

THE HIGH COURT

FAMILY LAW

[2024] IEHC 142

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 COUNCIL REGULATION 2201/2003/EC AND

IN THE MATTER OF J AND K, MINORS

(CHILD ABDUCTION; BEST INTERESTS OF THE CHILDREN)

BETWEEN:

W.A.

APPLICANT

AND

A.T.

RESPONDENT

AND

THE MINISTER FOR JUSTICE ACTING AS THE CENTRAL AUTHORITY

NOTICE PARTY

Judgment of Ms. Justice Mary Rose Gearty delivered on the 13th of March 2024

1. Introduction

1.1 This is an application by the father of two boys for their return to Ireland. The Respondent mother retained the boys in Poland without his consent. He is from a third country but has been resident here for many years. The Respondent

mother removed these young boys, called J and K for the purposes of this judgment, in 2016, failing to return them after the Irish District Court refused her application to relocate but allowed a Christmas visit to Poland. At that time, the children were habitually resident in Ireland. The eldest is now under fourteen and the youngest is under ten years old.

2. Proceedings before the Polish Courts

2.1 The Applicant made an application in 2014 under Council Regulation 2201/2003/EC (“the Regulation”) when the Respondent took the older boy, J, to Poland. This Regulation provides for a swift summary procedure for the return of a child wrongfully removed from home by one parent without the consent of the other. The proceedings were withdrawn some months later when they returned home. The younger boy, K, was born in Poland, after which time the Respondent returned to the family home in Ireland with both boys.

2.2 The current application has a long and unusual history. It began with a relocation application by the Respondent, in the District Court in Ireland, which was refused. She then brought J and K to Poland for Christmas and never returned. The Applicant applied for the return of J and K under the Regulation, and the Polish court of first instance ordered that the boys be returned as they had been removed from their home without the consent of their father. While the Respondent raised the defence of grave risk, the defence was not established to the court’s satisfaction. She appealed and the Circuit Court in Poland dismissed her appeal, again ordering that J and K be returned home.

2.3 The Polish Circuit Court’s conclusion in 2018, included this comment:

“[the] failure of [the Respondent] to respect the decision of the Irish Court with regard to facilitating the contact of the children with their father and the return to Ireland at a specified time demonstrates the [Respondent’s] focus primarily

on her own objectives and aspiration as well as selective adherence to the applicable standards and rules.”

2.4 That decision was appealed, unsuccessfully, to the Polish Supreme Court which ruled that J and K must be returned as their removal had been wrongful. During the Polish proceedings, the Respondent moved her residence, apparently to avoid the return orders repeatedly made in that country.

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. The 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.

2.6 The Polish Circuit Court now upheld the grave risk defence, referring to allegations of violence which had not been substantiated in the initial application in either the District or the Circuit Court in Poland. Bearing in mind that the parties had not lived together for any of the intervening time, it is difficult to see how the allegations carried more weight 4 years after she left, or how boys who had never complained about fear or violence before, claimed to remember suffering at the hands of their father.

2.7 The Applicant has listed several inconsistencies in these findings in written submissions but two 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. It was 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.”

That Court 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.”

2.8 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 children to their habitual residence.

2.9 The Applicant relied on various decisions of the European Court of Justice (the “ECJ”) in a bid to persuade this Court to override the non-return order in this case. These decisions have been critical of the Polish legal system, in particular, *European Commission v. Republic of Poland*, Case C-619/18, 24th of June 2019, a case which contains comments on the erosion of judicial independence in Poland. At paragraph 58, the ECJ noted *“that requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which*

is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law will be safeguarded”.

2.10 Due to the rule of law concerns that have been raised here, this is a factor which the Court must address directly. 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. A judiciary which is dependent on the government of the day thereby opens the door for autocratic government, for rulers who do not themselves obey the law, for insufficient checks on power and creates the potential for dictatorship and the erosion or elimination of human rights that arbitrary rules inevitably bring in their wake.

2.11 The unusual procedural history and the stated basis for contradictory decisions in the Polish courts make this a case which is difficult to explain, when viewed from the vantagepoint of another jurisdiction. However, 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. I set this out clearly as the rule of law is never something to be taken for granted; its precepts guarantee the safety of citizens from arbitrary changes in the law and from the erosion of their fundamental rights. Judges must oppose interference with the rule of law. But that comment applies equally to this Court, as it does to Polish courts. 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.

2.12 While courts must guard against injustice, in this case, what is relied upon is an adverse decision to this Applicant, 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.

