23 February 2023. A careful review of the affidavits subsequently filed by the parties makes clear that the orders were not complied with and the efforts by the trial judge to put in place interim orders to establish a pathway towards the restoration of a constructive relationship between the father and his children came to nought. There was much recrimination between the parties in the affidavits sworn in June and July 2023. Each parent blames the other for the failure of the regime proposed under the interim order of February 2023 to work. It must have been very evident to the judge at the conclusion of the hearing and at the point where she came to write her judgment of 13 March 2024 that further adjournments of the application would merely have the impact of prolonging uncertainty would not be beneficial to the interests of the children and risked having a further deleterious impact on the welfare of both children. Accordingly, the judge cannot be criticised for her decision to refuse the further applications for adjournment on any of the grounds appealed against. Indeed, the judge's observations that in future such extensive delays would not be countenanced in such applications has much to commend it.

Delays otherwise

71. The appellant complains that he ought to have been afforded an opportunity to obtain a further and different expert's report. This engages two issues, the substance of the report in question and also the question of further delays which would inevitably ensue. There is much criticism of the s. 32 expert report. There is no doubt that it is erroneous in a number of key factual areas. However, a comprehensive review of the judgment makes clear that the judge primarily relied on the report for the purposes of ascertaining the views of the

children and it is not suggested that the report was erroneous in conveying the views of the children.

Evidence of Expert

72. As to the correct approach to the evidence given by an expert, the decision of O'Donnell J. (as he then was) in the Supreme Court in *Karen Millen Fashions Ltd. v. Dunnes Stores* [2014] 1 I.R. 10 is of assistance and in my view relevant in the instant case. In that case the plaintiff sought injunctions against the defendants in respect of alleged infringement of an unregistered community design pursuant to Council Regulation (EC) No. 6/2002. Of interest and relevance to the instant case is the analysis of O'Donnell J. which in essence concluded that the evidence of an expert ought not to be generally determinative as to the ultimate issue but is primarily to be of assistance in regard to the issue which the court is required to determine. In that regard he observed at para. 23 of the judgment:

> *"... For my own part, I can see how it is at least convenient to permit experts to give evidence in general as to their conclusions, so long as it is very clearly understood that what is important are the reasons leading the expert to that conclusion rather than the fact of the conclusion itself. Anything else is somewhat artificial. It is a matter of near certainty that the only expert witnesses called by either side will have formed an opinion favourable to that side and their evidence can often be best understood when both the reasons and conclusions are stated so long as it is understood and appreciated that the reasons leading an expert to a particular conclusion are the important matters for the court to consider. ..."*

73. Of course, in the instant case there is a significant distinguishing element, namely the appointment of the expert not at the behest of either litigant but rather on the direction of the court for the purpose under s. 32(1)(a) of addressing *"any question affecting the welfare of the child"* or *"(b)... to determine and convey the child's views."*

74. On first perusal of the report, it has to be concluded that it was suboptimal in a number of material respects and in particular there were errors in connection with the history of the marriage between the parties and various events that were alleged to have taken place. In the course of the oral hearing of the appeal, it became evident how that state of affairs came about. It appears that when the psychologist initially contacted the lawyers for the parties, that communication went into the junk folder of the husband's solicitor. Thus, the solicitor and the father were oblivious to her request for material that would assist her in preparation of the report in question. It would appear that no subsequent follow up communications were made by her in the course of the process undertaken. The trial judge addresses this state of affairs in Part 5 of her judgment. She concludes (5.3): *"Through no fault of her own, the expert made findings based on a partially correct history of events."*

75. It appears, for instance, that the assessor laboured under the misapprehension that a barring order was in place based on a copy of a barring order furnished to her by the mother's lawyers. The mother and her solicitors had not divulged that the said barring order had been the subject of a successful appeal and the order had been set aside and in effect *"overturned on appeal"* as the trial judge noted. But the High Court was fully aware of the correct facts. The judge made clear that conclusions based on this misinformation *"must be discounted."* The judge, having evaluated the complaints and objections of the father, concluded that: *"It is not established that the papers the expert received were so incomplete as to invalidate all of her conclusions or that she was inappropriately influenced by receiving two different accounts with supporting exhibits from only one side."* (5.3) In particular, the judge noted that she had received the father's comprehensive grounding affidavit.

