THE HIGH COURT

FAMILY LAW

[2022] IEHC 736

[2022 No.10 HLC]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND

IN THE MATTER OF ZACH AND KEVIN, MINORS

(CUSTODY AND RETENTION OF CHILDREN,

NON-CONTRACTING STATE TO THE HAGUE CONVENTION)

BETWEEN:

M.K.

APPLICANT

AND

R.M.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 21st of December 2022

1. Introduction

1.1 This is an application by a mother for Orders in respect of her children, called Zach and Kevin for the purposes of this judgment. Zach is four and Kevin is two years old. The family went to Egypt to visit the Respondent's family in March of 2022 and, during that holiday, the Respondent decided to remain in Egypt with the children. Egypt is not a Contracting State to the Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). An order for the return of the children is sought under the provisions of the Guardianship of Infants Act 1964 (the 1964 Act).

The Applicant seeks declaratory relief either in addition to, or in place of, an order to return the children to Ireland.

1.2 The Court's jurisdiction is limited in this case. The Respondent, whose presence at each hearing was via video link and was voluntary as he could not be compelled to attend from Egypt, resists the application. The children are now in Egypt and, even if the Court does direct their return, the Respondent has indicated that he will not return to Ireland and that his sons will remain in Egypt. Thus, the main Order sought is not enforceable.

1.3 A second aim of the proceedings may be more practical: it is to assist in any future application in Egypt. But this carries its own difficulties. This Court has no authority to direct a court in Egypt and would not presume to do so. The Court can decide cases based only on the evidence before it and provides this written judgment primarily for the assistance of the parties. While acknowledging the principle of comity between courts, nationally and internationally, the Court recognises that the evidence before an Egyptian court may be different to that which was produced here and assures any judicial colleagues in Egypt that the following outlines the Court's decision and represents the interpretation taken by this Court of what was presented in evidence and submissions. This is a statement of the law as it applies in Ireland and is offered as such, with great respect to any judge who may hear a related application hereafter and with no intention to issue any direction to a colleague. I will consider favourably an application by the parties to lift the *in camera* rule, which provides that proceedings are not heard in a public forum and which protects the children referred to herein, to the limited extent necessary to allow the parties to share the pleadings, the judgment and the orders made with the relevant authorities in Egypt due course.

2. The Applicant's Legal Arguments

A. The Principles of the Hague Convention in a non-Contracting State

2.1 The Applicant seeks an order returning the children, relying on the inherent jurisdiction of the Court and submitting that the principles of the Hague Convention can be applied even if the State in question is not a signatory state. The Hague Convention is a specific urgent remedy made available to contracting states to enable the swift return of children who have been abducted. There is no comparable remedy between states which have not signed that Convention and the concepts relevant to it (establishing grave risk, for instance) are not applicable to non-Convention cases for the simple reason that those states have not agreed to be bound by those principles.

2.2 In the alternative, the Applicant seeks an order pursuant to Part II of the Guardianship of Infants 1964 for the return of the Applicant's children to the jurisdiction of Ireland. She furthermore contends that her children have been wrongfully retained in Egypt "*and this constitutes child abduction for the purposes of the Hague Convention.*" In those circumstances, and as "*a first step in securing the return*" of her children, she seeks relief on the basis that this will be of assistance to her "*in seeking to obtain further Orders from the Egyptian Courts in due course if same becomes necessary*."

2.3 In support of the argument that the Court may rely on Convention principles, the Applicant refers to Professor Shannon's *Child and Family Law* (3rd ed. Round Hall, 2020). At para 10-12, the textbook states "*With regard to children brought to or retained in this jurisdiction, it is to be anticipated that, although not bound thereby in such circumstances, the courts will be mindful of the Convention principles in determining such cases, while the welfare of the child must be regarded as the first and paramount consideration.*" The Applicant submits that, as the case concerns wrongful retention in a non-Convention State, the principles and provisions of the Convention are of significance. While the Applicant concedes that this Court does not have jurisdiction to enforce the Convention in relation to a non-contracting state, the Applicant nonetheless contends that this Court should be mindful of the principles of the Convention in reaching its determination.

2.4 The cases in which similar issues have arisen confirm the Court's view that principles of the Hague Convention are not to be applied, by analogy, to non-Convention cases. In *S.K. v. A.L.* [2019] IECA 177 [47], Whelan J said:

> "*The functions of a judge dealing with any aspect of an application pursuant to the Hague Convention or the Child Abduction and Enforcement of Custody Orders Act 1991 are wholly distinct from the functions of a judge dealing with issues of custody, welfare and the best interests of a minor. In making determinations concerning a minor pursuant to the Guardianship of Infants Act 1964 (as amended), no breach of any principle of comity can arise since the functions of the judge under each regime are wholly distinct and different. The best interests of the minor is the paramount consideration in all determinations of welfare pursuant to the Guardianship of Infants Act 1964 (as amended). However, the best interests of a minor are not paramount pursuant to the Hague Convention since the purpose of that instrument is to achieve restoration of the status quo ante leaving all considerations of welfare and best interests to the courts of the habitual residence of the minor in question.*"