2.13 The Court was also asked to consider a reference to the ECJ as to how this case might be decided, taking this unusual history into account. Two factors militate against this. Firstly, the legal reality is this: there is 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.

2.14 The second factor is a recent development relevant to the above submissions, which is the change of government in Poland. It has been widely reported that the new government intends to restore the confidence of the Member States of the EU in the Polish judiciary and has already taken measures in that regard. 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.

2.15 The jurisdiction vested in this Court by the Regulation 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. The

operation of Article 11(6) to (8) of the Regulation is engaged. If this was an abduction that had occurred in the last 12 months, then some of the authorities relied on by the Applicant, which refer to the summary return of children, would be highly relevant, but it is not such a case. Nor can I simply mark my disapproval of the Respondent's conduct by turning back the clock to the point at which the Irish District Court refused to allow her to relocate with the boys.

2.16 This is an application to override a non-return order made in another Member State. The test is not to signal disapproval of the process used, or to reassess the substantive decisions made, in that other state. Having noted the rule of law implications of the submissions made, with the potential damage to these children and the wider reputational issues for that jurisdiction, in my view this is not an appropriate case for any findings of fact to that effect, nor is there a requirement for this Court to ask for the assistance of the ECJ.

2.17 The test I must apply here is set out clearly in Article 11 of the Regulation, the relevant paragraphs of which require the Polish court to transmit its order and all relevant material including transcripts of the hearings, to this Court within one month of the non-return order. That has been done. Thereafter, the parties are invited to make submissions to the Court, in accordance with national law, so that the Court can examine the question of custody. 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.

2.18 Ms. Justice Finlay Geoghegan considered the nature of this jurisdiction in *AO'K v MK (Child abduction)* [2011] 2 IR 498, noting that the Regulation does not expressly set out the procedures to be deployed or issues to be determined under Article 11(7), save that it requires the court to "*examine the question of custody of the child*". She concluded, in summary, that the test is to ask what is now in the best interests of the children in the case, bearing in mind the relevant law in Ireland. This requires that I consider the views of these boys and the effect of the removal on their relationship with the left-behind parent.

2.19 A notably similar case, in terms of facts, is *Z v. Z*. [2021] IEHC 20. There, Simons J. raised the issue of delay in the context of Article 11 proceedings and held it was contrary to the provisions of the Regulation, in particular, the requirement for urgency, to allow the application to be made for the first time over six months after the making of the non-return order. While my comments below, about negotiations and agreement, apply here as the parties did facilitate and improve access arrangements in the past year, a final order must be made, despite the Applicant's request for a further adjournment of the case.

3. Procedural History and Article 11 delays

3.1 In *Z v Z*, there were comparable delays which occurred both in the initial transmission of documents to the Court from the Central Authority and in setting hearing dates, which had to be vacated due to the COVID-19 global pandemic. Nonetheless, this case is now being decided years after the children returned to Poland and this will, inevitably, inform the decision on their welfare. In line with the comments from Simons J. in *Z v. Z* and from Ní Raifeartaigh J. in *D.M.M. v. O.P.M.* [2019] IEHC 238, cases should normally be assigned hearing dates within months of first being listed. This case was unusual in that the case went through the Polish judicial system twice and both parties were conscious of the unusual features of the case.

3.2 Delay appears to be a feature of these cases: in a list with otherwise strict time limits regarding applications for the summary return of abducted children, the final review of non-return orders appears less urgent by comparison. The respondent often has little motivation to urge the Court to a hearing as that parent is usually in a strong position, getting stronger over time, given that a child's best interests include such factors as social and family environment, over which that parent has almost complete control.

3.3 Conversely, the applicant faces the uphill battle of arguing that, despite what is inevitably a long period in a child's life with the other parent and a court

order in another Member State directing that he should remain there, an Irish court should be persuaded to override that custody order. If an applicant succeeds, the inevitable effect is to uproot a child again, but considerably later than would be the case after a summary application for return.

3.4 While a return order may be made, the reality of Article 11 cases is that this is rarely done and, that being so, the applicant often allows the case to remain in the list as this allows the Irish Court to direct access, perhaps on better terms than anticipated in the new habitual residence. Even if access is not as generous as, or is equivalent to, that being offered anyway, the respondent is perceived as having more motivation to abide by Irish court directions as long as there remains a risk of the non-return order being overruled by this Court.