Views of Children

76. Ultimately the analysis of the trial judge is that the report was availed of by her to assist her in evaluating and determining the views of the children based on interviews the

assessor had directly with them. In my view, that was a permissible deployment of the evidence and is not undermined by the fact that in other aspects of her report the assessor identifies as fact matters that are incorrect and untrue. At 5.6 the judge observes:

> *"Insofar as the children are concerned, the expert's views are supported by her interviews with them and create serious concerns for the Court in that there appears to be evidence of deliberate alienation on the part of the Respondent mother."*

At 5.7 she further observes:

> *"The Irish assessor not only interviewed the boys and their parents but contacted her Polish counterpart, a psychologist retained by the Respondent to assess the boys."*

77. The judge then notes the observations and assessments of the mother's retained psychologist. The court specifically noted that the Polish psychologist had had no contact with the father. The judge further observed at 5.8 concerning the Polish psychologist retained by the mother: *"This psychologist interviewed the boys in person. ... Her conclusions were similar to those of the Irish expert which are set out below, namely, that the boys are afraid of their father and perceive these proceedings as a mechanism for him to take them away from home and away from their mother."* The High Court judge noted that the Irish court appointed assessor had interviewed both boys online. At 5.9 she noted that the older boy *"described his father coming to his school, speaking Polish, and trying to remove him physically. He said his mother prevented it, so it was all ok. J knew his father's first name. ... His description of witnessing an assault on his mother and of being hit himself contradict the account he gave years earlier. It is difficult to attach any weight to J's narratives."* Having evaluated various elements, the judge concluded that the child's account of the father arriving at the school and speaking Polish was *"unlikely"*.

78. However, as is noted at 5.10 and 5.11, the views of the boy in question were communicated unequivocally. The older boy emphatically stated "*No*" when asked whether

he would like to have any sort of contact with his father. He also stated that he wished to reside with his mother and brother in a Polish city: *"I'm Polish and nothing else. I want this case to be finished."* The younger child stated to the court appointed assessor that he was really stressed about meeting her and said he did not know the purpose of the meeting. Of his father, the boy stated: *" I don't know him and I don't want to know him".* He claimed not to know his father's name. When he was invited to tell the assessor one thing about his father, he stated *"[t]hat he wanted to kidnap my brother".* Of the younger child the assessor noted that the boy had no interest in meeting his father, stating *"I am Polish nothing else, my whole family is Polish".* He did not accept the statement that his father loved him, asserting that the father had sent him something once but that it had been broken.

79. The conclusions of the assessor on their views on access was that neither boy wanted contact with the father. Both believed that he was a violent dangerous man who had the potential to abduct them. They wanted to remain in Poland with their mother and regarded their father as a threat to that status quo. In effect grounds 5, 10, 11, 12, 13, 14 and 15 contend that the trial judge's approach to the expert assessor's report was wrong and that she erred in finding that the observations of the Polish psychologist that the children cannot move on until the case is resolved weighed heavily against making an order directing their return to the jurisdiction to the courts of Ireland. However, these criticisms must be weighed against the contextual facts. As counsel for the father pointed out, he has had no contact of any relevance with the children for upwards of seven years. Whilst he is largely blameless in regard to that state of affairs, the mother having engaged in conduct to irreparably harm and undermine the relationship between the father and his two sons, that very substantial effluxion of time is highly material in arriving at an understanding of the factual basis underpinning the current views of the children for the ascertainment of which the trial judge correctly placed reliance on the assessor's online interviews. The children are now aged

eleven and a half and nine years. Their knowledge of English in minimal. The father is not fluent in the Polish language and accordingly, even a linguistic barrier has been put in the path of effecting a restoration of a positive relationship between the father and his sons.

80. Orders for custody are not awards for good behaviour, neither can a court refuse custody if it is demonstrated to be in the best interests of children even if the parent in question has been guilty in the past of bad or inappropriate behaviour. By the time the judge came to deliver her judgment on 13 March 2024, a further two and a half years had elapsed since the Polish Circuit Court had made the final non-return order for reasons pursuant to Article 13 of the Hague Convention. That is a very substantial further period of time, during which it is inevitable that there was ongoing uncertainty for the children as to whether they would be removed from Poland and returned to Ireland potentially without being accompanied by their mother.