2.5 The passage above is in line with an earlier decision of Finlay-Geoghegan J. in *A.B. v. C.D.* [2017] IECA 174, who held that in non-Convention cases, the Court should "*not apply either directly or by analogy the principles according to which applications under [Convention] provisions are determined*". Thus, where the trial judge had ordered the

return of a child to Brunei, he had been correct to do so by determining whether or not such an order was in the child's best interests. The Court of Appeal noted that the English courts had taken a similar approach, with Baroness Hale in *Re J* [2006] 1 A.C. 80 stating that "*the child's welfare is paramount and the specialist rules and concepts of the Hague Convention are not to be applied by analogy in a non-Convention case*".

B. <u>The Applicant's Case under the Guardianship of Infants Act</u>

2.6 The Applicant has also pleaded that the children should be returned under the relevant Irish legislation. Part II of the Guardianship of Infants Act 1964 sets out the relevant jurisdiction in section 3 as follows:

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

2.7 Section 10(2)(a) of the 1964 Act provides that a guardian:

> "*shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant.*"

2.8 Section 11 provides:

> "*(1) Any person being a guardian of an infant may apply to the court for its direction on any question affecting the welfare of the infant and the court may make such order as it thinks proper.*
>
> *(2) The court may by an order under this section –*
>
> *(a) give such directions as it thinks proper regarding the custody of the infant and the right of access to the infant of his father or mother*".

The Applicant's application, if brought under this legislation, must be considered by reference to the best interests of the children, and not by reference to the principles of the Hague Convention. In the first instance, one must determine if the Act can apply to children who are currently in Egypt and not in Ireland. There is no such apparent limitation expressed in section 10(2)(a) or in section 11, but the practical reality is that no Irish court can make any direction which is binding on courts in another state.

2.9 Ms. Justice Finlay Geoghegan, sitting in the Court of Appeal in *A.B.*, held that the Irish courts have jurisdiction to hear an application for the return of an Irish child to a non-Convention state and the issue is to be decided by reference to the best interests of the child. That case involved the return of a child who had been taken to

Ireland from the child's home in Brunei. The converse is in issue here as the Irish children have been taken to the state of Egypt. Their home, until last March, was in Ireland and their mother is one of the two people with the right to determine where the children should live under Irish law, the other being the Respondent, their father.

2.10 The approach taken by the Court of Appeal in *A.B.* was summarised by Finlay Geoghegan J. as follows: "*In circumstances where the parents are in dispute as to whether or not an order for the prompt return of a child to its country of habitual residence should or should not be made obviously its upbringing and indeed probably the question of access is in question. This legislative requirement is underpinned by Article 42A of the Constitution*." This reference is to the Constitutional guarantee that the best interests of the child shall be the paramount consideration when considering the child's welfare.

2.11 That case also confirms what is clear from the legislation itself: in determining what is in the best interests of the child the Court should have regard to the relevant factors and circumstances including those set out in s. 31 of the Act of 1964 (as inserted by s. 63 of the Children and Family Relationship Act, 2015). Those factors are:

> "*31 (2) (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, 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 stage of development and the likely effect on him or her of any change of circumstances;*
>
> *(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;*
>
> *(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;*
>
> *(f) the child's social, intellectual and educational upbringing and needs;*
>
> *(g) the child's age and any special characteristics;*
>
> *(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;*

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

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

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

2.12 Relatively little argument was addressed to this aspect of the case i.e. the Court's jurisdiction to make orders in respect of Irish citizens not currently in this jurisdiction. Looking at the wording of section 11, in particular, the section is widely drafted and, taken with section 10(2)(a), the provisions appear to reflect an important Constitutional protection for Irish children. In my view the Court is entitled to make an Order, even if only a declaratory Order, setting out the Court's view as to what custody and access arrangements would be in the best interests of these children, on the application of their mother if, as happened here, the Court has heard from the Respondent father and considered his evidence before making the Declaration. The children have, until recently, always resided here. They are Irish citizens who are entitled to the protection of the courts, even if an order to return is not appropriate.

2.13 The Respondent in this case, although he understood that he was not obliged to attend the Court, was present online for every court date and was present online throughout the full hearing. He engaged fully with the evidence and made submissions to the Court based on that evidence. In those circumstances, the Court decided the issues raised by the Applicant and the Respondent as set out below. The burden of proof is on the Applicant who argues that the children's best interests will be served by remaining with her.

3. Evidence Relevant to the Best Interests of the Children

A. Affidavit Evidence

3.1 Both parties lodged affidavits in the case and, while objection was initially taken to the form of the Respondent's statement, this was not strongly pressed. As

the Court indicated, in such a serious matter, where one of the parents wanted to be heard and in particular where he was representing himself, the strict rules as to form should not prohibit a litigant in person from presenting evidence to the Court. He provided a statement, confirmed its contents were true and it was stamped by a local solicitor who confirmed his identity. In circumstances where this litigant in person was appearing remotely from a different jurisdiction, this Court accepted his statement as evidence in the case and the reliability of various parts of the statement is considered below when considering individual issues in turn.