3.5 The reality on the ground is that negotiations are always ongoing in these cases and, on occasion, this Court has noted improved dynamics in the family, as trust is rebuilt. However, that is not the function of the review mechanism and allowing time for negotiation, or even mediation, cannot become a default position in the court list. 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 child's welfare must remain the most 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.

3.6 The best result for children is that their parents reach agreement about their future, but in cases with lengthy histories of conflict, which is almost inevitably the case in an Article 11 application, it is rarely in the children's interests to adjourn a final order, hence my conclusions regarding delays in the list. 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.

4. The Best Interests of the Children

4.1 The Court is guided by the criteria set out in section 31 of the Guardianship of Infants Act of 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015). These include the benefit to the child of having a meaningful relationship with each parent and with wider family; the views of the child; his physical, psychological and emotional needs, his age and the likely effect of any change of circumstances; the history of his upbringing and care; his religious, spiritual, cultural and linguistic upbringing and needs; his social, intellectual and educational upbringing and needs; his special characteristics; any harm which the child has suffered or is at risk of suffering, and the protection of his safety and psychological well-being; proposals for his care and upbringing and for contact between child and parents; the willingness and capacity of each parent to care for the child, to cooperate with the other, and to facilitate continuing relationships between the child and his parents, and with the child's other relatives.

4.2 Furthermore, the Court must have regard to household violence, including the likely impact of such violence on the Respondent. I must consider the child's safety and psychological well-being and the likely risk that a perpetrator of violence poses to the child. Finally, the section provides that a parent's conduct may be considered only to the extent that it is relevant to the child's welfare and best interests. In other words, this Court is not seeking to punish any parent but to assess the consequences of the parents' conduct on the child.

4.3 Despite the Respondent's breaches of the law and despite the contradictory decisions of the Polish courts, this Court must consider these issues only insofar as they affect the boys and their interests. 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.

4.4 The conduct of the Respondent has been to disobey court orders and to move jurisdictional or home addresses when thwarted by the courts, both in Ireland and within Poland. Despite this, there are other facts which have a more significant bearing on this case, considering the list of factors in the 1964 Act.

4.5 The children left Ireland in 2016 and have not returned here since. They do not speak English. Their maternal family surrounds them in Poland. Their schools, doctors and friends are all in Poland. They fear the Applicant. The Respondent submits, correctly, that there is little in the Applicant's affidavit to assist the Court in terms of how the boy's best interests may be served by moving them from their home of over seven years. I cannot simply follow the earlier Irish District Court ruling on custody and access in order to uphold the rule of law. Important as that is, it must be balanced with the best interests of J and K, which are assessed as they appear to be in 2024, not as they were in 2016.

5 The Expert Assessor's Report

5.1 Independent expert, Ms. Ruth More O'Farrell, an experienced social worker, with qualifications in psychotherapy and child forensic psychology, prepared a report for the Court. This expert assessor has interviewed the boys and met with both parties, albeit on remote link in each case.

5.2 Through an automatic direct reply function, the papers provided to this expert emanated from the Respondent and the Applicant was not copied on any but her original email requesting material. As a result, it was argued that while the Respondent sent copies of her pleadings and exhibits, she did not send any of the Applicant's exhibits. In circumstances where the expert emailed both sides, this is not an omission that can be laid at the door of the Respondent or the expert.

5.3 Through no fault of her own, the expert made findings based on a partially correct history of events. 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 copy of a court order appears to have been sent by the Respondent's lawyers, without noting that the first application for a barring order was withdrawn and that the later barring order, when granted, was overturned on appeal. Conclusions based on this misinformation must be discounted.

5.4 The expert assessor specifically acknowledges that she has no independent corroboration of the Respondent's history. I note that she did receive the Applicant's grounding affidavit. This must have alerted her to the fact that numerous assertions are robustly refuted by the Applicant, not confined to this issue of a barring order, which is a matter that would usually be corroborated by the court or garda records. I also note that she refers to the successful appeal of the barring order. 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.

5.5 Insofar as the expert assessor received more material from the Respondent, it was open to the Applicant to send any further material if he wished to do so. More fundamentally, 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.

5.6 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. The Applicant submitted that the case could, and should, be adjourned for a more comprehensive report. I am satisfied with the detailed report prepared by Ms. More O'Farrell in this case, which has already had a lengthy history in this list. It is not in the interests of the children to allow the matter to be delayed further before the courts in Ireland for the reasons already outlined.