81. Given the fact that the arrangements put in place by the judge as steps towards the restoration of a relationship between the children and their father as recently as February 2023 had failed and there was a high degree of recrimination between the parties as to who was primarily responsible for that state of affairs, on any objective assessment, there was little prospect that the mother would facilitate the restoration of the relationship by means of contact taking place, either in Poland or in this jurisdiction. Indeed, even suggestions of email contact by the father with the children were impeded and obstructed by her. It appears from a review of the papers that the mother's insistence was that emails whereby the father would communicate with his sons had in the first instance to be sent to her solicitor who then would presumably transmit them to the mother and ultimately they might (or might not) be conveyed to the children. The father had no knowledge as to the place of residence of the children in Poland and the mother did not wish under any circumstance that the father

would receive or send direct emails to the children. All in all, her conduct presented a sorrowful symphony of obstruction and non-cooperation.

82. Confronted with a state of affairs whereby the Irish courts had no means of securing the constructive cooperation of the mother towards assisting in the restoration of the fundamental elements of the relationship between the father and the children, the only reasonable and proportionate measure available to the trial judge was to proceed to make a determination as to the best interests of each child having due regard to the Guardianship of Infants Act, 1964 in light of the actual evidence and salient facts as they obtained at the date of the High Court hearing.

Current best interest

83. In this regard, certain key elements within s. 31(2) in particular were of importance. That is so by virtue of, *inter alia*, the scheme of the Brussels II *bis* Regulation and Article 11(8) in particular and is illustrated by decisions such as *Povse v. Alpago* where the ECJ (now CJEU) was asked to rule on the application of Article 11(8) in relation to return orders made in the context of interim custody orders. The mother had removed the child from Italy and returned to reside in Austria. The father instituted proceedings pursuant to the Hague Convention seeking the summary return of the child and that application was refused by the Austrian courts on grounds under Article 13 of the Hague Convention. Various proceedings and interim applications were brought by the parties both in Italy and in Austria and ultimately the courts in the requesting State (Italy) made a certified order requiring the mother forthwith to return the child to Italy. In the meantime, the Austrian courts had granted sole custody of the child to the mother. Before the latter order was rendered as the final order of the Austrian courts the father brought an application before the Austrian courts seeking to enforce the Italian return order. The issue then on appeal came before the Austrian Supreme Court which made a reference to the ECJ and the ECJ made a series of rulings

including that a decision of a Member State with jurisdiction requiring the child's return falls within Article 11(8) even though that State's courts have not yet made a final order in respect of custody.

84. In effect *Povse* establishes that Article 11(8) applies to return orders which are interim orders made by the courts of the habitual residence pending a final hearing and final conclusion of a custody/welfare hearing in that State. It also held that a subsequent judgment granting provisional custody made by the courts of Austria and deemed enforceable under the laws of that State did not preclude the enforcement of a certified order requiring the child's return to Italy (same having been certified pursuant to Article 42 of Brussels II *bis*). Finally, *Povse* held that the enforcement of a certified judgment could not be refused by the courts of Austria because of subsequent changes in circumstances such that it might be seriously detrimental to the best interests of the child in question. All such changes and issues concerning welfare have to be pleaded and brought before the court which has jurisdiction, namely the Member State of origin (in that case Italy), which also is deemed to have jurisdiction to hear any application to suspend enforcement of its judgment if the evidence so warrants.

85. In light of the check list to be found in s. 31(2) of the 1964 Act, it is very evident that it is current circumstances and not the historic terms of any prior court order that fall to be considered in establishing a child's *best interests*.

> *"31.(2) The factors and circumstances referred to in subsection (1) include:*
>
> *(a) the benefit to the child of having a meaningful relationship with each of his or her parents … except where such contact is not in the child's best interests …;*
>
> *(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; ..."