3.2 There was some debate during the hearing, as often occurs when litigants are unrepresented, when the Respondent occasionally sought to add to his account but, as was made clear, the Court is entitled only to accept the evidence as set out in the affidavits and the exhibits. The Respondent was given time to respond to the Applicant's affidavit, lodged his statement and exhibited various texts and photographs. Both he and counsel for the Applicant addressed the Court at a full hearing on the 19th of December. Due to a decision to adjourn, described below, there was only a short hearing on the original hearing date, the 10th of December.

3.3 The Respondent did refer to two pieces of documentary evidence which had not been exhibited, both from identifiable sources, namely a psychiatrist's report and a school registration. The Respondent requested that the address of the school not be shown to the Applicant. The Applicant agreed that the Court could see these items as they bore directly on the case and the Court's duty to consider the welfare of the children, without prejudice to any argument as to authenticity or to the effect that she was entitled to know where her children went to school. Today, 21st December, the Court received these two additional documents from the Respondent.

3.4 Before looking at all relevant factors in more detail, it appears to the Court that both parents clearly love their children, both are capable of providing for them in terms of basic security, food and clothing, both are capable of offering them an education and the support of family members and both are capable of providing a safe home for their children. The core of the submissions from the Respondent appears in the following messages, which he exhibited and which I set out here in full:

On page 238 of the e-pleadings, a Facebook Message from the Respondent to the Applicant reads:

Hi [M], I know it's very hard on both of us and the kids but I can't go back to Ireland. could be good for some one else but not me and the boys. I never thought this will ever happen but also I never thought for once you and your family will treat me that bad. I never thought my kids will grow up without they mother but I have no choice. it's better to end it this way than be worse than that. I'm heart broken but I'm really hurted very bad as well. please … look after

yourself and don't worry about the boys you know no one on earth will love them more than me. I didn't want the boys to see you to make easier on them. you think I'm bad person but belive me I'm doing the right thing for the boys. if you thought about it you will see me the reaction not the action

At page 237 the messages include:

Respondent, RM: I want a guarantee that you will not take the kids and travel one day

Applicant, MK: Well you did that on me

MK: So you've only yourself to blame for thinking like this

RM: I only saved my kids to be in middle of two drunk women and only for they safety. do you remember how many times yous start to argue and fight together at 1 or 2am and Z been scared

RM: this is the trust not just playing games

RM: I have evidence for that btw

MK: We are not Muslim. My mother tried our best for them children and you know that. None of us are saints

MK: Do you think the best solution is the two boys being without a [screenshot cuts off]

The messages above encapsulate the argument made by the Respondent in which he attributes his actions to the Applicant's actions. It is notable that he exhibits no evidence of any previous similar disputes. Whether characterised as action or reaction, he took two children to a country in which they have never lived and deliberately separated them, permanently, from their mother. The above exchanges also show that he did not allow the Applicant to see the boys, claiming that this would "make it easier on them". This was the Respondent's choice rather than a more reasonable response, which would not have had as serious an impact on his sons.

3.5 There are two matters which emerged strongly from the affidavit evidence. The first was that the account of how the boys came to be in Egypt was not denied in any respect. Instead, the Respondent stated that he felt he was justified in making the decision and that he did so for the safety of the boys. This viewpoint is considered in more detail in the next few paragraphs. However, the effect of this is that many of the averments of the Applicant went unchallenged and appear to the Court to be reliable, if only for that reason. The Respondent was advised in early case management hearings to put any matter of significance into his statement and, specifically, if he disagreed with anything that was in the grounding affidavit, to set this out. He was able to controvert the Applicant's statements in other respects, in particular in relation to her averments about money, but did not refute her evidence that he had unilaterally

decided to take the boys to Egypt, permanently, and that he had threatened her with serious consequences should she try to get her sons back. The Court can find as a fact that this was probably done and said as reported by the Applicant.

3.6 The Respondent argued strongly that the Applicant was incapable of providing a safe home for his sons. This was based on his submission that both she and her mother drink to excess. He pointed to photographs which, he argued, showed marks on the boys' skin. The implication was that this happened while in their mum's care and probably while she was drinking. This Court has considered the argument very carefully and has examined the exhibits said to support that argument. Before moving to that detailed evidence, it should also be noted that there is a cultural difference between the two parties as regards social drinking which was effectively conceded by the Respondent in his references to the culture in Ireland around alcohol. A national stereotype involving drinking is not a basis on which a court decision could or should be made. Some of the affidavit evidence made general statements about the position of a child in Egypt with reference to food security and the Court will not and cannot base a judgment on a broadly stated argument based on newspaper generalisations. Just as this Court will not subscribe to broad generalisations about how safely a child might be raised in Egypt, nor will the Court comment on the safety of a child raised in a country where it is lawful for an adult to drink alcohol. The Respondent told the Court that he used to drink but gave it up when he had children. This is his choice but is not expected of a parent as a matter of law or morality. Just because there are cultural differences between two countries does not mean, as a matter of logic, that one culture is better than another for children without evidence specific to each case.

