Unapproved

THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 233
Record Number: 2020/127

Noonan J.
Power J.
Binchy J.

BETWEEN/

C

APPELLANT

- AND -

G

RESPONDENT

JUDGMENT of Ms. Justice Power delivered on the 5th day of August 2020

Introduction

1. This case involves the abduction of a young boy from Poland. The Court is called upon to determine whether the High Court fell into error in refusing to order the return of the child because to do so would expose him to 'a grave risk' of physical or psychological harm or otherwise would place him in an intolerable situation.

2. It is an appeal from the judgment of Simons J. delivered on 14 May 2020. Before the High Court, an application was made on behalf of the appellant pursuant to the Child Abduction and Enforcement of Custody Orders Act 1991, as amended, which provides that the Convention on the Civil Aspects of International Child Abduction 1980 ('the Convention') shall have the force of law in the State.

Background

3. The facts of the case may be summarised, briefly, as follows. The appellant is the father of the child at the centre of these proceedings. In the High Court, the child was identified under the pseudonym 'Jan'. The respondent is Jan's mother. Jan was born in Poland on 23 November 2012. Poland is his habitual place of residence and he is a Polish national.

4. Jan and his parents lived as a family from the time of his birth until August 2017. Following the breakdown of Jan's parents' relationship, proceedings were instituted in the District Court in Poland which, on 5 November 2018, made an order determining that Jan would reside with the respondent and establishing access arrangements for the appellant.

5. On 8 December 2018 Jan's mother took him from Poland and brought him to live with her here in Ireland. He was six years old at the time. Whereas, initially, the respondent had not conceded the point, it is now common case between the parties that Jan's removal from Poland occurred without the consent of his father and that it was a 'wrongful' removal under Article 3 of the Convention.

6. Jan's father wrote to the respondent in February 2019 requesting an indication of her intended date of return, with Jan, to Poland. She did not reply. On 1 April 2019 Jan's mother telephoned the appellant to extend her condolences on the death of his father. During the course of that conversation she indicated that she did not intend to return to Poland with Jan nor did she intend to return Jan to his father in Poland.

7. On 29 April 2019 Jan's father applied to the appropriate Central Authority in Poland dealing with international child abductions, and that application was transmitted, subsequently, to the Central Authority in Ireland.

Proceedings

8. The proceedings herein were instituted on 6 June 2019. The appellant has sought a declaration that the respondent has wrongfully removed the child to this jurisdiction, within the meaning of Article 3 of the Convention and he has sought, *inter alia*, an order pursuant to Article 12 of that Convention directing the return, forthwith, of the child to his habitual place of residence in Poland.

9. The dates of the procedural history of the proceedings are set out, comprehensively, in the judgment of Simons J. Early in the proceedings, the High Court had made an order directing that the child be interviewed by a clinical psychologist, Mr. Stephen Kealy.[1] Essentially, the High Court sought to ensure that Jan's views were heard, and to ascertain Jan's level of maturity and his answers to certain questions specified in the order. Mr. Kealy furnished two reports, the first of which was dated 22 July 2019 and the second of which was completed on 29 February 2020. I shall consider Mr. Kealy's reports, presently (see paras. 92-95 below).

10. It is important to state at the outset that, notwithstanding common human frailties, both of his parents love and care deeply for Jan.

11. Since coming to Ireland, Jan's mother has established a new relationship and, throughout 2019, she and her partner, who is also Polish, were endeavouring to start a family. On 13 December 2019 she gave an undertaking to the court[2] that she would return with Jan to Poland. She did not discharge that undertaking in circumstances where, she submitted, she had been advised by her doctor against travel, having recently become pregnant.

12. In his judgment, the trial judge noted that Jan's mother had not formally conceded that the removal of Jan represented a '*wrongful removal*' within the meaning of the Convention.

[1] Details of the matters on which the child's views were sought were set out in the Order of the High Court (Ní Raifeartaigh J.) of 1 July 2019.
[2] See paragraph 14 of the judgment of High Court.

He did acknowledge that the thrust of the parties' submissions was not directed to this threshold issue but rather to whether any of the '*defences*' to an application for the return of a child under Article 13 of the Convention had been established. He identified what he considered to be the three principal issues to be resolved: (i) whether the return of the child would expose him to physical or psychological harm or otherwise place him in an intolerable situation (the grave risk defence); (ii) whether the return would be in Jan's best interests; and (iii) whether Jan objects to being returned to Poland.

13. In considering the first issue, Simons J. noted the high threshold for the grave risk defence as set out in the Supreme Court in *K(R) v. K(J) (Child Abduction: Acquiescence)* [2000] 2 I.R. 416. That formulation was, in turn, to be found in the United States Court of Appeals for the Sixth Circuit judgment in *Friedrich v. Friedrich*, 78 F.3d 1060 (Sixth Circuit 1996). In *Friedrich*, the court held that a grave risk of harm for the purposes of the Convention could only exist in two situations: (i) where the return would put the child in imminent danger prior to the resolution of a custody dispute, for example, where the return would expose the child to war, famine or disease; and (ii) where there is a grave risk in cases of serious abuse or neglect or extraordinary emotional dependence that the courts in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child the protection required.

14. The trial judge confirmed that the onus was on the person opposing the return (*R v. R* [2015] IECA 265) to prove that a defence under Article 13(b) had been made out. Simons J. held that the return of Jan to Poland would give rise to a grave risk that he would be exposed to physical and psychological harm. He did so on three grounds: -

(i) the risk associated with international travel during the pandemic;

(ii) the fact that removing Jan from his primary carer would create an '*intolerable situation*' for him, she being unable to travel due to pregnancy; and

(iii) the fact that Jan had spent 18 months in Ireland created a grave risk of psychological damage if returned to Poland at this stage.

15. On the first ground, the trial judge held that requiring Jan to travel to Poland during the current pandemic would expose him to '*a grave risk of contracting the disease'*. He was not sure whether it was '*even possible to travel to Poland*' and had no evidence that there were immigration or quarantine controls on any persons entering Poland from Ireland.

16. In addition to concerns over the pandemic, the trial judge considered that returning Jan to Poland would place his mother in an invidious position whereby she would have to choose between (a) creating a risk to her own health by accompanying Jan to Poland or (b) having him travel without her thereby depriving him of his primary carer at a time of significant change in his life. Simons J. found neither outcome was '*acceptable*' from Jan's perspective.

17. On travelling with Jan during pregnancy, Simons J. distinguished the facts in this case from those in *CMW v. SJF* [2019] IECA 227. In that case, Whelan J. had noted (at para. 61) that the decision of an abducting parent to threaten not to return with a minor to his country of habitual residence, represents '*a very powerful weapon which can be deployed to overcome the summary return mechanism of the Hague Convention*'. Simons J. found no suggestion that Jan's mother's reluctance to accompany him to Poland was '*tactical*' in the sense of being designed to frustrate the making of a return order. Her concerns, rather, were located in a history of miscarriages in addition to the risks posed by the current Covid-19 pandemic. The trial judge considered that the facts of this case were more comparable to those in *ML v. JC* [2013] IEHC 641. In that case, the High Court refused to make an order for the return of the children by reason of the fact that the mother's mental health might break down if she were to accompany them to their state of habitual residence.

18. If Jan were to travel without his mother and be solely in his father's care, the trial judge noted Mr. Kealy's view that such a return to Poland could be emotionally challenging for him

and likely to harm his overall wellbeing. To have him stay in his father's care could have serious emotional consequences for him. He considered that Jan would either have to travel in the care of his father '*with whom he has no meaningful relationship and against whom serious allegations have been made*' or he would have to travel with his mother in circumstances where her health would be put at risk. By contrast with the quality of the relationship which the children in *CMW* had with their father, Simons J. found that Jan's relationship with his father was '*almost non-existent*'. Based on this reasoning, he found that travel to Poland would present a grave risk of psychological harm to Jan and would thereby place him in a '*intolerable situation*'.

19. A third factor in the trial judge's consideration of the defence that had been raised under Article 13(b) was the fact that Jan had been living in Ireland for eighteen months. This, he considered, was a significant period of time in the child's life. He accepted the appellant's submission that '*settlement*' factors cannot be used where Convention proceedings commenced within one year from the date of the wrongful removal (Article 12 of that Convention) and, indeed, he expressly acknowledged that the defence of settlement and that of grave risk were separate. Nevertheless, he found that Jan's stay in this State was '*potentially relevant*' to the Court's assessment of whether there exists a grave risk of psychological harm. He did not develop this point any further (see para. 113).

20. The claim that much of the delay in the proceedings was attributable to Jan's mother was said to be '*overstated*'. Simons J. held that most of the delay was attributable to external factors such as delay in obtaining legal aid, the need for an updated psychological report and the logistical difficulties presented by the Covid-19 pandemic. The two-month delay caused by Jan's mother between mid-October and mid-December 2019 was because of her '*not unreasonable*' request for an adjournment so as to seek clarification as to the effect of the Polish court's order.

21. Simons J. noted the appellant's submission that even if a defence of grave risk had been established, the Court would still have to exercise a discretion and consider whether a refusal to return Jan would undermine the general policy objectives of the Convention. Referring to in *Re D (A Child) (Abduction: Rights of Custody)* 2007 1 AC 619 [55], he thought it difficult to envisage how a court, having found that a grave risk exists, would, nevertheless, order the return of the child. He noted the obligations of a court in exercising its discretion to refuse a return under Article 13 as had been set out by the Supreme Court in *MS v. AR* [2019] IESC 10. That case involved an assessment of the court's discretion in circumstances where the child's objections were made out under Article 13. The Supreme Court noted (at para. 65) that '*the further one is from a prompt return, the less weighty the general Convention policies will be*'. It found that a court exercising its discretion must have regard to the fact that the jurisdiction to refuse a return is an exception to the general policy and provisions of the Convention. Thus, the exercise of a discretion in circumstances where a defence has been made out must be exercised with care and in the best interests of the child and not in a manner that undermines the general policy objectives of the Convention, including, the deterrence of abduction. The Supreme Court noted that in applications to which the Brussels Regulation applies, [3] regard should be had to Articles 11(6) to (8) thereof and to the practical consequences which a refusal to return has for the resolution of ongoing custody disputes. The trial judge was satisfied that an order refusing Jan's return would not undermine the general policy of the Convention.

22. The High Court then addressed the issue of the 'best interests' of the child. He noted the mother's submission that the Court must have regard to the child's best interests, the implication being that, in some instances, those interests might justify a decision to refuse to return a child even where, strictly speaking, his circumstances would not fall within the provisions of Article 13, if considered in isolation. He cited the ruling of the European Court

[3] Council Regulation [EC] No. 2201/2003

of Human Rights in *X v. Latvia* (App. No. 27853/09, 26 November 2013) wherein the Court underscored the importance of a child's return not being ordered '*automatically or mechanically*' where the Hague Convention applies. Those same principles were adopted by the High Court in *VR v. C'ON* [2018] IEHC 316 which was approved by the Court of Appeal. However, Simons J. did not consider it necessary to have recourse to the '*overarching requiremen*t' to have regard to the '*best interests*' of the child because he considered that the refusal to order Jan's return by reference to the grave risk defence operates to secure his best interests.

23. As to whether Jan objected to being returned, the trial judge noted that Article 13 provides that a court may refuse to order the return if a child objects and has obtained an age and a degree of maturity at which it is appropriate to take account of his views. He also confirmed that the different Article 13 defences must be considered separately (*MS v. AR* [2019] IESC 10 [72]).

24. It was necessary to comply with the Brussels Regulation,[4] Article 11(2) of which requires a Court (when applying Articles 12 and 13 of the Convention) to ensure that a child is given the opportunity to be heard unless this appears inappropriate having regard to his age or maturity. The trial judge was satisfied that Jan had expressed no view on returning to live in Poland. Accordingly, he considered that no weight should be attached to this consideration in determining whether to order the return of the child.