86. Considering those three factors in the first instance, it is clear that the children were experiencing a severe state of anxiety and distress, as is evident from their direct interface with the s. 32 appointed assessor. The views of the children need not be rehearsed; they were very clearly communicated and the judge was obliged to have regard to them. The physical, psychological and emotional needs of the children given their ages are also readily ascertainable. Taking those factors together, coupled with the assertion on the part of the mother that she is not prepared to return to reside in this jurisdiction, they are to be balanced against the consequences - that in effect what the father was seeking is an order directing the children to be removed from the care of the mother and brought to this jurisdiction in the hope or expectation that that might precipitate the mother to travel to Ireland with them for the purposes of facilitating the restoration of his access rights under the District Court order of 2016. Making an order calculated to stress test the clear statement of the mother and risking that the children would after over seven and a half years be required to reside with the father from whom they are undoubtedly estranged and in considerable fear was not an order that could reasonably have been made by the trial judge on welfare grounds. Same would not be in compliance with s. 3 of the Guardianship of Infants Act or indeed with the spirit and intendment of the 1964 Act and would, on the evidence before the High Court, have been contrary to the best interests of these children.

87. Turning then to the further grounds, s. 31(2)(d) requires the court to consider the circumstances of the children's upbringing and their care, including the nature of the relationship of each child and each parent and other relatives and persons who were involved in the children's upbringing, which of course would include their paternal grandmother who

did care for them and certainly the older boy when he was of tender years. The history of the children's upbringing and relationship unfortunately involves the immutable fact that they have not set foot in this jurisdiction since 2015. They barely speak any English, their upbringings and care over those years has exclusively been in Poland so far as can be ascertained. The father has been excised and excluded from their lives. Irrespective of how blame is apportioned, the nature of the relationship between the child and their father in each case is one of virtual total estrangement and on the part of the children a deep fear which appears to be genuinely felt, although entirely baseless, that their father will kidnap them and remove them from Poland.

88. With regard to s. 31(2)(e), (f) and (g) the children's religious, spiritual, cultural and linguistic upbringing and needs, their social intellectual and educational and needs, and their ages and special characteristics, after such a very substantial period of time uprooting the children from Poland and requiring them to reside in this jurisdiction for the primary or sole purpose of reinstating access and reestablishing the relationship with the father in circumstances where they are not to any material extent conversant with the English language does appear to be a significantly disproportionate measure. It is clear that they are well established within the Polish educational system which appears to be meeting their needs.

89. The children's ages are relevant insofar as it plays a part in the weight to be attached to their views; views which were very strongly and stridently articulated, leaving no room for uncertainty or doubt.

90. Concerning ground (h), any harm which the child has suffered or is at risk is a concept which encompasses the psychological wellbeing of the children. It is very evident that proceeding to make an order as sought that the children would be returned to this jurisdiction for the purposes of ensuring compliance with the order of the District Court or a like order

would cause profound psychological distress anguish and concern to both children. That fact cannot be ignored, even though it is the wilful conduct of the mother that has primarily contributed to that state of affairs having been brought about. The apportionment of blame as between parents cannot in and of itself be a determining factor but rather it is the best interests of each child based on current facts that is the determining factor.

91. The judge gives comprehensive consideration to all of the factors identified in s. 31(2)(a) – (k) as relevant. Psychological and emotional needs are addressed at 4.1 and 4.2. In regard to allegations of violence, the judge was at pains to note that the allegations had been repeated frequently by the mother and had been shared with at least one of the boys, yet the mother had never sought to have the father charged in Ireland and the one barring order obtained was withdrawn, the other was successfully appealed: *"There is no credible evidence before me of violence against the children. The more serious allegations made recently to Polish courts were not made here, nor were they supported by any documentary evidence."* (6.7) As the judge clearly pointed out, merely repeating the allegation to various entities, including the mother's own privately retained Polish psychologist *"does not make the allegation more likely to be true."* The judge noted that the issue of her protection was never raised or addressed by the more recent decisions of the Polish courts or any evidence put forward by the mother. The judge correctly noted: *"It is not my function to punish the Respondent but to act in the best interests of her children, even if she continues to actively ensure a lack of trust between father and sons."* (6.8)

92. Whilst the appellant selectively quotes from the judgment or extrapolates grounds in the notice of appeal which critiques the High Court judgment, in my view it is important that the judgment is read in its totality. For instance, ground 12 criticises the judgment where the judge had remarked that the expert's report could be used by the court with a caveat that there was insufficient evidential support for a finding of physical violence. However, the

judge did address the issue of violence very clearly, for instance at 6.7 (cited above). Further, it is comprehensively dealt with at 6.6, the judge concluding: *"It is important that this Court act only on the evidence provided, however and there is evidence only of her assertions in this case, with no independent support or sworn testimony which has withstood critical examination."* That said, the judge was balanced in her assessment, observing at 6.8: *"This Court cannot go so far as to find as a fact that the alleged history of violence is fabricated."* This demonstrated the limitations of the process.