5.7 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. That psychologist noted the Respondent's claims of violence against the Applicant, though the psychologist had no contact with him. Again, this Court is conscious of the same caveat that must be applied to her conclusions; the Polish psychologist did not hear from the Applicant at all. It was suggested that the Applicant had her details through the court case, but had not sought to contact her. This is not a fair criticism. The person best placed to make arrangements to hear from all relevant parties is the professional who prepares the report, not the family member who may be affected.

5.8 This psychologist interviewed the boys in person. 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. She concluded that therapy for the boys could not be effective until these proceedings were over.

5.9 The Irish assessor interviewed both boys online. J 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. When asked what else he knows about his father, said: *"Nothing, my mum asked me if I want to speak about him and I don't because he wanted to take me, so I don't like speaking about him."* 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. 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.

5.10 This boy's conclusion was: *"I want to live with my mother and brother in [a named city] in Poland. I'm Polish and nothing else. I want this case to be finished."*

When asked whether J would like to have any sort of contact with his father, in the words of the assessor, this child emphatically said: *"No."*

5.11 The younger boy, K, in the words of the assessor: *"said he was stressed and distressed and at times made noises like he was crying, [but] he did not appear to ever shed tears. At times in the interview [he] covered his face with his hands and made a high pitched whining sound..."*

a. *[He] said that he was really stressed about meeting with me, though he said he didn't know the purpose of the meeting. When I expressed curiosity, he thought it was: "To clarify the case." [K] was unable to say what he thought the case was or who was in it. He said: "I don't like thinking about it."*

5.12 K said of his father: *"I don't know him and I don't want to know him."* He told the assessor that he didn't know his father's name. The report adds: *When asked to tell me one thing about his father, [K] said: "That he wanted to kidnap my brother." I asked how he knew that and [he] said he found out from his brother. I asked him to tell me about it, [he] said: "He wanted to take him, he also wanted to take me." I inquired about this, and [K] said: "Well I'm not sure if he wanted to take me but he wanted to take my brother." "My mum didn't tell me, my brother told me."*

5.13 This boy had no interest in meeting his father and, when asked about his father being from Ireland, K replied *"I am Polish nothing else, my whole family is Polish."* He did not accept the statement that his father loved him, noting that he had sent him something once, but it was broken. K wanted no contact with his father and wanted to stay in Poland with his mother and his brother.

5.14 The assessor notes that neither boy wants contact with their father and concludes that both boys *“believe that their father is a violent, dangerous man who has the potential to abduct them. They want to remain in Poland with their mother and regard their father as a threat to that status quo.”*

6 Evidence of Fear, of Violence and of Parental Alienation

6.1 The assessor concludes that both boys acquired information about their father from external sources, rather than reported their own lived experiences to her. Based on that information, they fear their father. Insofar as this is the limit of the information directly from J and K, I have set it out in great detail. 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.

6.2 In submissions, the Applicant had initially proposed more direct access, more often. He now appears to accept that indirect access is more appropriate. It is clear why the expert assessor recommends something more indirect and less frequent. This is warranted, not because the Court accepts evidence of violence against the mother, but is because one must listen to what the children are saying. 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.

6.3 It is unlikely that J or K has any personal memory of violence, as this was never suggested in the original 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.

6.4 I have carefully considered the vital relationship of the father, and his family, with his two sons and the complete loss of their cultural inheritance from his country of origin. These are boys who were, at their earliest stage of life, minded by the Applicant's mother. That family has lost contact with the two boys and the boys have lost a rich cultural heritage as a result. 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. A better vindication of the Applicant's rights is to help to rebuild the relationship rather than impose a relationship on them, thereby inviting inevitable failure.

6.5 The boys' view of the Applicant is a view that is likely to have been influenced by their mother, the Respondent. They express a fear that he is looking for them which, when viewed against the background of the case, may display love and concern for them but is now something that they fear. 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.

6.6 Counsel for the Respondent argued in submissions that I might find some of her actions distasteful. This is not the word to use in describing her conduct. She has damaged the relationship between her sons and their father and what she has done may be irremediable. I am conscious that her allegations of violence have been made persistently, albeit that they have changed over the years. There is well documented support for the view that a victim of domestic

violence may not be able to disclose details of the familial violence initially, or even for some time until after the relationship is over. 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.

6.7 To date, while the allegations have now been shared with at least one of the boys, there has never been a charge against this Applicant in Ireland and the one barring order 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. I have not heard the Respondent on these issues, nor has there been any cross-examination in these proceedings, as is normal in Article 11 cases which are heard on affidavit only. So far, the Respondent has repeated the allegations on affidavit, to the court assessor and to the Polish psychologist. Merely repeating an allegation, without more, does not make the allegation more likely to be true. This is the basis for all rules against hearsay and narrative evidence. While repetition may show consistency, this is only so if the allegations remain consistent. Repetition does not add weight to the evidence.