25. The trial judge refused to make an order returning Jan to Poland.

The Grounds of Appeal

26. Grounds 1-10 of the Notice of Appeal relate to the trial judge's alleged error in law and in fact in refusing to make an order returning Jan to Poland and in finding that the defence of

[4] See below at para. 42.

grave risk provided for in Article 13(b) of the Convention had been established. The appellant alleges that the trial judge erred in having regard to the length of Jan's stay in Ireland and in failing to have regard to the temporal nature of the matters which he had found, wrongly, would give rise to a grave risk of harm. The appellant also claims that the trial judge, impermissibly, took into account for the purpose of evaluating the grave risk defence of Article 13(b), issues pertaining to Jan's welfare which had been set out in the psychologist's report.

27. Grounds 11-15 of the Notice of Appeal relate to the trial judge's findings in respect of the alleged risk posed by the Covid-19 pandemic in the absence of the respondent's failure to discharge the burden of proof in this regard. The remaining grounds of appeal relate to findings made in respect of the respondent's pregnancy and associated inability to travel to Poland as constituting a grave risk. It is claimed that the trial judge erred in making such findings in the absence of compelling evidence and without meeting the high threshold required. The appellant submitted that, if necessary, a stay could be placed on the execution of a return order pending the birth of the respondent's unborn child.

28. The respondent opposes the appeal. In her view, the trial judge correctly analysed whether there was a grave risk of harm to the child in accordance with the evidence and that he did not err in law in considering settlement in the context of the defence that was raised. The respondent also opposes the appeal on the ground that the trial judge did not err in having regard to the risks posed by the current Covid-19 pandemic and the associated risks of travel both in respect of the pandemic and the mother's health and pregnancy. She also submits that the trial judge did not err in taking into account issues relating to the child's welfare, in circumstances where the court was obliged to have regard to the best interests of the particular child in question. In her view, the trial judge correctly directed himself regarding the high threshold required under Article 13(b) defence. The trial judge was entitled to take judicial notice of the Government warnings in relation to travel during the pandemic. The respondent

was not responsible for the delay, such as it was, in this case. Any jurisdiction to place a stay on a return order would sit, uncomfortably, with the Convention, the aim of which was to ensure a return '*forthwith*' following summary proceedings.

Submissions

29. The appellant disputes the trial judge's finding that the defence of grave risk was established. His submissions may be summarised thus. Simons J. did not apply the appropriate standard of proof in reaching his conclusion. He erred in (i) relying on welfare observations in the psychologist's report; (ii) finding that Jan's length of stay in Ireland was relevant in establishing grave risk; (iii) finding that international travel during the Covid-19 pandemic constituted grave risk; (iv) finding that the grave risk existed because of the respondent's pregnancy; and (v) failing to consider the temporal nature of the risks identified in making the above findings of grave risk.

30. That the defence of grave risk is a '*rare exception'* and that the threshold for establishing it is high are well settled principles of law. The Supreme Court in *A.S. v P.S. (Child Abduction)* [1998] 2 I.R. 244 has confirmed that any exception to the requirement to return children wrongfully abducted must be '*strictly construed*'. In *Minister for Justice (EM) v JM* [2003] 3 I.R. 178, it set out the general rule that children should be returned to the country of habitual residence from where they had been wrongfully removed and it considered the parameters of the grave risk defence.

31. In *EM* the Supreme Court held that the interruption of an autistic child's treatment for autism, which she was receiving while in Ireland did not constitute a 'grave risk' as contemplated by Article 13(b) of the Convention. Thus, interrupting Jan's stay in Ireland does not fall to be considered as a grave risk. The judgment of Macur J. in *RS v KS* [2009] 2 FLR 1242, which found that the length of a child's stay in England gave rise to the grave risk

exception, was erroneously made. The applicable law in this jurisdiction is as set out by the Supreme Court in *EM.* The Court of Appeal had recently upheld an order to return a child to Canada on the basis that no 'grave risk' had been established (*CMW v SJF* [2019] IECA 227).

32. Substantive welfare questions are matters for the courts of habitual residence, and, as Fennelly J. in *P.L. v E.C.* [2009] 1 I.R. 1 had pointed out, Convention applications should not become inquiries into best interest. Ten years on, Donnelly J. in *AA v RR* [2019] IEHC 442 reiterated that the requested court is not entitled to refuse to make a return order *'based on the general consideration of the welfare of the child'.*

33. The decision of Finlay Geoghegan J. in *C.A. v C.A.* [2010] 2 I.R. 162 establishes that grave risk requires a high threshold and supports the view that a stay may be placed on an order made pursuant to Article 12 notwithstanding the Convention's imperative of prompt return. The same learned judge in *R v R* [2015] IECA 265, recalled that the courts of habitual residence will normally be trusted to protect the child, particularly, where the state of habitual residence is another EU member state. This case is also authority for the proposition that the length of stay is not something to be taken into account in assessing grave risk for the purpose of a return order.

34. In the instant case, the trial judge had erred in placing reliance on the case of *ML v JC* [2013] IEHC 641 in which White J. held that the risk of the mother having a mental breakdown on return to the child's place of habitual residence, would place the child in an intolerable situation. The severe implications of return for the child in that case were not analogous to the present situation.

35. On the best interests of the child, the appellant referred to the judgment of Ní Raifeartaigh J. in *VR v CO'N* [2018] IEHC 316 (later approved by this Court), where the trial court had regard to the decisions in *Neulinger v Switzerland* (2012) 54 EHRR 31 and *X v Latvia* (2014)

59 EHRR 3.[5] Ní Raifeartaigh J. considered that '*the threshold for establishing grave risk of an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child.'*

36. Regarding the impact of Covid-19, the appellant brought to the Court's attention the recent decision of the High Court of England and Wales in *Re PT* (otherwise *KR v HH*) *[*2020] EWHC 834 (Fam). The respondent mother, in that case, was also pregnant but the trial judge did not consider that the risks associated with international travel had reached the grave risk threshold. The appellant submitted that this Court should make an order for return of the child and, if necessary, place a stay on that order so as to allow for the respondent's imminent delivery of her baby.

37. The respondent opposes the appeal. Her counsel, Mr. Durcan, identified two issues of principle that arise for determination: (i) whether or how the passage of time may be taken into account in assessing a possible defence under Article 13(b); and (ii) what effect, if any, the current Covid-19 pandemic has on the operation of the Convention and, in particular, on the defences arising thereunder. He also submitted that a third possible issue arises relating to the power of the courts to place a stay on orders arising under the Convention.

38. The respondent submitted that the trial judge had made correct findings of fact and had applied the law, correctly. Simons J. had understood that the defence of '*settlement*' under Article 12 did not apply in this case, but he was correct in noting that the child's length of stay in Ireland could be one of several factors to be considered in the assessment of grave risk. Mr. Durcan submitted that the purpose of the Convention was to protect the best interests of the child. He accepted that the foundational principle of prompt return underpins the Convention but argued that, in this case, a return '*forthwith*' has not been nor cannot be achieved. He cited

[5] Citations as appearing in submissions.

the observation of Finlay Geoghegan J. in *MS v AR* (para. 103) to the effect that the balance between the weight to be attached to the Convention's policies which favour return, and the best interests of the individual child, may alter with the lapse of time since the wrongful removal. Citing dicta in *EM v JM* and *R v R* and the judgment of Macur J. in *RS v KS*, Mr. Durcan argued that there was no 'exclusionary principle' in respect of the length of stay and the assessment of a defence under Article 13(b). Such is the approach required by *Neulinger* and *X v Latvia*. To omit the passage of time as a factor in the court's assessment is to omit an important element of grave risk. It would involve leaving out a consideration of the best interests of the child and would be in breach of the European Convention on Human Rights ('the European Convention'). The nexus between expedition and the best interests of a child is central to understanding the operation of the Convention.

39. The trial judge was entitled to have regard to the risks associated with travel during the pandemic and during the respondent's pregnancy. The pandemic has affected all aspects of life. What was tolerable pre-Covid may not be tolerable now. Remote contacts are now a regular phenomenon worldwide. The trial judge had correctly distinguished this case from the facts in *CMW*, finding the situation here to be more analogous to that in *ML v JC* [2013] IEHC 641. In *ML* the court held that the impact which a breakdown of the child's primary carer would have on his or her welfare would place him in an intolerable situation. This was appropriate authority in support of a refusal to make a return order in this case. The trial judge was entitled to have regard to the respondent's pregnancy, Jan's attachment to his mother, the fact that he could not reside with his father and to find that removing Jan from his primary carer would present a risk of psychological harm and would place him in an intolerable situation. The decision of Donnelly J. in *AA v RR* [2019] IEHC 442 supports the contention that the court can have regard to the cumulative effect of circumstances when deciding whether there is a grave risk of the child being placed in an intolerable situation.

40. As to the imposition of a stay, the notion of this goes against the impulse for a summary return that underpins both the Convention and the Brussels Regulation regime. If there is a jurisdiction to impose a stay on a return order, it should be deployed sparingly and not in this case.

Legal principles

41. The relevant provisions of the Hague Convention are as follows: -

"Article 1:

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State.

Article 3:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

…

Article 12:

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

*The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, **shall also** order the return of the child, unless it is demonstrated that the child is now settled in its new environment.*

…

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

Council Regulation EC Number 2201/2003 – The Brussels II bis Regulation

42. Regulation EC Number 2201/2003 - *Jurisdiction Recognition and Enforcement of Matrimonial and Parental Judgments* (hereinafter 'the Regulation') - is a legal instrument to help international couples resolve disputes involving more than one country in relation, *inter alia*, to the custody of their children. In relation to child abductions, the Regulation lays down rules to settle cases in which children are unlawfully removed or detained. The Courts of the

EU country where the child normally lived immediately before abduction continue to have jurisdiction until the child lives mainly in another EU country. Article 11 of the Regulation deals with the return of a child and its provisions insofar as they are relevant to this case are as follows:

> *"Article 11(2):*
> *When applying Article 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.*
>
> *Article 11(4):*
> *A Court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."*

Article 8 of the European Convention on Human Rights

43. Article 8 of the European Convention on Human Rights provides: -

> *"Right to respect for private and family life:*
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

44. The U.N. Convention on the Rights of the Child provides as follows:

> *"Article 3:*
> *In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of Law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

Case Law

45. Several cases were opened to the Court during the hearing, principal among which were the following. In *A.S v P.S.* (*Child Abduction*) [1998] 2 I.R. 244, a mother who had removed her children from their country of habitual residence and had refused to return, claimed that the father had sexually abused one of the children. In this context, the court identified grave risk as a:

> *"rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. As such the exception must be strictly construed."*

Notwithstanding *prima facie* evidence of sexual abuse, the Supreme Court ordered the return of the children, so long as adequate protective measures were in place.

46. On the high threshold applicable to an Article 13(b) defence, the Supreme Court in *Minister for Justice (E.M.) v J.M.* [2003] 3 I.R. 178 overturned the judgment of the High Court refusing the application for return, notwithstanding testimony as to physical abuse and disruption of the child's autism treatment. Regarding the exceptions within the Convention, the court cited Lord Donaldson of Lymington M.R. in *In re: A. (Minors) (Abduction: Acquiescence)* [1992] 2 F.L.R. 14 at p. 28, wherein he observed that the consequence of Article 13(b) '*is only that the court is no longer bound to order the return of the child, but has a judicial discretion whether or not to do so, the discretion being exercised in the context of the approach of the Convention.'* Denham J. stated as follows:- (at p. 188): -

> *"Prima facie, the basis of the defence that there was grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation must spring from the circumstances which prompted the wrongful removal and/or retention. Events subsequent to the removal and/or retention would be material only insofar as they tended either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred in the requesting State."*

Although the eldest child's treatment for autism would be disrupted by his return, that did not amount to grave risk. The Supreme Court reasoned that *'issues of welfare of the child are best determined in the jurisdiction of his or her habitual residence'* and the High Court had erred in conducting '*what was essentially a custody hearing*'.

47. Considering the impact of the delay in the proceedings, Denham J. referred to her comments in *A.S. v. P.S.* wherein she stated the need to have child abduction cases heard speedily and described such delays as '*entirely unsatisfactory*' and defeating '*in part the purpose of the Hague Convention*'.