93. The father's starting point was also his end point: that the wilful conduct of the mother in removing the children and thereby failing and neglecting and refusing for the past seven and a half years to comply with the terms of the District Court access order made in November 2016 warrants in and of itself the summary return now of the children to Ireland, for the purposes of the recognition and enforcement of his rights of access under that order. For all the reasons stated above, that is based on a fundamentally erroneous understanding of the legal order and the considerations and ambit of the function to be discharged by any court in the State where an order within Article 11(8) is sought. The process to be engaged in by the court is to determine what are the current best interests of the children based on current facts and circumstances and the law on the best interests and welfare of children. The judge concluded that their best interests lay in having the courts of Poland make determinations with regard to the restoration and maintenance of the relationship between the children and their father who resides in Ireland. It appears to me that issues such as arise under s. 31(2)(i), (j) and (k) of the 1964 Act warranted such a determination. The High Court noted that its efforts to put in train a process to restore contact did not meet with success. For all those reasons, the court was entitled to come to the conclusion that it did in an effort to avoid futile delays and continuing uncertainty, all the while in circumstances where the

mother has never returned to Ireland and appears to have evinced no intention of returning to this jurisdiction and accordingly will not be amenable to the courts of this jurisdiction.

Conclusions

94. The older boy spent the first nine months of his life in Poland and lived in Ireland for the following seven months or so. Then he went to Poland with his mother on a holiday in the month February 2014 when he was about sixteen months old, that resulted in the institution by the father of child abduction proceedings under the Hague Convention which appeared to have been ultimately disposed of at the latest by June 2014. During that time, the mother and the older boy remained in Poland for approximately three months, she then returned to Ireland and the parties were reconciled. At that time the boy was aged about eighteen months. Some nine months later, she returned to Poland, this time to give birth to the couple's second child and remained there until the younger child was about twelve months old. She returned to Ireland in May 2016 and remained here for seven months, departing in December 2016 with both children, never to return. It is very evident that the vast bulk of the lives of both children have been lived out in Poland to the exclusion of the father. That is a key factor which appears to have very strongly informed the approach of the Polish court in giving its ultimate determination on 1 September 2021 determining that a summary return would cause grave risk to both children within the meaning of Article 13 of the Hague Convention. At that point it had been observed that it had been over four years since the wrongful retention and that the objective of an immediate return would not be achieved. We are now at a point in time when over seven and a half years have elapsed since the children set foot in Ireland.

95. Although the father posited that further reports be obtained in light of his understandable concerns about aspects of the s. 32 report that was to hand, in my view any such reports would not have resolved the underlying issue. There is no dispute or contest

with regard to the expressed views of the children. Ultimately it is in the best interests of the children that the processes to be engaged in take place in the courts within the jurisdiction of Poland. Excessive delays can impose significant stress and anxiety and uncertainty on children who already have been the subject of prolonged litigation. It is contrary to the spirit and intendment of the Brussels II *bis* Regulation that there be undue or untoward delays in disposing of the custody application pursuant to Article 11(8). Although no strict time limit is identified, it is desirable, subject to the circumstances presenting, that such cases are proceeded with and disposed of with all due expedition, having due regard to the importance for the psychological wellbeing and stability children and of certainty and clarity as to their future care.

96. I believe it is clear that the six-week time frame specified in Article 11(3) of the Brussels II *bis* Regulation does not encompass Article 11(8) custody proceedings which ensue following an order for the non-return of a child based on Article 13 of the Hague Convention grounds. However, it is not in the interests of children that delays take place beyond what is reasonably necessary and although reasonable efforts should be made to facilitate negotiations and an agreed resolution for the future care and custody of the children, unless a clear and feasible pathway is identified, it is necessary for the court to proceed to make final determinations with all due expedition to ensure that their best interests under the Guardianship of Infants Act, 1964 are vindicated and compliance had with the requirements in Article 42(2)(a), (b) and (c) of the Brussels II *bis* Regulation itself.