3.7 The Court has examined the Respondent's allegations of excessive drinking and finds that there are four pieces of evidence that bear on the question: the photographs he exhibits of empty bottles in the house, the text messages between the Applicant and her mum, the Applicant's evidence of her employment, including the reference from her employer and the bank statements. The Respondent relied on what he described as evidence of alcohol purchases in the statements.

3.8 The photographs of empty bottles at pages 272-276 show 8 bottles, each appear to be litre-bottles, which contained different spirits. At least two vodka bottles are identifiable, and texts confirm that the Applicant and her mum have drinks of choice, namely vodka and whiskey, respectively. There is no indication in the photos as to how long the bottles have been in the bin or container and nothing to indicate how often either woman takes a drink. The texts are somewhat more helpful but not dated so, again, it is not possible to quantify how many drinks either woman might take.

3.9 The first relevant text reads:

Applicant: 20:18 – We're home and they'll be in bed soon

20:18 – 😁 😁 😊

20:18 – I got a drink 🍸

Her Mother: 20:18 – Just Right send me a photo of them

The second text is as follows:

Mother: 22:20 – That wee [K] boy is just gorgeous 😍

Mother: 22:21 – Is your drink downstairs

Applicant: 22:21 – He's getting big mam. No mam it's here but I need coke and I'd prefer to drink downstairs as he is working in the room next door. Going have two n go to bed mam

3.10 This is the extent of the evidence in this regard and as the texts are undated it is impossible to tell whether there is any time between the two exchanges or if they are months apart. The most referred to in any one text is two drinks. I note also that the Applicant is employed, and has been for some years, in a responsible position. While the Respondent does not approve of the Applicant's drinking habits, there is no evidence that the children have been endangered by it or are at risk in any way.

3.11 The photographs which the Respondent relies on do not bring this argument any further. There are no obvious injuries and, in any case where there is a mark, no evidence to support his claim that this occurred when the Applicant was drinking. If this was a serious concern for him, one would expect to see some evidence of a complaint or contact, either with child protection services in this country or even with some member of his family or indeed with the Applicant about the issue. While he has preserved texts about taking a drink at home, and photos of empty bottles, he does not appear ever to have raised the issue of injuries to his children with anyone else. There is insufficient evidence for this Court to find that that injuries were suffered by the children due to any lack of care by the Applicant or her mum.

3.12 In this regard, I note that the Applicant has been invited by the Respondent to join him in Egypt and he submits that he does not want to break up this family. If he was concerned about her parenting ability and genuinely attributes injuries and marks on the boys to her negligence, this offer is difficult to understand.

3.13 Finally, having been invited to examine the Applicant's bank statements, the evidence there is mostly ambiguous but there are purchases which are likely to be alcohol. Taking this evidence at its height and assuming all possible references to be bars or off-licences, no single transaction involved more than €20. On occasion, there is a series of purchases from a named bar, never more than four, most of which are on weekend nights in 2019 and 2020. I did not see two weekends in a row with such a pattern. Across sample periods from 3 years of statements, there are two identifiable transactions in an off licence. Significantly, the purchases are weeks, and sometimes months, apart. There is no evidence of daily drinking or even of weekly drinking. The statements suggest routine use of the bank card for all sorts of purchases and are likely to be a true reflection of the Applicant's spending. What may be alcohol (and I am prepared to accept, for the purposes of giving careful consideration to his submission, that any purchase in a named bar or off-licence is of alcohol and not soft drinks or food) amounts to a relatively small amount of the Applicant's spending and does not disclose the kind of habit that the Respondent seeks to establish.

3.14 The boys have numerous relatives in Ireland; their grandmother and two uncles are mentioned. They also have family in Egypt. Their paternal grandmother is there and appears to be an important support to the family, and they have at least one uncle living locally. Both countries can provide for their schooling and religious wellbeing. No argument was made that their spiritual lives would be negatively affected in either country. The specific factors to be considered under section 31 are set out, in turn, below. This section A, above, gives an account of what was averred to so as to give a flavour of the matters each party revealed insofar as the boys were

concerned. Other matters in the affidavits are not relevant to the boys' welfare such as general financial matters and the Respondent's health, for instance.

B. The Welfare Report

3.15 This Court ordered that an independent enquiry be made into the welfare of the Applicant's children, detailing their psychological wellbeing, provision for habitation, and general physical and mental health. The report is unsigned and was prepared by the Red Crescent, which body is affiliated with the Red Cross. The report was prepared in circumstances where the Respondent agreed at case management in October that he would admit the Red Cross body to his house but then decided he would await the outcome of the case. When the Court advised him before concluding this hearing last week that it could take only the most negative view of the boys' current care without such a report, he agreed to give access to the Red Crescent and a report was made available about a week later, the day before the final hearing.