48. Finlay Geoghegan J. in *C.A. v C.A.* [2010] 2 I.R. 162 found that a mother who relocated her children had failed to establish a defence under Article 13(b) of the Convention. She testified that the father was physically violent towards her and constituted a threat to the children. Relying on *A.S. v P.S.*, Finlay Geoghegan J. stated that grave risk is a rare exception to the State's obligation under the Convention to return wrongfully removed children back to their jurisdiction of habitual residence. To make out this defence, '*clear and compelling evidence*' was required. The evidential burden of proof, she confirmed, rests on the person opposing the order for return. While the Convention requires the prompt return of the child, the trial judge in that case observed that placing a stay upon an order of return may be appropriate for a short period to secure the orderly and safe return of the child. Finlay Geoghegan J. placed a two-month stay on the order for return because the children were in the middle of a school term.

49. The decision of *R. v R.* [2015] IECA 265 (Finlay Geoghegan J.) involved a mother who removed her children from their country of habitual residence. In that case, this Court held that the trial judge had been correct in rejecting the mother's defence of grave risk, notwithstanding allegations of physical and psychological abuse. In summary proceedings for the return of the children, the Court found it would not be appropriate or possible to decide contested issues of

fact. Finlay Geoghegan J. observed that the home state will normally be trusted to protect the child's best interests, particularly where the state of habitual residence is another EU member state. Regarding the timing of the return, the Court acknowledged that the Convention required the return of the children '*forthwith*'. However, considering it well established that a short stay may be placed on such an order, the Court deferred the coming into effect of the order for return until the end of the children's school term.

50. The Supreme Court (Fennelly J.) in *P.L. v E.C.* [2009] 1 I.R. 1, ordered the return of a child, subject to certain protective provisions, in circumstances where the abducting mother had made allegations of sexual abuse against the applicant father. The court held that it was for the Australian court, which had yet to decide on the allegations, to test their veracity. Fennelly J. commented at para. 55 on the correct approach which a returning State must take: -

> *"It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. . . . The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child."*

The respondent did not persuade the court, on the balance of probabilities, that the Australian court was unable or unwilling to protect the welfare of the child. The court further noted that the Convention contained no provision permitting refusal of return on the grounds of delay, *simpliciter*.

51. *VR v CO'N* [2018] IEHC 316 also involved a mother who sought the return of her child to Australia. The father in that case argued that he was unlikely to get a visa to return to Australia which created a grave risk for the child, given the closeness of their relationship. Having regard to the decisions in *Neulinger v Switzerland* (2012) 54 EHRR 31 and *X v Latvia* (2014) 59 EHRR 3., Ní Raifeartaigh J. held that '*[t]he threshold for establishing grave risk of*

an intolerable situation for the child is a high one, but the Court must factor in to an appropriate degree the best interests of the particular child.' The court found it was not '*highly unlikely*' that the father would be unable to visit Australia, nor would the child's return constitute an intolerable situation. On appeal to this Court, Finlay Geoghegan J. ([2018] IECA 220) upheld the order for return of Ní Raifeartaigh J. and emphasised that where the grave risk defence is based upon factual contentions, the burden of adducing the evidence necessary to establish the defence rests upon the person opposing the return.

52. In *AA v RR* [2019] IEHC 442, the mother relocated her children without the consent of the father, despite a court order preventing such removal. The mother argued that forcing her to return would detrimentally affect her mental health, creating an intolerable situation for the children. Donnelly J., in her decision to return the child, considered *Neulinger and Shuruk v Switzerland* (App No. 41615/07, 6 July 2010) that stated the child's best interests must be borne in mind and assessed in each individual case. The court distinguished *M.L. v J.C.* where the respondent had extensive evidentiary support for mental ill-health, whereas here no such record existed. The court noted that the cumulative effect of all factors may be considered in determining 'grave risk'. While the trial judge acknowledged the importance of keeping the best interests of the child at the forefront, she located the appropriate venue for adjudication of the general welfare of the child in the court of habitual residence.

53. The Supreme Court in *MS v AR* [2019] IESC considered the return of children to Poland despite their having spent the vast majority of their lives in Ireland. By the date of the appeal, two years had passed since the date of removal. Upholding the order refusing to return the children to Poland, Finlay Geoghegan J. observed that '*the further one is from a prompt return, the less weighty the general Convention policies will be'.* The court noted that normally, the general policies of the Convention, which favour return, prevail. In this case, given that the *'sense of stability and contentment'* experienced by the children in Ireland was *'of a different*

order to the norm', it was in the children's best interest that there should not be a further move until a full welfare assessment was conducted.

54. In *CMW v SJF* [2019] IECA 227, Whelan J. ordered the return of children to Canada on the basis that no grave risk was established. She summarised the approach developed in Irish jurisprudence to Art. 13(b) and noted the impact of the *Neulinger* judgment to such considerations: -

> *"It is clear from the jurisprudence of the Supreme Court that a potential defence pursuant to Art. 13(b) offers an exception to the requirement pursuant to the Convention to return a child summarily to the jurisdiction of habitual residence once wrongful removal has been established. It is an exception furthermore that must be narrowly construed in light of the plain language of the sub-section. The burden of proof rests on a respondent to Hague Convention proceedings to discharge the evidential burden of establishing that a summary return, in and of itself, would result in grave risk of the minor being exposed to either physical or psychological harm, or being otherwise placed in an intolerable situation. The concept of intolerability connotes substantial and not trivial circumstances. Art. 13(b) must be construed within the human rights framework and in light of the decision in Neulinger and Shuruk v. Switzerland it must be interpreted having regard to the child's best interests"* (at para. 56).

In response to an indication that the appellant would not return with the children, Whelan J. noted (at para. 61) that: -

> *"Assuming that the appellant makes good on her threat not to return with the minors to Canada this will inevitably cause some distress and disruption to them. It must be borne in mind that such a decision on the part of an abducting parent represents a very powerful weapon which can be deployed to overcome the summary return mechanism of the Hague Convention."*

She further commented that even if the evidence adduced by the appellant were to meet the standard envisaged by Article 13(b), this would not in itself warrant a refusal to order the return of the children; instead, it '*merely opens the door*' to the discretion of the Court.

55. Mental health difficulties were raised in the case of *ML v JC* [2013] IEHC 64 in which White J. refused to make an order for return following a determination that problems arising from the respondent's mental health would create an intolerable situation for the children, if

returned. In the view of White J. there was '*soundly based'* medical opinion to support the alleged risk of recurrent mental breakdown which met the high threshold of the grave risk exception.

56. That Convention proceedings are not concerned with the punishment of reprehensible behaviour on the part of the abducting parent was confirmed in *P v B (No. 2) (Child Abduction: Delay)* [1999] 4 I.R. 185 in which Denham J. commented that: -

> *"However, the Hague Convention and the Act are instruments for the benefit of the child. The child's interest is paramount. Consequently, defences to the application of the plaintiff, which go to the core of the proceedings or which are specifically mentioned in the Act, may be considered by the Court in spite of the reprehensible behaviour of the defendant."*

57. In *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, the father sought the return of his children notwithstanding a recent conviction for child abuse which he was appealing. The Court of Appeal held that there is: -

> *"...an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence."*

The court ordered the return of the children noting that Californian courts could make adequate provisions to protect the children from any harm they might suffer from their father.

58. The mother in *Re E (Children) (Abduction Custody Appeal)* [2011] UKSC 27 alleged domestic abuse by the father, after she had removed the children from the place of their habitual residence. The Supreme Court (Lady Hale and Lord Wilson) ordered their return and commented at para. 33 that: -

> *"...the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might*

properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm."

The court acknowledged a '*tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true'.* Nevertheless, the court reasoned that *Neulinger*'s interpretation of Article 8 of the European Convention did not require a reappraisal of the Convention because '*in virtually all cases, as the Strasbourg court has shown, they march hand in hand'.*

59. Macur J., in *RS v KS* [2009] 2 FLR 1242, found that the length of a child's removal amounted to a'grave risk, where the father was not a fulltime resident in the child's country of habitual residence. In this case, the court reasoned, that '*which seeks to protect*' the child will '*promulgate the harm it seeks to abate*'. Having regard to the length of time that the child had been relocated, he found him: -

"*to be 'settled' to the relevant degree which invokes Article 13(b), to delay any appropriate return would mean that the harm he is at grave risk of suffering is increased with his ever increasing establishment, stability and security of life in the United Kingdom and his foreseeable lack of comprehension in the short and medium term as to why he would be alienated from home, family and friends."*

Macur J. invited the English court to assume jurisdiction over the child's residence, as it would be better placed to conduct a welfare assessment of his circumstances.

60. The relationship between the Convention and the European Convention was the subject of the Grand Chamber's 2010 judgment in *Neulinger.* Writing on the requirements of Article 8, the court observed: -

136. The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see Gnahoré, cited above, § 59). On the other hand, it is clearly also in

the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development . . ..

137. The same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation (Article 13, sub-paragraph (b)). In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention.

. . .

138. It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, his age and level of maturity, the presence or absence of his parents and his environment and experiences (see the UNHCR Guidelines, paragraph 52 above). For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned."

61. Further focus was placed on the best interests of the child in the judgment of the Strasbourg Court in *X v Latvia* (App. No. 27853/09). Finding that there had been a violation of Article 8 of the European Convention by the domestic court's failure to have regard to a psychologist's report when considering a return order, the court stated (at para. 116): -

"Under Article 13, first paragraph, (b) of the Hague Convention, the courts examining the return request are not obliged to grant it "if the person, institution or other body which opposes its return establishes that ... there is a grave risk". It is the parent who opposes the return who must, in the first place, adduce sufficient evidence to this effect. In the instant case, it was therefore for the applicant to provide sufficient evidence to substantiate her allegations, which, moreover, had to concern the existence of a risk specifically described as "grave" by Article 13, first paragraph, (b). Furthermore, the Court notes that while the latter provision is not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it cannot be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13, first paragraph, (b) concerns only the situations which go beyond what a child might reasonably bear."

62. More recently in *G.S. v Georgia* (App. No. 2361/13, 21 July 2015), the Strasbourg court considered the appropriate relationship between Article 8 and the Hague Convention:

> *"47. A harmonious interpretation of the European Convention and the Hague Convention can be achieved, provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the said Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to ascertain that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention; and*
>
> *48. Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted, is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.*

63. The Explanatory Report on the 1980 Hague Child Abduction Convention authored by Ms. Eliza Pérez-Vera ('the Pérez-Report') addressed the limited role of certain exceptions to the duty to secure the prompt return of children under the Convention, including the one set out in Article 13(b), and underscored that these exceptions must be applied only so far as they go and no further. At para. 34 it states: -

"This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention."

Case Law on Covid-19

64. The grave risk exception based on the Covid-19 pandemic was invoked in *KR v HH* (otherwise in *Re PT*) [2020] EWHC 834 (Fam). The case involved an 11-year-old girl of Spanish nationality whose mother, eight months pregnant at the time, took her to the UK on 13 February 2020 without her father's consent. Her father, who was previously granted custody of his daughter on alternate weekends, pursuant to an order of the Spanish courts, brought an application for his daughter's return. On 23 March 2020, Judd J. made an order providing for the final hearing to take place, remotely. By the date of the hearing, the UK had entered lockdown and Spain had the second highest fatality rate in Europe, though flights were still operating between Spain and the UK.

65. In his reasoning, the Deputy Judge (Mr Rees, QC) considered two aspects of the pandemic's risk. First, the judge noted the Covid-19 pandemic was at a more advanced stage than in the UK and second, international travel poses a greater risk of infection. By way of judicial notice, the judge took into account the most recent UK government advice, all the while noting that evidence and instruction relating to the pandemic was subject to potentially rapid changes. In his decision to return PT, the judge made a series of conclusions: PT and her parents were not most at risk according to UK government advice; PT's mother was in a group advised

to socially isolate due to her pregnancy; there was no evidence before him that either country is more or less safe than the other; from the fact that international flights were still operating it could be inferred that while the risk of infection was higher for those engaging in air travel, it was not so high as to merit either government terminating flights entirely.

66. In its final determination, the court concluded that the risk of infection from air travel, while greater than if PT stayed in England, did not amount to 'grave risk' as envisaged by the Article 13(b) of the Convention. The court found that PT was wrongfully removed by her mother and ordered her return to Spain as soon as '*reasonably practicable given the global public health pandemic*' (at para. 52).