97. For all the reasons outlined above, I am satisfied that the High Court judge was correct in her approach to the issues presented by the appellant in the motion of 13 October 2022 on foot of the orders previously made by the High Court on 14 July 2022 pursuant to Article 11(6) and (7). In substance, what the father primarily sought to achieve was a series of orders that would ratify or substantially mirror the orders granted in his favour by the District

Court on 10 November 2016. Such orders would have encompassed detailed provision in respect of the weekly access between the father and his two sons, joint custody being granted to the parents and of necessity, an order directing the summary return of the children to Ireland for the purposes of enabling the father to exercise access together with remote/virtual access in the manner he had contended for. It is evident from the documentation, the affidavits and the written submissions of the parties that the court gave careful consideration to the many and complex issues arising in this matter from the time the judge was first seised of same up to the date of delivery of the judgment which is the subject matter of this appeal on 13 March 2024. In particular, the judge, as she was clearly entitled to do, embarked on an interim access hearing process in 2023 following on hearings in January and February 2023 and made interim access orders on 23 February 2023 which were not complied with by the mother. Thereafter certain aspects of the delays were referable to the s. 32 report by the expert which ultimately became available circa 7 November 2023. There are clear deficits in the said report. However, the judge expressly acknowledged its limitations and in substance confined it to its core elements, namely its assistance to the trial judge in conveying the views and wishes of the children concerned.

98. The assessor had direct contact with both children online and thus was in a position to ascertain and communicate their views to the High Court. To a lesser extent she was also competent to take account of their clearly expressed views and in light of same to express her assessment of the likely impact that the orders proposed would have on them. The assessor had the relevant qualifications to express such a view, make a direct evaluation with regard to their psychological and emotional states and needs in light of their respective ages and stages of development, and was well placed to give a professional view as to whether the orders in substance sought which included an order directing the summary return of the children to Ireland to facilitate enforcement of access rights in favour of the father might

impact on the children's welfare and best interests. The expert was also in a position to have first-hand experience of their linguistic difficulties with the English language and their respective states of psychological wellbeing in light of the representations made to them, primarily, it would appear, by their mother, that the father intended to abduct them and remove them from her care and take them to Ireland. The judge did not treat the assessment by the assessor as in any way determinative of the issue of the best interests of the children. She proceeded with appropriate caution in light of the limitations and errors in the report.

99. I am satisfied that the trial judge found the expert report to be of some assistance – particularly in ascertaining the views of both children – but did not treat it as determinative on the overall evaluation of best interests of the children within the meaning of s. 3 of the Guardianship of Infants Act, 1964 and having due regard to the comprehensive definition of welfare as defined in s. 2 of the said Act. She adhered very particularly to the principle enshrined in s. 3(1)(b) of the Act, namely that in deciding the question concerning guardianship, custody or upbringing of the children, it was for the court to regard the best interests of the children as the paramount consideration. It is clear from the judgment that that principle was foremost in the judge's mind throughout the exercise she engaged in.

100. Whilst it is understandable that the father would wish the judge to be drawn into a process of evaluating or commenting on the procedures adopted by the Polish courts, that was not an appropriate course of action to embark upon. Both Ireland and Poland have ratified the Hague Convention on International Child Abduction over thirty years ago; in the case of Ireland in 1991 and in the case of Poland in 1992. Thus, enduring and constructive relations exist between the two states in regard to the reciprocal recognition and enforcement of rights pursuant to the said Convention and subsequently the Brussels II *bis* and Brussels *ter* regulations. The principles of mutual trust and mutual recognition inform the approach of the courts of members states to the recognition and enforcement of judgments. No

evidence was put before the court in the form of an affidavit of foreign laws or from a relevantly qualified Polish lawyer to suggest that the practices and procedures adopted in February 2020, 14 April 2021 or 1 September 2021and the orders and directions made by the various courts including the Polish Supreme Court and the final relevant Polish Circuit Court were improperly obtained under the domestic legal order or as a matter of international law.