3.16 At the resumed hearing, this Court ruled against an adjournment for the purposes of obtaining a further report. The Applicant submitted that the report does not go far enough. She asked me to consider whether the two medical reports attached to the letter are sufficient to conduct a psychological assessment. A formal application was made for a psychological report pursuant to section 32 of the Guardian of Infants Act. Given that the case has now been in the Hague list since October, at which time it was assigned a hearing date in early December which has already been adjourned to the 19th of December, the Court was not inclined to delay this case further. At least two more months would have been necessary to obtain a full report even if the parties were all in the jurisdiction. As matters stand, this Respondent did not have to attend court, nor did he have to allow anyone access to the boys for the purposes of reporting back to the Court, but he did so at my specific request. He was asked to consider returning to Ireland temporarily to allow a full assessment but declined this offer. In those circumstances, this judgment is furnished with the information available to the Court from the parties, the report obtained at the behest of the Court and nothing further. Section 31(5) provides that, in any proceedings to which section 3(1)(a) applies, the court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child: this is the sub-section that propelled the Court to determine this matter even in the absence of further evidence that would have been helpful in clarifying some matters of fact.

3.17 It is difficult to identify if the author of the Red Crescent report is qualified to comment on the medical or psychological condition of the children. The report

appears to mirror closely what the Respondent says about conditions in Egypt for his sons. The report contains an enthusiastic endorsement of the Respondent's parenting abilities and confirms that the boys are in good health insofar as the visitor could ascertain. The close bond between the paternal grandmother and the boys is noted. The visitor did not see the boys at home which is a singular and unfortunate deficiency in the report. There is no indication that the author was aware of the reasons for the visit. The conclusion is expressed: *We believe that, given the current situation, children are emotionally, economically and healthily safe*. It is not clear what the current situation entailed in the view of the author.

3.18 There is another significant caveat: Ms. H, their paternal grandmother, is said to be a healthy lady, ideal to assist in caring for the boys, but this is at odds with the (signed and apparently authentic) medical report in respect of this lady, which reveals that she was in a dangerous condition in 2021 with a guarded prognosis. There is no indication that this was revealed to the author of the letter from the Red Crescent.

3.19 I must place some weight on the welfare report, despite the lack of identifiable author and the reservations expressed above. It came to the Court via the Red Cross. It is very reassuring to read that the boys appear to be safe and healthy. Nonetheless, given the contents of the medical report in respect of the Respondent's mother, and where it appears that she will mind the children while the Respondent is at work, there is uncertainty as to what will happen should her health deteriorate and this indicates that the author of the report could only take note of the situation in Egypt at face value, as he (or she) was given no opportunity to investigate further or to arrange for psychological reports. The Court has no confirmation of comfortable living conditions for these boys but accepts that their general appearance suggests that they are not in obvious distress. The Court has already accepted that both parents love their children and can conclude that the Respondent is making material provision for them as best he can, with the help of his mother and brother.

C. Evidence in respect of the Provisions of Section 31

3.20 Each of the following factors must be considered carefully and weighed by the Court in deciding where the best interests of the children lie.

(a) A meaningful relationship with both parents: The evidence in this regard was that the Applicant was forced to leave her children in Egypt with no warning and with no choice in the matter. At hearing, she suggested a mediated form of access and the Respondent declined. He submitted that, as an Egyptian citizen, he had done nothing wrong and was entitled to take his children home, adding that they are half Egyptian. Asked about the prospects for a future relationship with their mother, he confirmed that she was welcome to come and live with them in Egypt under which conditions

she would have access to them. There was no other plan for access described to the Court. For completeness, it must be noted that phone contact had been arranged but there is a dispute between the parties as to how this has failed, with each blaming the other. At this point, communication has broken down.

(b) The views of the children: These have not been formally ascertained. Insofar as one can extrapolate from surrounding evidence, the children love and have a strong bond with both parents. Children of this age require the love and support of both parents, ideally, and usually they do not want to be separated from either parent.

(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: There is no expert psychological evidence of the effect of moving from their lifelong home to a foreign country on these boys. It is inevitable that, like any small children, these boys suffered a significant rupture to their lives due to their prolonged stay in Egypt, a country where they do not speak the language and where, after the first weeks, their mother was suddenly absent. It is significant, in this Court's view, that one of the Respondent's opening statements to the Court was to say, in regard to the retention of the children, that he did "*not know what the big deal is*". This shows a profound lack of insight into the kind of adverse events that can damage a child, psychologically and emotionally, for life. Just as he argues that if a parent is drinking to excess it must affect a child negatively, so must he realise that if a child is separated from one parent that the child is deeply harmed, perhaps for life, by this separation. This is particularly the case when the child has been in the care of that parent for all of his life and the sundering of contact is sudden and total, as it was in this case. My view of these events is that the sudden absence of their mum in their lives is hard to quantify in terms of loss but will certainly have a significant negative effect and is potentially devastating for both boys.