Discussion

The Obligation to Return and Potential Defences

67. The Convention has been described as '*an admirably clear and simple instrument*' with the twin objects of securing the return of a child who has been wrongfully removed from the State of his habitual residence and ensuring that custody and access rights of that State are effectively respected in other Contracting States. That the deterrence and combatting of child abduction is a good to be pursued in the interests of children was recognised by Lord Justice Moylan in *Re W* [2018] EWCA Civ 664 where (at para. 46) he observed:

> "*Child abduction is well-recognised as being harmful to children. As was noted in Re E, 'the first object of the Convention is to deter either parent […] from taking the law into their own hands and pre-empting the results of any dispute between them about the future upbringing of their children. If an abduction does take place, the next object is to restore the children as soon as possible to their home country, so that any disputes can be determined there.'"*

68. The Convention is designed to protect the interests of children by securing their prompt return to the country from which they have been wrongly taken. However, it recognises that in certain limited and very precise circumstances it may not be in their best interests so to do.

Those limited circumstances are identified in the '*defences*' that may be made in response to an application to return a child to his country of habitual residence. There are five defences available. One is found in Article 12 (the '*settled*' child defence). Three are set out in Article 13 (which may be summarised as the consent or acquiescence defence / the grave risk defence / and the objections of child defence). A further defence may be raised under Article 20 if the return of the child would involve a breach of fundamental human rights.

69. All defences available under the Convention must be read in the context of the fundamental obligation to return a child. This obligation is spelt out in Article 12 which mandates the authority in the requested state to return a child '*forthwith*' where that child has been wrongfully removed or retained in terms of Article 3. That mandatory obligation to return a child applies where the child is in the requested State and a period of less than one year has elapsed from the date of the wrongful removal. Even where proceedings have been taken after the expiration of one year, the judicial authority in question **shall order**[6] the return of the child **unless** it is demonstrated that the child is '*now settled*' in his or her new environment.

70. Under Article 13, the judicial authority is not **bound to order the return** of the child if the party opposing the return establishes a defence specified therein. Where such a defence is established, that 'opens a door' or triggers the exercise of a discretion on the part of the trial judge (see Lord Donaldson's statement as cited in *EM v JM* at p. 187). If any available defence fails, then the requested court has no discretion and is ***bound*** to order the return of the child.

The Standard of Proof

71. Once an applicant's case is made out under Article 12, the burden of proof shifts to the objecting parent to establish that a defence is available (see *C.A v C.A.*). It is common case between the parties in this case that Jan's removal from Poland was wrongful under the terms

[6] Emphasis in bold is mine both here and throughout the judgment unless otherwise indicated.

of the Article 3 of the Convention. It is, however, the mother's case that a return order, if made, would constitute a grave risk of harm or would place him in an intolerable situation.

72. The High Court in *C.A. v. C.A.* confirmed the high nature of the threshold required for the grave risk defence holding that the type of evidence which must be adduced in support of such a claim must be 'clear and compelling evidence' (para. 21). The Supreme Court in *A.S. v. P.S.* had reiterated that such a defence is a '*rare exception'*.[7] In directing the return of children in the context of allegations of sexual abuse having been made against the applicant father, it stated that the grave risk defence is *'a rare exception'* to the requirement to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. Indeed, in only two of the cases opened to the Court on this appeal had the defence of grave risk been established.[8]

73. The question before this Court is whether Jan who, is now aged seven years and ten months, should be returned to Poland under the Convention. The primary issue in this appeal is whether the grave risk defence as set out in Article 13(b) has been established. The trial judge refused to make a return order on the basis that Jan's mother had succeeded in establishing that defence. Simons J. found that if Jan were to be returned to Poland there existed a grave risk of psychological harm which would place him in an intolerable situation. He relied upon three principle grounds, each of which shall now be considered in turn.

The 'Covid-19' Ground

74. The trial judge found that for Jan to engage in international travel during the Covid-19 pandemic would expose him to a grave risk '*of contracting the disease'*. In this regard, Simons J. referenced the Irish Government's advice against '*all unnecessary travel*' at this time, noting

[7] At page 259 of the Report.
[8] In this jurisdiction, White J. in *ML v JC* found that the defence had been established and Macur J. made a similar finding in *RS v KS.*

that there was no evidence before the court that it was '*even possible to travel to Poland*', as of the date of the judgment. He also observed that there was no evidence as to whether there were any commercial flights currently then operating between Ireland and Poland nor was there any evidence of Polish immigration or quarantine controls being imposed on passengers arriving from Ireland.

75. Judicial notice of the pandemic has been taken some courts when dealing with applications under the Convention. For example, in *Walpole, Secretary Department of Communities & Justice* [2020] FamCAFC 65, a court in Australia overturned an earlier order that obliged a mother to return with her two children to their father in New Zealand. While the basis for this decision rested upon a grave risk relating to the danger posed by the father, the Australian court addressed the Covid-19 pandemic's import to the question of a grave risk defence. Ryan and Aldridge JJ. took judicial notice of the international travel restrictions and observed (at para. 9) that had the appeal failed on other grounds, then further submissions on the risk involved in returning the children to New Zealand in the midst of a pandemic would have been required.

76. This Court has had the benefit of the parties' submissions in relation to the pandemic. Ms. O'Toole, on behalf of the appellant, argued that the pandemic does not constitute a risk of the gravity required under the Convention. She submitted that it is subject to temporal limitations. In her view, there was no evidence before the Court that Jan would be more exposed to a risk of contracting the disease by travelling to Poland than by travelling to anywhere else in the State.

77. On behalf of the respondent, Mr. Durcan argued that one of the matters of principle to be determined in this case was the effect, if any, which the Covid-19 pandemic has on the operation of the Convention and, in particular, on the application of the defences arising therein. He submitted that the pandemic has affected all aspects of life and that it has made

international travel '*dangerous*'. The more exposure one has to other people the greater the risk of contracting the virus. He argued that the trial judge was entitled to look at the level of risk to which the child would be exposed by remaining in Ireland and to balance it against the risk that would be involved if he were to be removed to Poland. He argued that what was tolerable pre- Covid-19 may not be tolerable post-Covid-19. The court was entitled to have regard to the broader impact of the pandemic and to recognise that remote contact is now a regular phenomenon worldwide. How courts do their business has changed and, arguably, the Polish proceedings on custody could be heard remotely. In his view, it was unrealistic to say that none of this was of significance in applications under the Convention or in relation to how courts determine what is tolerable and what is not.

The Court's Assessment

78. The pandemic has, undoubtedly, affected lawyers, their clients and the courts in or about the provision of legal services. There are, however, limited authorities available in relation to its effect upon applications under the Convention. In *KR v HH* (the *PT* case) the matter was addressed by Deputy Judge Rees in a judgment delivered in March of this year. In that case, the Spanish mother of the abducted child was pregnant and had made a number of allegations about the father who had brought proceedings seeking the return of the child to Spain. The court addressed the argument relating to the risk of physical harm presented by the pandemic. Taking judicial notice of advice given by the British government, he concluded that those most at risk of developing serious complications from coronavirus are the elderly and those with underlying health conditions. Being pregnant, the child's mother in that case was in a group of people who had been advised to socially isolate. Although the pandemic, at that stage, was more advanced in Spain than in England he did not have any evidence from which to conclude that one country was any more or less safe than the other. He stated (at para.47): -

"It is clear that the pandemic is a serious public health emergency in both nations and that the number of cases in the U.K. is expected to continue to rise in the coming weeks. Both countries have imposed significant restrictions on their citizens in an effort to contain the pandemic. I am simply not in a possession (sic) to make any findings as to the relative likelihood of contracting the virus in each country."

79. Deputy Judge Rees. accepted that international travel, as of March 2020, potentially carried with it a greater prospect of infection than remaining in self-isolation. He noted that limited international flights continued to be permitted between the U.K. and Spain for essential travel. From that he inferred that the risk of infection posed by air travel, whilst no doubt significantly greater than normal, was not so high that either Government had felt it necessary to end flights altogether. Taking all those matters into account and accepting the travel associated with a return to Spain was likely to increase the risk of the child contracting the virus, he did not consider that such a risk, when considered in the context of the likely harm that would be suffered by the child should she contract the virus, was sufficient to amount to the grave risk of physical harm required by Article 13(b). In those circumstances he was satisfied that the Article 13(b) defence had not been made out.

80. In this appeal, considerations similar to those in *KR v HH* arise. The trial judge found that that Jan stood '*a grave risk of contracting the disease*' by travelling to Poland. He reached this conclusion without the benefit of any medical, scientific or other evidence adduced before the court. Without underestimating the seriousness of the pandemic, one might expect, reasonably, that some evidence would be required before a positive finding of this nature could be made. The onus of proof remains on the respondent to adduce evidence relating to the pandemic such as establishes the grave risk and she has not done so. Moreover, a distinction must be drawn between a grave risk of harm and a probability of infection. Whereas gravity qualifies the risk referred to in Article 13(b) it is, nevertheless, linked to the harm envisaged in the defence set out therein (see *In Re E* at para. 33). Care must be taken, therefore, not to conflate a moderate or even high risk of contracting Covid-19 with a grave risk of harm should

one become infected with the virus. In this regard, it seems to me that the trial judge fell into error in conflating those respective risks. While I accept that the risk of contracting Covid-19 is a relevant factor in the assessment of grave risk, that risk cannot, in and of itself, be equated with a grave risk of harm.

81. In assessing the defence that arises in this appeal a distinction must, therefore, be drawn between the likelihood of Jan becoming infected if exposed to the virus and the probability of a grave risk of harm being visited upon him should such infection occur. Whilst there was no evidence adduced by the respondent in relation to the risks associated with the pandemic, the parties did not dispute the Court's entitlement, in these wholly unprecedented times, to take judicial notice of information that is within the public domain, as, indeed, did Deputy Judge Rees in the recent case of *Re PT* (see para. 65 above). Current official guidance from the government of Ireland indicates that children are not among those categories of persons who are severely at risk of developing complications if they become infected. Those categories are limited to the elderly and to those with various health conditions or compromised immune systems.[9] Regarding children and the pandemic, the Health Service Executive ('the HSE') website states that: -

> "*Very few cases have been reported in children around the world. Children also seem to get a milder infection than adults or older people."*[10]

82. The principal matter to which the trial judge referred in support of his conclusion that Jan was at grave risk of contracting the disease related to current restrictions on travel and to the government's advice against '*all unnecessary travel'*. He was correct in identifying such restrictions on travel and, to date, the official guidance in this regard remains the same.[11] However, in view of the vital importance of the policy that underpins the Convention, it seems

[9] https://www2.hse.ie/conditions/coronavirus/people-at-higher-risk.html
[10] https://www2.hse.ie/conditions/coronavirus/protecting-your-child.html
[11] Such guidance is, of course, concerned, primarily, with the prevention and spread of the disease rather than with a grave risk of harm.

to me that it would be difficult to argue, let alone to conclude, that the return of an abducted child to the country of his habitual residence, on foot of a court, order constitutes '*unnecessary*' travel. The purpose of returning such a child is related, intrinsically, to his welfare and allows for issues concerning his long-term good and best interests to be determined by the courts of habitual residence. An order for return, seen in its true context, could not, to my mind, constitute '*unnecessary*' travel.

83. The trial judge found that there was no evidence before the court of it being '*even possible to travel to Poland'* at that time. Nor was there evidence of any commercial flights operating between both countries. Furthermore, there was no evidence of immigration or quarantine controls in place. His observations appear to have been directed at the appellant who was requesting the court to make an order that his child be returned to Poland. It seems to me that there is some force to the appellant's submission that, in this regard, Simons J. reversed, impermissibly, the requisite burden of proof by relying on '*an absence of evidence to prove an absence of safety whereas the correct legal test requires the respondent to show the presence of evidence to prove the presence of grave risk*'. Indeed, it does appear that the trial judge may have lost sight of the party on whom the burden of proof must rest. In circumstances where the primary obligation is to return a child, it fell to Jan's mother to show that such a return was not possible because of the gravity of the risk that would confront her child if he were to be returned (see *C.A. v C.A.* at para. 21). In failing to require that such evidence be adduced by the *respondent*, the trial judge's approach to the burden of proof was incorrect.