6.8 This Court cannot go so far as to find as a fact that the alleged history of violence is fabricated. At most, and this is all that is necessary, the Court can say that the Irish authorities may have been in a position to make orders to protect the Applicant 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.

6.9 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. There has been some effort to recognise the damage done by acknowledging in submissions that access with the Applicant is in the best

interests of the boys. This is a very welcome development but must be followed up in that she must encourage the relationship and not just agree to a certain arrangement and allow that to lapse.

6.10 As noted, it seems sensible that future contact be made through an independent therapist. This is not a finding of fact against the Applicant but a response to the current situation. There is a complete breakdown in trust between the two parties. The Respondent knows that it is in her gift to foster a better relationship between the boys and their father. The people who will suffer most if she does not make efforts in this regard, are her sons.

6.11 The Applicant, in turn, should recognise that whatever his legal expectations may be, to continue to press for the return of the children or for immediate direct access are actions likely to be viewed by them as an attempt to remove them from their home and this approach would be a poor foundation for any relationship. There is no need for the Applicant to have direct contact with the Respondent in order to arrange indirect access with his sons.

7 Article 15 - an inappropriate mechanism

7.1 The Applicant suggested that the Court consider transferring the case to the Polish courts, given that they are better placed to deal with the substance of the matter, under Article 15 of the Regulation. This is headed: "*Transfer to a court better placed to hear the case*" and allows a court having jurisdiction as to the substance of a matter to transfer the case to a court of another Member State. This is an exceptional measure which requires the proceedings be stayed while the third country is asked to assume jurisdiction. The provision goes on to set time limits and procedures whereby this might be done.

7.2 Article 15 is intended primarily to address situations in which a child attains a third habitual residence during ongoing proceedings or where, for instance, a child may have property in a third Member State. Article 15 is not required to

enable the Polish courts to take over, as they will do so under Article 11 when this Court makes a final order.

7.3 This is an Article 11 review case and the correct course is simply to refuse to return the boys to Ireland as a final order. I was also asked to consider adjourning the case for a further attempt at access arrangements to be made. For the same reasons that I refuse the main relief sought, I will not adjourn the case. Anything short of a final order perpetuates this case, unnecessarily, and the Polish courts are best placed to resolve this matter now.

8 Facilitating Future Contact

8.1 One final issue involves the refusal of the Respondent to reveal where she and the children are living. I note that the Applicant appears to have, nonetheless, discovered where the boys go to school. There is no evidence addressing how he came to know this. The whole issue is another disturbing feature of this case.

8.2 I note that J associates his father with an effort to remove him from school and recounts an implausible narrative around what appears to be a genuine fear. This court cannot find as a fact that his account to the assessor was reliable, as set out, but however unreliable in fact, it is interesting that the Applicant has the information and that his son appears to know this and has interpreted as outlined. Whatever the Respondent'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.

8.3 I will hear the parties as to how the Applicant may apply in Poland for indirect contact, through a third party, with his sons. There should be an indication as to the relevant local court where an access application may be made. Thereafter, it is a matter for the Polish courts.

9 Conclusions

9.1 The Court must refuse the relief sought; it is not in the interests of J or K to grant custody to the Applicant or to direct that they return to Ireland. The boy's maternal family, school, home and relevant medical documents or witnesses who can provide details about their lives are all in Poland. They speak only Polish. The case will now return to the Polish courts.

9.2 It is a matter of concern that the most recent Polish judgment refers to offences which were never established and to risks which were not substantiated in earlier proceedings. Moreover, there appears to have been no consideration of how, or if, the authorities in Ireland could have protected the Respondent.

9.3 Notwithstanding any of these concerns, the best interests of the children now require that they remain in Poland, despite the significant damage done to the boys by the dismantling of their relationship with their father.

9.4 The Respondent has accepted that indirect contact should recommence to foster a meaningful relationship between the boys and their father.

9.5 My comments on the insufficiency of the evidence to substantiate the allegations of violence made against the Applicant, the findings of conduct on the part of the Respondent which shows a disregard for court orders in both countries and which probably amounts to parental alienation, and the recommendations as to indirect contact through a third party are intended for the assistance of the authorities in Poland as to what further investigations and reassurances may be required in this troubling case.

9.6 I will hear the parties on the precise form of the Orders required.