Under this heading it is important to note the contents of a report on Zach, the older boy. This was dated yesterday's date and is handwritten on the headed paper of a consultant psychiatrist. It has not been exhibited in any statement or affidavit but, taking the document at face value, it reads that the author was consulted in August 2022 about the effect of what he refers to as "Divorce" on him and the "separation sequence and the effect of being abroad not with his family in Egypt what is better to his mental health." He recommended that he interview Zach in play therapy and notes "I have to apply psychological test to stand for his status, then to know his preference being with any of his parents, and which society he feels more familiar". He concludes that Zach is attached to his father and grandmother. This last statement is not in issue. No conclusion is expressed about the effect of the separation from his mother on this 4-year-old boy. I have a serious concern about the premises of this

enquiry which is expressed to be *an examination of the effect of being abroad, not with his family in Egypt*. With all due respect to this doctor, the relevant enquiry is as to the effect of being taken from his family in Ireland the previous March and not how being abroad, not in Egypt, would affect the boy, difficult though that may also be at this stage. Again, and in line with the text messages and submissions of the Respondent, this instruction to the psychiatrist reveals a total lack of insight into the original injury done to this very young child which was to remove him from everything he knew due to difficulties the Respondent himself was experiencing.

(d) The history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives: This is dealt with above to some extent. The children spent their entire lives in the care of their two parents. The Respondent ended that situation unilaterally last March by his actions. He characterises these as reactions, but the reality is that there was no opportunity for the Applicant and Respondent to find any alternative solution due to this action on his part. There was no attempt to separate amicably or to attend counselling for the sake of their children. The situation went from conflict between the adults to a sudden and world-changing decision for their two children, made by one parent only. Indeed, the texts exhibited make it difficult to assess whether the parents had identified a source of conflict between them directly before these events. The children's relationship with both parents, until this action, was close and loving. No argument was made by either side that there was anything other than close ties with each parent. Both parents also claim, with some support, that the children had and have extended family ties with other family members.

(e) The child's religious, spiritual, cultural and linguistic upbringing and needs: As set out above, the religious and spiritual aspect of the case was not touched upon in oral argument. What is clear from the affidavit evidence and a reference made in respect of educational needs being met is that the two children spoke English when they were removed to a country in which Arabic is the predominant language. The Respondent's family members do not speak English. The Respondent intends to send the boys to an international school where they will continue to speak English but he must accept that the language they will need in their daily lives is a very different one and, on his own evidence and even after nine months in Egypt, they speak only broken Arabic at this point. While it is very much an advantage that the children will have a second language, this can and should be achieved in circumstances which do not involve the trauma of being uprooted and moved to a country where they rarely hear the only language they have spoken until that time.

(f) The child's social, intellectual and educational upbringing and needs: Both Ireland and Egypt offer education and social opportunities to these boys. This was not a

strong feature of the oral argument save as regards the plans for these boys which factor is considered under factor (i), below.

(g) The child's age and any special characteristics: One child, Zach, has had speech therapy in Ireland. The Respondent says that he has identified a suitable psychologist and has undertaken to email his report by the date on which judgment will be delivered, on the 20th of December. If that does include an appropriate proposal, then the specific difficulty can be addressed in either country.

(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: This has been discussed in detail above as regards the Respondent's affidavit and oral arguments about alcohol. In summary, the Court does not accept that there is a risk of harm to the two children because their mother drinks alcohol. There is insufficient evidence to support a conclusion that she drinks to excess or to their detriment. The psychological well-being of the boys in their current environment has not been established although their physical health and bonds with their father are clear. The trauma that children suffer when their whole environment changes overnight, including the total absence of one of their primary carers is so well-documented that it must be noted here. The lack of insight on the part of the Respondent in this regard has already been referred to.

(i) Where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and cooperating with each other in relation to them: This is a significant factor in this case. The seeming cooperation of the Respondent is tied to the condition that the Applicant give up her job, leave her home and family and move to Egypt to live with him. There are no other circumstances in which he envisages her having direct contact with her children as he will not return to Ireland with them. As the section specifically provides, the cooperation of parents in this regard is desirable. While the Applicant appears to envisage contact in Ireland, she appears more open to counselling or concessions in her submissions to the Court. To that extent, it weighs in the Applicant's favour that there is more likelihood of a meaningful relationship with both parents and more likelihood of cooperation if she should be successful in obtaining the return of her sons. The Applicant's confirmation, by message set out above, that he had deliberately kept his sons from contact with the Respondent while he retained them during what was expressed to be a holiday, is a deeply worrying indication of his intentions for the future and his understanding of what is, and is not, good for children. It appears that there will be little or no cooperation on his part.

The proposals for the care of the children are also a cause of concern in that the averment of the Applicant that the children will be cared for by the only female member of the Respondent's family, namely his mother, has not been refuted. Nor has the averment that she suffers from diabetes and a chronic heart condition. This is supported by the medical report referred to. There is reference to a new house but no description of this accommodation.