84. Having found that Jan would be exposed to a grave risk of contracting the disease if an order for his return were to be made, the trial judge noted that in the definition of grave risk, as cited by the Supreme Court in *K(R) v. K(J),* one of the factors to be considered was whether the return would involve a child being returned to '*a zone of disease*' (the *Friedrich v. Friedrich* formulation). Most if not all Member States of the United Nations have been affected by the

outbreak of Covid-19. To that extent, almost every country within the UN may be characterized as '*a zone of disease'*. If the trial judge's approach to the interpretation and application of the *Friedrich v. Friedrich 'zone of disease'* test is correct, then every time an Article 13(b) defence is raised within Convention proceedings, a judicial authority would have to conclude—for as long as the pandemic persists—that the defence of grave risk must succeed on the basis that the country of habitual residence is likely to constitute '*a zone of disease*'. That would, essentially, involve the suspension of the operation of the Convention. Realistically, I do not consider that it can be said that the pandemic has created a grave risk of harm in respect of every child whose return is sought under the Convention. To my mind, '*disease*' as contemplated by the US Court of Appeals for the Sixth Circuit, has to be seen in the context of its comparator dangers, namely, war and famine. It cannot, reasonably, be contended that the return of a child to Poland during the current pandemic constitutes the same or a similar risk as returning a child to a zone of war or famine.

85. It should also be recalled that when contemplating the return of a child, the requested court must consider whether the courts of habitual residence can implement protective measures to avoid harm. In this regard, the trial judge appears not to have taken on board the fact that the Polish authorities continue to implement measures to restrict the spread of the disease. Nor was there any evidence of an inability or an unwillingness on the part of the Polish family courts to protect Jan from any harm that may, possibly, be said to exist.

86. I accept that engaging in international travel at this time carries with it a higher prospect of infection than remaining in self isolation. By adhering to appropriate safety measures, however, that risk of infection may be reduced. In any event, such risk that exists, whilst no doubt greater than normal, is not so high that either the Irish or the Polish authorities considered it necessary to end flights between both countries. Travel to Poland is not prohibited. Whilst

Poland is not on the Irish government's published 'Green List',[12] this simply means that anyone returning from Poland is expected to restrict movements for 14 days upon re-entry into Ireland.

87. There is no doubt that the pandemic is a serious worldwide public health emergency and that it is a situation that is changing and evolving from one day to the next. Authorities in Poland and Ireland continue their efforts to contain the spread of the disease. Without in any way diminishing its seriousness and cognisant of the fact that the path of the virus is unpredictable, it has not been established that returning a child to Poland would constitute a grave risk of physical harm solely by reason of the pandemic. No authorities have been opened to the court in support of such a proposition and such cases as are available do not suggest that returns under the Convention have been suspended by reason of the pandemic.[13]

88. However, notwithstanding the absence of any case law to support the proposition that the existence of the pandemic, in itself, satisfies the grave risk requirement of Article 13(b), I consider that judicial authorities need to remain alert to the need to adapt to the unique circumstances which define a global public health emergency. In applications under the Convention, courts must be vigilant in response to concerns raised about the risks associated with Covid-19 for as long as the pandemic remains. Regard must be had to its seriousness and to the changing path of the virus as well as to the fact that the science in many areas is evolving. In an adversarial system, there is, of course, a duty on a party who alleges that there are risks associated with the pandemic to prove so by adducing cogent and reliable evidence that is capable of being tested. In the absence of such evidence, however, and bearing in mind the best interests of a child, a court may find itself left with little option but to take judicial notice

[12]On 21 July 2020, the Irish government agreed a 'green list' of countries and territories from which people can travel without having to restrict their movements upon arriving in Ireland.

[13] See, for example, the judgment of Deputy Judge Rees in *KR v HH*. See also a recent report in the *Times of Malta* concerning a decision of the Court of Session in Edinburgh in which a return order was made in respect of a child who had been wrongfully removed from Malta. Notwithstanding a submission in respect of the pandemic, Lord Brailsford was not satisfied that the respondent had made out the grave risk defence. https://timesofmalta.com/articles/view/court-orders-scottish-teen-and-baby-back-to-malta.795820

of the most reliable information that is available from officially recognised sources. Such a situation, however, must be considered as the exception rather than as the rule in an adversarial system such as ours. As matters currently stand, I take the view that the courts are entitled to presume that travel for the purposes of returning an abducted child to the place of his habitual residence constitutes 'necessary' travel. Each child is unique and what may be a low risk of harm for one child may constitute a grave risk for another. The Court is required to approach these applications on case by case basis, assessing whether travel during the pandemic would expose a particular child to a grave risk of harm or otherwise would place him in an intolerable situation if returned. In conducting such an assessment, decision makers must bear in mind the distinction between the risk of contracting Covid-19 (which may be said to be moderate or even high if precautions are not taken) and whether a grave risk of harm would ensue if such an infection were to occur. If, having conducted such an assessment, a court is satisfied that the grave risk of harm defence has been established, then it should proceed to exercise its discretion in considering whether a return order should, nevertheless, be made in the best interests of the child concerned.

89. Having given careful and considered thought to the various factors that must be addressed in considering whether a grave risk of harm would arise in the event of a return order being made in this case, I am bound to conclude that any increased risk of Jan contracting the virus (whether from air travel or from being in Poland), if such were established, is not sufficient, in itself, to prove that a grave risk of physical harm would arise in the event that a return order were to be made.

The 'Psychological Harm' Ground

90. The second limb upon which the trial judge found that the Article 13(b) exception had been established was based on his finding that a return order would place Jan's mother in '*an*

invidious position'. She would be confronted with choosing between risking her own health by accompanying Jan to Poland or allowing him to travel without his primary carer at a significant time in his life. Neither outcome, Simons J. found, was acceptable from Jan's perspective.

91. Counsel for the appellant submitted that the trial judge erred in basing his findings in respect of psychological harm, at least in part, on welfare observations made by the clinical psychologist in his report. She acknowledged that in accordance with Regulation 11(2), it was appropriate that Jan was interviewed. I pause now to consider the reports of the assessment conducted by Mr. Kealy.

92. The first interview with Jan lasted one hour and thirty minutes. On behalf of the appellant, Mr. Kealy had before him the exhibits contained in the affidavit of Gráinne Murphy sworn on 6 June 2019. Those exhibits are official documents. They contain no personal evidence from Jan's father about his relationship with his child since birth. In contrast, on behalf of Jan's mother, Mr. Kealy had her completed Parent Report Form, a completed Strength and Difficulties Questionnaire and a completed Parenting Child Relationship Questionnaire. During the course of the interview, Jan made reference to his maternal grandmother and his paternal grandparents, confirming to Mr. Kealy that he had more contact with his maternal grandmother than with his paternal grandmother. Jan spoke about missing Poland but noted '*here in Ireland prefer because not polluted by big factories'*. When asked if he liked living in Poland Jan replied '*Yes*'. He confirmed that he had not spoken with his father since coming to Ireland but indicated that he *'was not allowed to do so by his mother*'. Mr. Kealy said that Jan was '*very clear that he would like to do so if allowed by his mother'*.

93. In terms of language acquisition, it was noted that Jan had little knowledge of English and on the day in question had with him a Polish copy of Robinson Crusoe. When asked where he would prefer to live Jan indicated that he liked living in Ireland and he also liked living in

Poland. He expressed a wish to have contact with his father but suggested his mother did not allow this. Mr. Kealy noted the distinct possibility that Jan's understanding of the family narrative was influenced, to an extent, by the adults with whom he is in contact. He advised that Jan had voiced a wish to speak to his father and that this should happen as soon as practicable. He noted the importance of his father continuing to play a role in Jan's life in terms of his self-identity and that any narrative from his mother should not undermine the role of his father.

94. In Mr. Kealy's second report he noted that Jan had made friends in school and on the housing estate but that he was unable to name any of them. These friendships, from Jan's perspective, appeared to be transient as his friends called to go outside to play and after some minutes they left to go home. He had no '*special school friend*'. Mr. Kealy noted Jan's uncertainty about the number of contacts he had had with his father—possibly having spoken to him only four to five times since coming to Ireland. He recalled a planned trip to the zoo to visit his father but that his mother's partner's car had broken down. Jan spoke of his model train set which stays at his father's lodgings. He also spoke of his mother being scared to go to Poland because his father wants '*to broke our lives*' confirming that it was his mother who had told him this. Jan spoke of wanting '*the complications*' to end. Mr. Kealy commented on the fractious relationship between the parents being apparent from the text messages submitted in the reports of the respondent. He expressed the view that Jan's return to Poland at this time '*could be emotionally challenging for him'* and was '*likely to harm his overall wellbeing*'. He observed that Jan's father *'appears to have little current working knowledge of his son, no relationship and no experience, from the information available, of minding his son for nearly two years*'. He underscored that a considerable amount of work needs to be undertaken to restore a relationship with Jan's father. This would require a physical presence, which was

difficult for his father living in Poland. Necessary building blocks would be required to be put in place if a relationship were to be established.

95. Mr. Kealy was '*very conscious*' that Jan's narrative was informed by what his mother had told him, confirming that it appeared to Mr. Kealy that Jan's mother had discussed court proceedings with the child. Mr. Kealy considered that Jan's mother was likely to provide the same routine consistency, predictability and stability to Jan in Poland as she provides in Ireland. A return, however, could engender a level of hostility which could adversely affect a working relationship between Jan's parents in terms of establishing an access routine. Jan was open to meeting with his father but preparation for such access would be required. Jan had heard a narrative about his father from his mother and Mr. Kealy had the impression that Jan had not heard a '*counter narrative about his father or anybody associated with his father*'. Mr. Kealy could not say whether Jan's father had received simple factual information about his son's interests, school performance or other pursuits. In the documentation supplied, it was his mother who decided as to what she thought was in Jan's best interests '*without any reference to his father regardless of how tenuous their relationship was*'. Mr. Kealy noted that Jan's father has currently been denied an opportunity of meeting the child's care needs. Physical presence facilitates attachment by a parent in meeting such needs. Mr. Kealy confirmed that Jan '*would like to have contact with his father*' and that his mother played a crucial role in this regard, particularly in not undermining his father's role as father. A child's sense of identity and staying connected to the absent parent were 'also important' in Mr. Kealy's view.

96. Ms. O'Toole submitted that Mr. Kealy had made extensive remarks about Jan's welfare and that, in so doing, had gone beyond what a Convention report requires which is, essentially, to set out the child's views on return. He had furnished his opinion as to what is in Jan's best interests and had considered that any attempted return would be upsetting. She argued that

the trial judge had made the mistake of accepting Mr. Kealy's comments on Jan having no relationship with his father and how his mother would thus be in 'an invidious position'.

97. Referring to *VR v. CO'N*, a judgment upheld by this Court, she argued that Ní Raifeartaigh J. had considered all the relevant authorities on the issues that arise in this case. In *VR*, both the High Court and this Court had underscored that the onus was on the abducting parent to establish a defence raised Article 13(b) of the Convention. Citing in *Re E*, Ní Raifeartaigh J. summarised (at para. 24) the relevant principles that arise in connection with the test of grave risk:- the standard of proof is the balance of probabilities; the burden rests on the abducting parent to produce evidence to substantiate the defence; there is a link between the concepts of gravity and harm; the situation on return depends, crucially, upon the possibility of protective measures being available to avoid the risk of harm; the inherent assumption is that the best interests of the child are met by a return order; that assumption is rebuttable only where an exception has been made out; and that absent a definition of physical and psychological harm, its meaning can be gleaned by the alternative of '*otherwise being placed in an intolerable situation*'. Applying those principles to the facts of this case, Ms. O'Toole argued that the high threshold required to substantiate an Article 13(b) defence has not been reached.