101. The Regulation must be considered in its legal context. Its objectives and terms were developed and refined at Community level and as such it operates in accordance with the principle of proportionality. It is a measure which gives effective recognition to fundamental rights including the Charter of Fundamental Rights of the EU, particularly Article 24 . From 1 August 2022 , in light of S.I. No 400/2022, the Recast Regulation EU 2019/1111 (Brussels II (*ter)* repealed Regulation 2201/2003, subject to the saver in Article 100(2) under which this application proceeded.

102. I note the observations of Simons J. in *Z. v. Z. and Anor* [2021] IEHC 20. Though referred to by the respondent and by the trial judge in her judgment, the precise modalities whereby the jurisdiction of the High Court pursuant to A.11 (6) – (8) of Regulation 2201/2003 could be deemed to have been lost by reason of delay as was posited in *Z. v. Z.* was not to subject of much argument in the course of this appeal. The matter will fall to be more fully argued and properly determined on another occasion. I respectfully express reservations that the vital jurisdiction vested in the courts of the country of original habitual residence of a child, introduced by Regulation 2201/2003 with the consensus of all EU Member States, could be deemed rendered nugatory and that State deprived of the jurisdiction to make determinations based on the child's best interests on grounds of delay alone. A.13 based non-return orders are made for many and different reasons. Delay *per se* must never stand the prospect of ousting the jurisdiction of the courts of original habitual

residence unless the welfare and best interests of the child, separately evaluated warrant it. Otherwise, it is important to refrain from overreaching in pronouncing on issues of jurisdiction lest the delicate balance under which issues on jurisdiction, recognition and enforcement of decisions in matrimonial matters, parental responsibility, and international child abduction, which have been progressively enhanced pursuant to the EU Treaties including A.81(3) TEU with the active engagement by the European Economic and Social Committee, the Commission and the European Parliament in direct consultation with the Member States, be thereby undermined. The Regulations are refined and recast from time to time in consultation with all EU national parliaments. The existing Rules can always be improved but national courts should refrain from unilaterally pronouncing on the parameters for ouster of jurisdiction lest it undermine legal certainty or diminish the flexibility of intended remedies available in our national courts under either Regulation.

103. It is to be understood that the father is aggrieved at the outcome of the Polish Hague proceedings, however that does not entitle the courts of this jurisdiction to enter into speculation unsupported by any evidence with regard to the processes which led to the said outcome. The courts in this jurisdiction are bound to accept that the final order made pursuant to the Hague Convention/the Brussels II *bis* Regulation in Poland was the order of 1 September 2021 which ultimately, in light of Article 10(b)(iv) of the Regulation and Article 11(6), (7) and (8) triggered the process outlined above which brought the ultimate issue once more before the courts in this State. As stated above, the novel aspect of the Brussels II *bis* Regulation arising under Article 11(6) is that when the courts in Poland refused to return the children for reasons identified as being pursuant to Article 13, the courts in this jurisdiction retained the entitlement to be the final arbiter with regard to the welfare of the children and their custody. The intention of the Regulation was to give parents the

final opportunity of having determined a custody application on its merits before the courts of the child's original habitual residence.

104. It is not in contention that the retention of the children by the mother after 6 January 2017 was wrongful and in breach of the father's rights of custody. That fact in and of itself did not entitle the trial judge to make orders conferring joint custody on the father or indeed sole custody or to make an order directing that the children be returned to this jurisdiction to facilitate him in exercising rights of custody and contact with the children. Such an approach would not be in compliance with the domestic legal order or with the spirit of the UN Convention on the Rights of the Child – which Ireland has ratified – which mandates that the best interests of the child should be a primary consideration in all actions concerning children. Since the trial judge in exercising her functions was also applying the principles and norms of EU law, regard can also be had to the said principle enshrined in Article 51(1) of the EU Charter of Fundamental Rights which at Article 24.2 reiterates that in all actions relating to children *"the child's best interest must be a primary consideration."*

105. I am satisfied that the father's contentions in this regard are based on a fundamental misunderstanding of the operation of Article 11(6), (7) and (8) of the Regulation and applicable domestic law. An evaluation or judgment in regard to custody made in circumstances where the requested court has issued a non-return order must be made in accordance with the domestic legal order in this jurisdiction in regard to the welfare of children.