(j) The willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives: The Applicant has not been involved with the Respondent's family to date, other than to try to arrange contact. In that regard, there is evidence that the Applicant severed contact with the Respondent's mother during these attempts. Meanwhile, as set out above, the Respondent has indicated that the Applicant is welcome to be with the boys in Egypt if she re-joins the family. However, and this appears to the Court to be significant, he has refused to divulge the address of the school to which he intends sending their sons. The parents had decided on a school in Ireland and had enrolled Zach in this school. On the basis of this evidence, it seems to me that the Applicant and her family is more likely to maintain and foster relationships with the Respondent and his family than the converse. While the Applicant has not made huge efforts in this respect, the total embargo which appears to be envisaged on the part of the Respondent unless she moves to live with him in Egypt, is a bleak outlook for the boys. The photographs of the boys with their paternal grandfather do not reassure me in this regard. This man was not mentioned in the Applicant's affidavit or submissions and, while any such contact is welcome, the most significant family tie for these boys is with their parents. Their father has given no indication that this will be promoted other than on the stringent and unreasonable terms outlined. In respect of plans, detailed plans were made as to the children's medical and educational welfare, the plans were made by both parents and they are set at naught due to the decision of the Respondent to remove the children from their home. Again, in this context it is worth repeating, this appears to have been done without any negotiation with the mother or any attempt to resolve their differences short of what can only be described as a nuclear option of suddenly removing the children from her care.

(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.

In this regard, the children's GP is in Ireland, their medical and social history is here and the school that the parents chose for the boys is here in Ireland. The parties were able to communicate, apparently, to the extent of setting up all of these supports for their boys. This environment disappeared when the Respondent decided to move them, permanently, to Egypt without notifying his wife of this intention.

3.21 While there is evidence that the Applicant has employment, there is no evidence of means. Both parents have rights of guardianship and custody but must fulfil them adequately. In respect of her ability to provide for the family the Applicant mother has proven that she is competent to do so having steady employment and the means to provide for both her children in a material way since birth. It is clear from the affidavits and from texts exhibited in respect of loans to the Respondent that she has been the primary earner for this family. This has also been clear from supporting exhibits including details of her mortgage payments on the house in which these children have always lived, letters from a creche, from uncles and from her mother all of which tend to support the submission that the children are secure in this home and their future here has been planned and would be secure had they remained at home.

3.22 The Applicant specifically submitted that she does not cast aspersions on the Respondent which bodes well for a mediated solution to this extremely distressing case. She submitted that access to both parents is in the best interests of these children. With this in mind, I note that the Red Crescent report reassures the Court that the children are not in immediate need in their father's care. While there is less supporting evidence in this regard, I accept that he is in employment and can care for the boys and supply their immediate and basic needs, with the help of his mother. This is subject to risks, mentioned earlier, due to his mother's ill health.

3.23 The Applicant asked the Court to recognise the "tender years principle" whereby very young children are usually in the care of their mum. The authorities are quite dated in this respect. The male judges involved all took the view that the normal position is that children should be cared for by their mum, particularly when young. It was said that they naturally turn to their mother and that their father cannot readily supply such care. My own view is that it is very difficult to justify the distinction traditionally made between a mum and dad in this respect. However, I conclude that in respect of their overall care, the capacity of the Applicant, due to her understanding of what this parental separation means, the parents' joint preparation for the boys' education, her extended family, her financial and her home circumstances, appears to be greater than that of the Respondent. This does not mean that he is not a loving and capable father, it is to consider what is best for the boys overall.

3.24 Section 31 (4) provides that: "*For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only.*" In this regard, I have not referred to evidence of the Respondent that he had suffered ill health or that he had been insulted or ill-treated by the Applicant's family. These matters appear to have informed his decision to remove the boys but there was no evidence of impact on the boys and, as such, these matters are not relevant to their welfare, they are relevant to the Respondent's welfare.

4. An Order for Return and the Best Interests of the Children

4.1 There is authority dealing with Ireland-Egypt child abduction, *Director of Public Prosecutions v. Ismaeil* [2012] IECCA 36. There, the applicant abducted his nephew from Ireland to Egypt. Upon returning to Dublin without the child, the applicant was convicted of child abduction contrary to section 17 of the Non-Fatal Offences Against the Person Act 1997. The Court of Appeal upheld the conviction. According to Finnegan J., it was a gravely aggravating factor that the applicant "*clearly intended to deprive [the mother] permanently of custody of the child by removing [the child to] Egypt, a country to which the Hague Convention on Civil Aspects of International Child Abduction does not apply*". Finnegan J. said at [33]-[34]:

> "*…It is possible that the Egyptian authorities are unaware of the precise circumstances leading to [the child's] abduction. If so, then this judgment ought to make abundantly clear the circumstances in which this young child came to be unlawfully abducted and transported to Egypt.*
>
> *In these circumstances, the Court proposes to take the unusual and most exceptional step of directing the Registrar of the Court to send a certified copy of this judgment to the Minister for Foreign Affairs in the expectation that he in turn will transmit a copy of this judgment to the Egyptian authorities through the appropriate diplomatic channels. The Court trusts that the Egyptian authorities will in turn appreciate the seriousness of the matters disclosed by the contents of this judgment and take appropriate action.*"

4.2 The Respondent in the present case has told the Court directly that it is unlikely he will return the children, even pursuant to an Irish court order. There is an important distinction to be made here, however: This is a civil case, not a criminal case. This Court has no view on the potential criminality of the Respondent's actions, nor would it be appropriate to express a view. That is a matter for the independent prosecutor of the relevant country in any such case.