98. Counsel for the respondent referred to the fact that in *VR* the High Court had considered three European authorities to emphasise the importance of this Court having regard to the best interests of the child at every point of consideration. He noted that the Convention provides for the grant of orders that a child be returned '*forthwith*' and that once a planned return has not been effected (and he submitted that such a return had not been effected in this case) the requested court must, in assessing the defence of Article 13(b), 'factor in' the child's best interests. Quoting from Lady Hale in *Re D*, Mr. Durcan emphasised that when considering what is tolerable or intolerable, *'intolerable*' must mean a situation which '*this particular child*

in these particular circumstances should not be expected to tolerate'. He argued that the trial judge was correct in having regard to the interconnectedness of the matters which rendered Jan's return forthwith both inappropriate and impossible. Having expressly referred to the high threshold of Article 13(b), it was clear that the trial judge was aware of what was required.

99. Mr. Durcan argued that Simons J. was entitled to have regard to Jan's mother's pregnancy, his attachment to her and to the fact that Jan could not reside with his father. Convention proceedings were not designed to punish a child for the effects of his parents' conduct (*P v B*). Taking everything in the round, the trial judge was entitled to look at the combined effect of the return of this particular child to Poland and to conclude that it would place him in a situation that he should not be asked to tolerate.

100. Citing the Grand Chamber's judgment in *X v. Latvia*, Mr. Durcan submitted that a distinction had to be drawn between the normal 'rough and tumble' which children are expected to endure and that which goes beyond what a child might reasonably bear. What this particular child might reasonably bear has to be looked at in the light of the current pandemic, his mother's life changes and the imminent birth of a new baby and the uprooting which would occur should he be returned to Poland.

The Court's Assessment

101. The trial judge found that the respondent's concerns in respect of travelling whilst pregnant and during the pandemic were well founded given her history of miscarriages in previous pregnancies and the general threat posed by Covid-19. In examining this issue, it should be recalled that the respondent had given an undertaking to the court, pursuant to a settlement that had been reached between the parties on 13 December 2019, that she would return to Poland with Jan not later than 15 January 2020.

102. Ms. O'Toole pointed out that early in the proceedings the respondent had informed the court, in sworn evidence, that she and her fiancé wanted a child and that between February and May 2019, the respondent had suffered three miscarriages. The respondent had, undoubtedly, shown remarkable resilience in her ongoing commitment to conceive, in spite of a series of miscarriages, and at a time when she was, simultaneously, the respondent to Convention proceedings. The coincidental timing of her pregnancy in December and her undertaking to the court in that month was noted. In her affidavit of 20 September 2019 (just three months prior to her undertaking) the respondent had stated that she and her partner were '*endeavouring to start a family*'. Consequently, when giving her undertaking to the court, the respondent cannot but have been conscious of the fact that such an undertaking would have to be discharged in circumstances where she may, in fact, be pregnant. To my mind, the attendant risk associated with pregnancy should be seen in that light.

103. The trial judge was satisfied that the respondent had not engaged in any tactical manoeuvre, noting that her concerns around travel during pregnancy and the pandemic were reasonable. He sought to distinguish the facts in this case from those in *CMW v. SJF,* rejecting any suggestion that the abducting respondent was using a vulnerability to travel due to pregnancy as a weapon to overcome the summary return mechanism of the Convention. He considered that the facts of this case were more akin to those in *ML v. JC* in which the mother had a history of mental health problems and risked breaking down if a return order were made.

104. The comparison between this case and the facts in *ML* is strained. Pregnancy is not an illness. Admittedly, the respondent's doctor had advised, generally, against travel (without, it would appear, having been informed that the respondent was involved in Convention proceedings). The Government's advice is that pregnant women are no more likely to catch the virus than are others. There was nothing to suggest that Jan's mother suffered from such fragile health, whether mental or otherwise, that a return to Poland would endanger her ability

to care for Jan. She has shown notable resilience and strength in providing a stable and consistent home for him and, in Mr. Kealy's view, there was no reason to suggest that, should she return to Poland, she would be unable to continue so to do. In any event, Simons J. was not prepared to accept that travel during any stage of the respondent's pregnancy was an option.

105. In the trial judge's view, the alternative option with which the respondent was confronted was focused not on her own health but on Jan. This option envisaged the possibility of Jan travelling without her at a significant time in his life. In this regard, it seems that the only scenario Simons J. entertained was binary: either Jan stayed with his mother in Ireland or he was placed '*solely in his father's care*'. Given the lapse of time, the latter was not acceptable. It is somewhat remarkable that the trial judge, did not, it would appear, explore the possibility of any member of Jan's extended family supporting him in his return to Poland. In considering the prospect of Jan's travel to Poland without his mother the trial judge referred to what he called a '*finding*' made by Mr. Kealy that: -

> *"For [Jan] to return to Poland at this time where his father resides could be emotionally challenging and likely to harm his overall wellbeing. His father appears to have little current working knowledge of his son, no relationship and no experience, from the information available, of minding his son for nearly two years. For [Jan] to return to Poland solely in his father's care could have serious emotional consequences for him."*

It should be recalled that Mr. Kealy was not engaged to make 'findings' in respect of Jan. His role was to express a view on Jan's level of maturity and to ascertain what Jan's views were in relation to a return to Poland. Based on the above 'finding', however, the trial judge concluded that if Jan were returned to Poland, a grave risk of psychological harm existed which would, thereby, place him in an intolerable situation. The trial judge considered that Jan would either be placed solely in the care of his father with whom he had '*no meaningful relationship'* or he would have to travel with his mother in circumstances where her health would be at risk, an option he had already discounted.

106. There are several difficulties with the approach adopted by the trial judge. In making this decision he relied, exclusively, upon the view of a clinical psychologist who had met Jan on just two occasions, neither of which had lasted more than 90 minutes. An opinion had been offered to the effect that returning Jan '*could be*' emotionally challenging. '*Could be*' represents the possibility not the probability of an emotional challenge. Every day children face varying degrees of emotional challenge, but this cannot be equated with a grave risk of psychological harm. Mr. Kealy also considered that returning Jan was '*likely to harm his wellbeing*' again, falling short of a grave risk of harm as stipulated in Article 13(b). It should also be recalled that Mr. Kealy's views were formed in circumstances where he had expressly acknowledged that he was '*very conscious*' that Jan's narrative was '*informed by his mother*' and that Jan had not heard a counter-narrative about his father. Though '*very conscious*' of having heard only a one-sided narrative, Mr. Kealy nevertheless opined that returning Jan to Poland solely into his father's care could have serious emotional consequences. His observations were made in contemplation of one hypothesis only, namely, that there was no one, but Jan's father, into whose temporary care the Polish courts could place the child pending a full custody hearing. The file discloses that Jan has an extended family, a maternal grandmother and at least one maternal aunt. Furthermore, his mother has friends or '*trusted individuals*' with whom, previously, she had been prepared to leave Jan short term.[14] It appears from text messages between the parties and from the respondent's affidavit of 20 September 2019 that Jan had lived relatively close to his maternal relations before he was removed from Poland. He also has a paternal grandmother. It would appear that alternatives to Jan's placement '*solely in his father's care*' were not investigated. The trial judge omitted to consider that, upon Jan's return, it would be for the Polish courts to decide into whose care Jan should be placed pending a full custody hearing.

[14] See para. 10 of the respondent's affidavit of September 2019.

107. As to the allegedly harmful '*uprooting*' that would be involved in the making of a return order, the trial judge placed little if any weight at all on the fact that Jan had, in fact, been '*uprooted*', abruptly, from his permanent home, his family, his culture and his country and removed in a swift and sudden manner to a foreign state. He has found himself, overnight, amongst a people whose language he did not speak. The child had, expressly, voiced a wish to speak to his father and the psychologist had advised that this should happen as soon as possible. Nevertheless, based upon little more than a brief observation of Mr. Kealy (quoted above at para.105) the trial judge found that there existed a grave risk of psychological harm should Jan be returned to Poland unaccompanied by his mother.

108. Of some concern is the trial judge's finding that Jan has '*no meaningful relationship*' with his father. Again, this conclusion would appear to have been based on the evidence of Jan's brief encounters with Mr Kealy—a relative stranger—who readily acknowledged that the child's account of his father was informed only by his mother's narrative. The documentation Mr. Kealy had received was completed only by the respondent. The trial judge's finding that Jan had—not a fractured or damaged relationship with his father but — '*no meaningful relationship*' with his father lacked a sufficient evidential basis, ignored Jan's expressed desire and did an injustice to the appellant whose voice had not been heard. This brings us to the nub of the issue. With whom a child should live, and how a meaningful relationship with both parents may be maintained, are fundamentally matters to be determined by a judge who has had the benefit of a full custody hearing—all the more so, when dealing with proceedings to which the Regulation applies. It is appropriate to recall that the Polish courts had *seisin* of custody proceedings as of November 2019 (see para. 4 above), just weeks before the respondent removed Jan from Poland. A Convention application is not a custody hearing and must not become a full-blown examination into a child's future (see in *Re E* at para. 26 as cited in *AA v RR* at para. 58). Respectfully, I have to conclude that the trial judge erred in arriving

at such a far-reaching conclusion about the effective end of Jan's relationship with his father in circumstances where this finding was based on a relatively brief meeting in which a one-sided narrative had been received and in the absence of having 'heard the other side'.

109. In the context of Jan's mother's concerns of physical abuse by the father**,** I consider that Finlay Geoghegan J.'s observations (at para. 54) in *R v R* are apposite. Convention proceedings are summary proceedings for the return of a child and it would not be appropriate or possible to decide contested issues of fact. Jan's views of his father were noted to have been most likely informed by his mother's narrative of allegations. Notwithstanding that he had heard no '*counter narrative*', Jan was still '*very clear'* that he would like to speak to his father if he were permitted so to do. In these circumstances, the trial judge's finding that Jan's relationship with his father was '*almost non-existent'* is difficult to reconcile with Jan's clearly stated desire to speak to his father. To reach such a finding Simons J. had to discount the fact that Jan had lived with both of his parents from his birth in November 2012 until his parents parted company in August 2017. During those most formative years of his life, Jan cannot but have developed a relationship with his father whose love for Jan can be seen not only in the exhibited text messages exchanged between the parties but also in his immediate institution of these proceedings upon learning that Jan's mother did not intend to return him to Poland. Moreover, Mr. Kealy had underscored, expressly, that it was important for Jan's self-identity, that his father continued to play a role in his life. To the extent that his relationship with his father had been impaired over the previous eighteen months, the respondent's contribution to this reality appears to have been overlooked by the trial judge. Mr. Durcan is, of course, correct in his submission that Convention proceedings are not about punishing the reprehensible conduct of a parent (*per* Denham J. in *P v B* at para.19*)*. However, regardless of the respondent's contribution to the fracturing of that relationship, it was an error on the part of the trial judge to have concluded that such a crucial relationship was '*non-existent'* based on Jan's limited

exchanges with a stranger whose purpose was not to provide a full welfare assessment on Jan's future but to ascertain Jan's views about returning to Poland. The finding of a '*non-existent relationship'* was also inconsistent with the child's expressed desire to converse with his father. In finding that Jan has '*no meaningful relationship with his father*' the trial judge had, effectively, accepted that Jan's relationship with his father had ended. In so doing, he failed to take due cognisance of the fact that Jan wanted '*to have contact with his father'*.[15]

110. It must be recalled that this is a case to which the Regulation applies and one its main objectives is to uphold children's right to maintain contact with both parents even if they are separated or live in different EU countries.[16] It seems to me that the approach taken by the learned trial judge did not take sufficient account of Jan's right to maintain, on a regular basis, a personal relationship and direct contact with *both* of his parents unless such a relationship would be contrary to his best interests.[17] Additionally, he appears not have attributed appropriate weight to the fact that, under Article 8 of the European Convention, a child's ties with his or her family must be maintained except in cases where a family has proved '*particularly unfit*' (*Neulinger*). Family ties may be severed only '*in very exceptional circumstances*' and Article 8 requires that everything must be done to preserve personal relations and, if and when appropriate, to rebuild the family (*Neulinger*, para. 136). The decision of Jan's mother to remove him, wrongfully, from Poland and to take him to Ireland was not seen through the prism of a prohibited parental measure that would or could cause harm to Jan's long-term development. The trial judge, to my mind, erred in the emphasis he placed on what had transpired since Jan's arrival in Ireland such that the respondent's abduction of Jan had almost become a *fait accompli* and, in so doing, he attributed a disproportionate

[15] February 2019 Report of Mr. Kealy, at page 6.
[16] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33194
[17] Article 24(2) of the Charter of Fundamental Rights of the European Union

weight to what are, in reality, predominantly temporal difficulties that, for now, stand in the way of rebuilding Jan's family relations.