106. For all the aspects of the reasoning that the Circuit Court in Poland identified to bring the case within Article 13(b) of the Hague Convention, there can be no doubting that the court was correct in determining that this was an unusual case and that for most of their lives the two boys had lived in Poland under the care of their mother and maternal grandparents

prior to the wrongful retention having occurred at all. That analysis was self-evidently correct.

107. There is force in the arguments advanced on behalf of the respondent that in the context of this application under the remit of Article 11(6) - (8) the High Court is exercising jurisdiction to determine the issue of custody based on the statutory jurisdiction conferred by s. 11 of Guardian of Infants Act, 1964 (as amended) and the inherent jurisdiction were it applicable. The respondent's counsel is correct in his contentions that *"Consequently, the jurisdiction of the Irish High Court in such circumstances is concerned with the custody of the minor children. The Appellant cannot seek to re-litigate Hague Convention proceedings in Poland. The Irish Court is not functioning as an appellate court under the Hague Convention. It applies a different legal standard (best interests) at a different point in time (now)."* (para. 24 of submissions) That succinctly encompasses the ambit of the High Court's function. The High Court was not being asked to determine the lawfulness or otherwise of the original retention of the mother of the children in Poland. It is clear that the said retention breached the District Court order. It is equally clear that the relevant operative order made ultimately by the Polish court on 1 September 2021 refused the summary return pursuant to Article 13 of the Hague Convention. That fact that the refusal was made under Article 13 triggered the process which entitled the Irish court to make the final determination in regard to welfare, custody and access of the children since Article 11(6) – (8) of the Brussels II *bis* Regulation was engaged.

108. Before the High Court could have issued a certificate pursuant to Article 42(2) of the Regulation requiring that both children be returned to this State, the procedures in Article 11(6), (7) and (8) were to be engaged with, in addition to the provisions of Article 42(2). This necessitated a full and comprehensive current welfare evaluation of the children. The judge was correct in leaving aside all recriminations and making the decision purely on the

basis of the evidence as to the best interests of the children. This was mandated by all norms of international, domestic and constitutional law and governs all cases concerning the welfare of children. Thus the judge correctly situated her approach within the ambit of the Guardianship of Infants Act, 1964, having regard to the definition of welfare in s. 2, and ss. 3, 11, and 12 which in substance acknowledge that any order concerning access or custody including the orders made in November 2016 before the District Court are temporary in nature and always open to review should the best interests and welfare of the children require variation. In addition, such an approach is warranted by the European Convention on Human Rights, Article 8.

109. I am satisfied that the approach of the judge is entirely aligned with the jurisprudence, particularly the decision of Finlay Geoghegan J. in *A.O'K v. MK (Child Abduction)* [2011] 2 I.R. 498 and indeed the later decision of this Court in *S.K. v. A.L.* [2019] IECA 177 (para. 47) and the decision of Ní Raifeartaigh J. in *D.M.M. v. O.P.M.* [2019] IEHC 238. Although the conduct of the mother is to be deprecated, ultimately the courts in this jurisdiction approach the issue through the prism of child welfare and the current best interests of the child based on the available evidence put before the court.

110. It will now be for the courts in Poland to address the welfare interests of the children into the future to ensure that insofar as practicable the relationship with their father is restored such that the sorrowful symphony of evidence outlined by the father is rectified and at a minimum that in the first instance the existing orders which entitle the father to reports in connection with the boys' health and education are honoured and built on and over time a regime of contact as considered to be in their best interests is restored. The courts in this jurisdiction repose confidence in the relevant courts in Poland to address the matter in the future in a setting where the children will ultimately be deemed to be habitually resident within the jurisdiction of the courts of Poland.

111. I would accordingly dismiss this appeal for all the reasons stated above.

Costs

112. In light of the public interest in the vindication of the rights and best interests of children, it is proposed that there be no order as to costs. If any party seeks to argue for a contrary order written submissions should be lodged with the Court of Appeal office by 14 September 2024. Replying submissions within a further 14 days and the court will thereafter consider same and give a determination on costs.

113. Faherty and Allen JJ. concur with the within judgment.