4.3 In terms of the civil law, the Respondent submits that he has done nothing wrong and that he has taken legal advice, from an unnamed lawyer in Malahide, to confirm that his actions were not unlawful. In this, he may not be correct insofar as

the criminal law is concerned but I will not comment further on that hypothetical scenario. There was no court order preventing the Respondent from removing his children from the country.

4.4 Section 10 (2) (a) provides that a guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and *shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant* and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant. [My emphasis]

4.5 Section 10(2)(a) is difficult to define as a positive obligation on the Respondent to not take an infant away in the absence of a court order. The section is phrased, rather, as an entitlement on the part of the Applicant to take proceedings for restoration of custody in a scenario where the infant is wrongfully removed. Furthermore, in the absence of any other specific provision in legislation, and my attention was not drawn to any relevant provision, I take the reference to 'wrongfully' in Section 10(2)(a) is a reference to criminal law, i.e. Section 17 of the Non-Fatal Offences Against the Person Act 1997. It may also refer to the Convention, of course, but as already discussed, the Hague Convention does not apply in this case. As a matter of pure family law, then, it appears that there is no unilateral, ex-ante provision for prevention of removal by a guardian in the absence of a court order to that effect.

4.6 The factors that the Court must consider have been set out above with some detail in each respect. In my view, the evidence in respect of some factors suggests that both parties will provide well for their boys. However, considering the best interests of these children (as I must) in respect of (c), (d), (e), (f), (k) and (i) the evidence weighs, in some cases very strongly, in favour of the Applicant. The Respondent shows no insight into the damaging nature of his unilateral decision to remove the boys from their home, from their mother and to a country in which they do not speak the language and where they live with a family whose other members do not speak English. The evidence suggests that, while their father is at work, they have no English-speaking relative with them and no such company other than each other. The complete severing of contact with their mother, in these circumstances of a total change of environment, is potentially devastating and cannot be mitigated by contact with some members of an extended family whom they had not met before their removal from home in March of 2022. The prospect of this severing of contact being permanent is a very real threat if the Respondent is successful in retaining his sons and totally excluding the Applicant from their lives. His submission to this Court that he did not want her to know the address of their school was perhaps the most disturbing and telling proof of this intention on his part.

5. Other Reliefs Sought

5.1 The Applicant has sought a Declaration that the respondent "*has wrongfully retained the minors in contravention of the applicant's rights and/or within the meaning of Article 3 of the Convention and/or contrary to the best interests of the children.*" As already discussed, reference to the Convention is not appropriate in these proceedings but the Court is entitled to consider a declaration that the retention was contrary to the best interests of the children.

5.2 The evidence has established clearly, and indeed it was not contested, that the children had always lived in Ireland and had never been to Egypt before they were retained there by the Respondent. This was not in their best interests in circumstances where they did not speak the language, they had never visited their family there, the Applicant, their mother, actively objected to the move but was threatened in order to ensure that the boys stayed with the Respondent and, in all the circumstances, it is highly unlikely that she will join the family there. There were no adequate reasons given for this action on the part of the Respondent and none that revealed any risk of harm to the boys. Given the Respondent's refusal to let her know where Zach will be in school, this is an indication that he did not expect her to accept his offer, or that he has now repented of it and is determined not to permit further direct or meaningful contact. To accept his offer, indeed, she would have to abandon her home, her extended family and her job. The Respondent had already voluntarily done this, it might be said, in order to start a life with the Applicant but that word "voluntarily" is a key word: until his unilateral action, neither party had been forced by anyone to make life-altering choices. It was the Respondent's action alone that resulted in a serious rupture to his children's lives.

6. Conclusions

6.1 The Court has no authority to direct the Egyptian courts in any way, nor would the Court presume to do so. The Court does have a duty to identify the best interests of these children and determine how these might be vindicated. According to the evidence produced to this Court and the submissions made by the parties herein, the best interests of these children would be served by their immediate return to their home in Ireland but such an order is not enforceable in the circumstances outlined. Due to the seriousness of the case and its consequences for these children, I will make an Order declaring that the children were removed from their home in Ireland and retained in Egypt without the consent of their mother and that their best interests would be served by their return to Ireland in her care where the courts here can make further orders as to custody and access for both parents.

6.2 The Court heard both parties in respect of costs. Given the substantive success of the Applicant's claim, costs were awarded to the Applicant. However, the primary relief sought was under the Convention, which clearly does not apply in the case. This took up a significant amount of court time and the appropriate costs award was reduced by 25%. The figure was arrived at by estimating the time afforded to this argument. The Respondent was ordered to pay 75% of the Applicant's costs.