111. Notwithstanding that this was a case to which the Regulation applies, the judgment does not take sufficient account of the powers of the Polish courts to make arrangements for Jan's interests to be protected, including, during any interim period that passes whilst efforts are made to rebuild and maintain Jan's relationship with his father, who, as a parent, represents a key figure in his family. The family courts of Poland are in a position to take evidence from the parties and from any relevant witnesses and it is for those courts to consider whether a middle ground between the parties can be found so that Jan's relationship with his father may be 'rebuilt'. It is for those courts to see that his Article 8 rights are protected and there is no reason to believe that they are unable or unwilling to ensure, as Article 8 requires, that '*everything*' be done to preserve the parental relationship and, if appropriate, to rebuild the family. That requirement is based on the principle of the 'best interests' of the child, a principle which underpins, simultaneously, both the philosophy of the Hague Convention (prompt return) and the Article 8 rights of the child (family ties).

112. Whatever the issues between Jan's parents, his long-term welfare and best interests are matters for the judges of the Polish courts. It is they who will have access to a full and balanced history of Jan's relationship with both parents. It is they who will have access to witnesses who may be called to any custody hearing. Respectfully, I cannot but conclude that the trial judge fell into error when, notwithstanding the absence of a full welfare assessment, he concluded, in a summary application, that this particular child had no meaningful relationship with his father based on an abduction that had lasted for only 18 months.

The Length of Stay Ground

113. During the course of the hearing the parties differed on whether this Court could have regard to '*settlement*' factors in determining whether the defence of '*grave risk*' has been established. In Ms. O'Toole's submission, matters concerning settlement were primarily relevant to '*objections*' cases and, in her view, the trial judge had erred in incorporating Jan's settlement after 18 months into an assessment of grave risk. Mr. Durcan, for the respondent, disagreed, and argued that the trial judge was entitled to take into account the fact that Jan had remained within this jurisdiction for some time now. He had not been returned '*forthwith*'. Mr. Durcan urged the Court to have regard to the fact that it was the *effect* of removal on a child after a period of time which had to be given priority rather than assessing whether or not settlement could be raised beyond the parameters set by Article 12. Whether an application is brought just inside or just outside the one-year time period specified in Article 12 is not where the focus should be. The determining factor must be the effect which removal would have on a particular child after a specific length of time.

The Court's Assessment

114. The trial judge had, in fact, very little to say about the length of stay involved in this case. It seems to me that there is much to commend in Ms. O'Toole's argument that each defence under the Convention should be looked at distinctly and separately and that there should be no overlap between the issues arising in each context. Length of stay was not a factor taken into consideration for grave risk. The case law would appear to support that view. In *EM v. JM,* Denham J. noted (at page 187) that, *prima facie*, the basis of the defence of grave risk '*must spring from circumstances which prompted the removal'*. The interruption in a child's treatment for autism in *EM* did not constitute the type of grave risk contemplated by Article 13(b) of the Convention. In *RK v JK* it was considered (at page 451) that events subsequent

to the removal and/or retention of a child would be material '*only insofar as they tended either to aggravate any original intolerable situation* ***or to create one*** *and also would normally relate to matters which had occurred in the requesting state'.*

115. In *R v. R* the Court of Appeal (Finlay Geoghegan J.) recognised (at para. 61) that the return of the children would inevitably be '*highly disruptive'* for the children but held that it had not been established that such disruption would constitute a grave risk of physical or psychological harm to them or otherwise place them in an intolerable situation. Fennelly J. in *AP* rejected the notion that 'delay' could be a 'standalone' defence in the context of an Article 12 settlement case although he did not say that it could not be evaluated in the context of a grave risk defence. Even if Macur J. in *RS* v *KS* found (at para. 45) that the length of time the child had been in England, meant that he was 'settled' to the relevant degree which invokes Article 13(b), it must be noted that this ruling is not consistent with the jurisprudence of the Supreme Court on the necessary link between gravity of the risk and the circumstances obtaining in the requesting state.

116. It seems to me that the case law supports Ms. O'Toole's contention that length of stay is not a matter to be considered in the assessment of grave risk. Possibly, it might be argued that when the court in *EM* referred to events post-removal that may '*create'* an intolerable situation, (see para. 46 above) it may have been contemplating 'length of stay' as a factor to be considered. Even then, however, it seems to me that an 'event' post-removal would surely have to constitute something more than the mere passage of time.

117. To say, categorically and without exception, that length of stay could never be raised as a reason for grave risk of psychological harm may, perhaps, be a step too far and, as far as this case is concerned, it is a step that need not be taken. Every application is characterised by its own specific facts and an assessment of each defence raised must be carried out on a case by case basis. I would have to accept, however, that it could only be in highly exceptional and

very specific circumstances that a case *might* be made that the level of distress or uprooting caused solely by length of stay would be sufficient, in itself, to reach the threshold of grave risk. (The risk, perhaps, of suicidal ideation upon uprooting comes to mind.) Even then, it seems to me that such a scenario could only arise in a case where a child is old enough to appreciate the significance of the upset and disruption caused by removal, in which case, the defence is more likely to be one based on the minor's objections rather than one of grave risk.

118. I am more persuaded by the view that the defence of grave risk is concerned about difficulties in the state of habitual residence which prompted the child's wrongful removal in the first place. In this appeal, the trial judge's consideration that eighteen months was '*potentially*' relevant in the assessment of grave risk was an error of law. Many of the cases opened to the court involved an order for the return of a child where the length of stay was similar to that which obtains in this case.[18] The duration involved in this case, even now at 20 months, is not of such significance that it would lead me to conclude that, in and of itself, the return of Jan to Poland after such a period spent in Ireland would create a grave risk of psychological harm. The evidence does not support the finding that the upset which Jan may experience upon being brought home to Poland is so serious as to constitute a grave risk of harm. If the damage caused by the cessation or interruption of vital therapy to a child with autism is insufficient to constitute a grave risk of harm, then it is difficult to see how returning Jan to his home environment after 20 months abroad could do so. As a matter of legal principle, I am satisfied that the trial judge misdirected himself in law in concluding that Jan's 18 months in Ireland was a factor which was potentially relevant in his assessment of the defence of grave risk under Article 13(b) of the Convention.

[18] In *EM* the court was prepared to make a return order and did not consider that the length of stay gave rise to any grave risk. The period in question in *EM* was from September 2001 to July 2003. A period of 16 months in *AS v. PS* and 12 months in *RK v. JK* were not considered as constituting a grave risk.

119. Before leaving this third ground for the trial judge's finding, I should say that I am not persuaded by the argument that the cumulative effect which the pandemic, the pregnancy and the period of time would have on Jan should his return be ordered is sufficient to establish, on a global view, that the defence of grave risk had been made out. I appreciate that in *AA v RR* Donnelly J. held that the court may have regard to the cumulative effect of distinct difficulties in deciding whether there is a grave risk of the child being placed in an intolerable situation. In that case, the factors, in themselves, were very serious and included, a long history of mental illness necessitating inpatient care, significant financial concerns and the mother's inability to access legal representation. Even so, Donnelly J. was not satisfied that these factors, taken together, would place the children in an intolerable situation if a return order were made.

120. The particular factors, in this case, do not, individually or cumulatively, create a grave risk. The pregnancy will pass when the respondent is delivered of her child. The pandemic, whilst serious, does not create a grave risk of harm and the time factor is not relevant to considerations of grave risk. In my view, if none of the factors on its own is sufficient to constitute a grave risk of ham, then placing them together does not increase the gravity of the risk to be assessed. Three moderate risks of danger in travelling from A to B do not add up to one grave risk.

The 'Best Interests' of the Child

121. The trial judge addressed '*for the sake of completeness'* what the best interests of the child required, and he did so in response to an alternative argument that had been advanced on behalf of Jan's mother. He cited the principles set out by the Strasbourg Court in *X v. Latvia* and observed that Ní Raifeartaigh J. had applied those principles in *VR v. CO'N*. The trial judge, however, concluded that, in view of his finding in respect of Article 13(b), it was not

necessary to have recourse to the overarching requirement to have regard to the child's best interests, because those interests had been secured by the operation of the grave risk defence.

122. During the hearing of this appeal, there was some difference of opinion between counsel as to the stage in the proceedings when the Court should have regard to the best interests of the child. Whereas Mr. Durcan submitted that those interests are a primary consideration at all stages in the process, Ms. O'Toole's approach was somewhat more nuanced. Accepting that a broad 'high-level' consideration of a child's best interests must inevitably be engaged when assessing the grave risk defence, she nevertheless considered that the more in-depth assessment of a child's best interest falls to be considered only after a defence has been established, that is, when the Court is exercising its discretion as to whether or not it should, notwithstanding the defence, order the return of a child. An application under the Convention, she recalled is not the same as *'a full-blown examination of the child's future*' (*Re E* at para. 26*).*

123. Perhaps reflecting this divergence of views as to when best interests are to be assessed, Ní Raifeartaigh J. in *VR* considered that the grave risk defence and the various policies underlying it may be '*to a degree in conflict with each other*'. The *'conflict'* which the learned judge discerned related to the fact that whereas the threshold for establishing a grave risk or an intolerable situation is a high one, the court must '*factor in to an appropriate degree the best interests of the particular child*'.

124. I appreciate the differing nature of the principles which the Court must consider but I do not find there to be any conflict between the policies underpinning the grave risk defence and the requirement to have regard to the child's best interests. The starting point is that child abduction is harmful for the child.[19] The presumption underpinning the entire Convention is that abduction is not in a child's best interests and that it ***is*** in a child's best interests that he or

[19] The Hague Convention as a whole rests upon the unanimous rejection of illegal child removals (see para. 34 of the Pérez Report cited at para. 63 above).

she be returned to the place of habitual residence where a full assessment of welfare may be conducted. Alongside that presumption, is the recognition that in certain narrowly defined circumstances, which are set out in the Convention, that presumption may be rebutted. If a defence of grave risk has been established, then the preponderance of the evidence will have suggested that the presumption *has* been rebutted and that it may not, in fact, be in this particular child's best interest that the general presumption be applied.[20] If, on the other hand, the defence of grave risk has not been established then the Court is left with the underlying policy presumption that it is in a child's best interests that he or she be returned to the place of habitual residence. An analogy, albeit with all its inherent limitations, may be helpful in appreciating how the 'best interests' principle works in the context of the Convention's underlying policy and its recognised exceptions. A serious accident occurs. An ambulance is called. It is, in principle, in the person's best interests that he or she be removed, forthwith, to hospital where the injury may be treated. Hospital is the best place for that person because that is the place where all the necessary medical support and personnel are located to serve the patient's best interests. However, in rare and limited circumstances, it may not, in fact, be in a particular patient's best interests to move him. The journey to hospital may take too long and his condition may deteriorate *en route*. In such a scenario, it may, in fact, be in his best interests not to remove him to hospital 'forthwith' but to allow him to remain *in situ* and to apply, for example, defibrillation at the roadside. In both scenarios, the end goal is to serve the patient's best interests. Not removing the patient and treating him *in situ* does not undermine the general policy that, in principle, it is in an individual's best interests that he or she be moved, forthwith, to hospital following a harmful event.

[20] The court in such a case retains the discretion to order a child's return notwithstanding the fact that the defence has been established. The court may still consider it to be in a particular child's best interest to be returned. An example might be where, notwithstanding that a child has settled in his new environment, the abducting parent was due to be hospitalized or imprisoned with the consequence that the child would be left unsupervised should a return order not be made.

125. In *Neulinger*, the Strasbourg Court recognised the broad consensus, including, in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. That court's caselaw on Article 8 of the European Convention on Human Rights requires that the 'best interests' principle be a primary consideration in all decisions that affect a child. I agree with the observation of Lady Hale and Lord Wilson in *Re E* to the effect that when the Convention is properly applied – whatever the outcome – it is unlikely that there will be, at the same time, a violation of the Article 8 rights of the child on the basis that his best interests were not served. As they correctly point out, the violation in *Neulinger* arose not from the proper application of the Hague Convention but rather from the effects which the delay subsequent to its application had caused.

126. In *G.S. v. Georgia* the Strasbourg Court considered that a harmonious interpretation of the European Convention and the Hague Convention can be achieved where two conditions are observed.[21] Firstly, where factors capable of constituting an exception to the child's immediate return are genuinely taken into account by the requested court, which then makes a decision which is sufficiently reasoned on this point so as to demonstrate that those factors or questions *have* been effectively examined. Second, where all relevant factors have been evaluated in the light of Article 8 of the Convention. A refusal to take objections into account and insufficient reasoning for dismissing those objections would run contrary to the requirements of Article 8 and to the aim and purpose of the Hague Convention.

127. For the reasons set out in this judgment, I have examined, carefully, the three factors or grounds raised by the respondent in her objection to Jan's return and relied upon by the trial judge in refusing to make a return order. Each of these factors has been considered and reasons have been given as to why individually none of those factors reach the high threshold of constituting a grave risk of harm or otherwise placing the child in an intolerable situation.

[21] At paras. 47 and 48 of the Judgment.

Collectively, when those three factors are placed together, the cumulative effect thereof does not reach the required threshold of a grave risk or an intolerable situation.

Article 8 of the European Convention on Human Rights

128. I now turn to evaluate all relevant factors raised in this case in the light of Jan's rights under Article 8 of the European Convention. Having regard to his best interests I must be forward looking and assess the risk of what might happen on return *(AA v RR* at para. 62). In looking forward, I am mindful that if it this Court orders the return of Jan to Poland, it would be returning him to a country and to a home which he has known since he was born. Jan liked living in Poland. The change in his life has been relatively recent. I am also aware that Jan has an extended family, including, his maternal and paternal grandmothers, an aunt and '*other trusted individuals*' (as referred to in the Affidavit of his mother sworn on 20 September 2019) who are living in Poland. He would be returned to a country which he says he misses and to the place where his father, with whom he would like to have contact, resides.

129. Moreover, in addition to the foregoing, I am mindful of the fact that Jan has a right under Article 8 of the Convention to maintain family ties. He also has a right under Article 24(2) of the Charter to the company of both parents. The jurisprudence of the Strasbourg Court confirms that the severance of family ties with a parent may only be permitted in '*very exceptional circumstances'* and that '*everything must be done to preserve personal relationships and, if and when appropriate, to rebuild the family*' (*Neulinger* at para. 136). In finding, rather summarily, that Jan's relationship with his father was 'non-existent', these important Article 8 rights appear to have been afforded little, if any, weight in the assessment conducted by the trial judge. At the same time, I am mindful that Article 8 requires that Jan's development takes place in a sound environment and that neither parent, father or mother, is permitted to take measures that would be harmful to his health or development.

130. Jan's rights under Article 8 of the European Convention require protection against the unnecessary severance of family ties and the safeguarding of Jan from harmful measures that either of his parents may take. If Jan is not returned to the place of his habitual residence, it would appear that his ties with his father risk being, if not entirely severed, then at a minimum radically and, possibly, irreparably damaged. That is something which the courts could permit only in '*very exceptional circumstances*' (*Neulinger,* para.136). Bearing that risk in mind, it seems to me that the Polish courts are better placed to ensure that '*everything*' is done to preserve personal relations and, if and when appropriate, to rebuild the relationship Jan has with his father. Having determined contested issues of fact, they are also in a position to ensure that Jan's development can take place in a sound environment and that neither parent may take measures that would harm his health and development.

131. The appellant has brought these proceedings under Article 12 of the Convention for the return of Jan to the place of his habitual residence. Whilst I accept Mr. Kealy's view that preparations for the building of a relationship with his father will be necessary, I am mindful of the fact that, should Jan be returned, the courts of his home place will normally be trusted to protect him, particularly given that Poland is another EU member state (see *R v R* at para. 40). There is no reason to doubt that our Polish counterparts are unwilling or unable to ensure that measures which are necessary to protect Jan's best interests will be implemented.

132. When it comes to custody, welfare and access arrangements, the Polish courts are far better placed to hear the evidence of both parties, to weigh and assess all allegations and counter allegations, to decide contested issues of fact and to make a determination on the basis of Jan's best interests as to what his future care and family arrangements should be. I do not lose sight of the fact that those courts, currently, have before them two sets of proceedings that are pending: one relating to custody and access and the other, an application to relocate to Ireland.

This Court was informed that those proceedings have been adjourned pending the outcome of these proceedings.

133. In coming to a decision in this matter, I take the view that the concept of the child's best interests that underpins both the Hague Convention and the European Convention is fundamental to considerations under both instruments. Both Conventions, as the court in *Re E* put it, '*march hand in hand'* (see *Re E* at para. 27). Having considered the requirements of the 'best interests' principle under Article 8, the Strasbourg Court in *Neulinger* (at para. 137) observed:

> *"The same philosophy is inherent in the Hague Convention, which in principle requires the prompt return of the abducted child unless there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place it in an intolerable situation."*

134. Whilst a full-blown welfare assessment is not to be conducted by the requested state, I am, nevertheless, satisfied that this Court must have and that, in fact, it has had regard to the broad concept of the child's best interests, as articulated by the Strasburg Court, when dealing with the application herein. Whereas the appellant urges the Court to recognise the Convention's presumption in that regard, the respondent submits that on the particular facts of this case, that presumption has been rebutted by reference to Article 13(b) thereof.

Determination

135. Bearing in mind all of the foregoing considerations, I have reached the following conclusions. I am satisfied that Jan is habitually resident in Poland and that he was removed, unlawfully, therefrom by his mother and taken to this State in December 2018. I am further satisfied that his father, having instituted these proceedings in June 2019, is entitled to an order that Jan be returned 'forthwith' unless a defence has been established and, in the exercise of its discretion, the Court considers that he should not be so returned.

136. Weighing all of the relevant factors, I have reached the conclusion that the respondent's defence raised under Article 13(b) of the Convention has not been established and that the trial judge erred in finding that it had. In my view, Simons J. fell into error in the following ways. He failed to apply an appropriately high threshold in his assessment of the grave risk defence as required under Article 13(b). His finding that travel during the pandemic constituted a grave risk of harm was made without regard to any or any sufficient or persuasive evidence. In failing to ensure that the burden of proof of grave risk was discharged by the party opposing the child's return, the trial judge also erred. Furthermore, his finding that a grave risk of psychological harm would arise if Jan were returned was based, for the most part, on the brief remarks of a clinical psychologist in relation to Jan's overall welfare in circumstances where a comprehensive, considered and balanced welfare assessment had not been conducted. He also had regard to allegations she had made against the appellant without having heard the other side. The trial judge misdirected himself in law in taking into account Jan's length of stay of Ireland as a potential factor to be considered in the assessment of grave risk of harm. None of the matters to which he had regard either individually or collectively has reached the high threshold which is required to be reached before a defence under Article 13(b) of the Convention can succeed.

137. Having erred in this way, the trial judge went on to conclude that it was not necessary for him to have recourse to the overarching requirement of Jan's 'best interests', believing, as he did, that the defence raised had operated to secure those interests. Approaching the matter in this way, meant that the trial judge did not consider Jan's rights under Article 8 of the European Convention. In the absence of relevant, balanced and sufficient evidence, the trial judge found that Jan's relationship with his father was '*non-existent'*. In making such a finding in summary proceedings and in basing his decision, in part, thereon, the trial judge failed to consider that a finding of this nature meant, effectively, that Jan's ties to his father had been severed. He did

not attribute any or any sufficient weight to Jan's stated desire to have contact with his father. In this regard, Simons J. failed to respect the principle that family ties may be severed only in '*very exceptional circumstances'* and that '*everything must be done*' to preserve personal relations and, if and when appropriate, to rebuild the family. To comply with Jan's rights under Article 8 of the European Convention, such a severance could only occur after the courts of habitual residence had conducted a thorough and comprehensive assessment of Jan's best interests in the context of full custody proceedings. Such proceedings are currently pending before the courts of Poland. The trial judge failed, entirely, to have regard to Jan's right under Article 24(2) of the Charter of Fundamental Rights and, in particular, to his right to maintain, on a regular basis, a personal relationship and direct contact with both his parents.

138. In view of my findings set out above, I consider that the order of the trial judge should be set aside and that, in its place, an order should be made, in compliance with Article 12 of the Convention, that Jan be returned 'forthwith' to the place of his habitual residence.

139. Accordingly, I propose that such an order be made with immediate effect.

Granting a Stay

140. The only question that remains to be considered is to whether a stay should be imposed on the Court's order made herein in consideration of the matters set out hereunder. I am satisfied that this Court has the jurisdiction to grant such a stay. In *R v R* it placed a stay on its order for the return of a child with Finlay Geoghegan J. stating (at para. 66): -

> *"Article 12 requires the requested court to make an order for the return of the children 'forthwith'. In this jurisdiction it is well established that the court may where it considers that the best interests of the child so require, either place a short stay on that order or provide that the order come into effect, not immediately, but at a proximate future date."*

In view of the fact that the respondent is pregnant and that her estimated date of delivery is 15 August 2020, I consider that a stay should be placed on the order of this Court until after the

birth of the respondent's baby. The new baby's arrival will, undoubtedly, be an occasion of great joy for Jan's mother in circumstances where she and her partner have been actively endeavouring to start a family. Her joy, understandably, will be tinged with some sadness by the reason of fact that this Court has ordered the return of Jan to the place of his habitual residence; but that is what the law requires both under the Hague Convention and the European Convention so that Jan's best interests be served.

141. The Court is mindful that returning Jan to Poland may be challenging in the aftermath of a new baby's arrival although it is conscious that the respondent has extended family and other individuals whom she trusts in Poland. Whereas the appellant submitted that decision to become pregnant in the midst of Convention proceedings was a decision taken consciously by the respondent, there can, of course, be no question of the Court seeking to punish the abducting parent by its determination in a Convention application (see *P v B* at para.19). At the same time, what is in a child's best interests cannot be jettisoned by reason of decisions taken by a parent in endeavouring to build up a recently established relationship with a new partner. Once again, it is Jan's best interests that must be the primary consideration.

142. As did Finlay Geoghegan J. in *R v R*, I consider that it is also in the child's interests that the custody proceedings that are pending before the Polish courts be determined as promptly as possible. For that reason and bearing in mind that the respondent's due date is 15 August 2020, I propose placing a stay on the order until 15 September 2020. On or before that date, Jan is to be returned to the state of his habitual residence. The six weeks between now and then may be used to prepare Jan for his return and will allow his mother to make whatever arrangements are necessary to ensure full compliance with this Court's order.

143. The Court is mindful that certain practical arrangements will have to be put in place for the respondent to comply with the terms of its order. In December 2019, she gave an undertaking to the High Court that she would return to Poland with Jan. Clearly, at that time,

she intended to have in place practical arrangements for taking care of Jan in Poland in order for her to discharge the terms of her undertaking. Such arrangements may be short term, but they must remain in place until such time as the courts in Poland determine the custody proceedings and the relocation application. Whatever provisions to which the appellant had agreed in order to support the respondent in discharging her undertaking should continue to apply.

One final matter

144. Just before the hearing of this appeal ended, one final matter was raised by the respondent. Through her counsel, she indicated that she wanted to apprise the Court of the difficult position she would be in if her (now) husband were to withhold his consent to her travelling with their new baby to Poland while she accompanies Jan on that journey. She feared that she would then find herself in breach of the Hague Convention.

145. The Court recalls that the respondent and her husband were actively seeking, hoping and planning to conceive their child at the very time when she gave her undertaking to the High Court in December 2019 that she would return to Poland with Jan. Evidently, they perceived no difficulty in pursuing both paths. The respondent did not discharge that undertaking because she had, as they had hoped and planned, become pregnant. As her husband was undoubtedly aware of the serious nature of the undertaking she had given to the High Court at a time when the pregnancy was planned, the Court has no reason to conclude that he would be other than supportive of her in complying with this Court's order once she is delivered of her pregnancy. He is also a Polish national. Mindful of the fact that the respondent has already given an undertaking to the High Court with which she failed to comply, the respondent needs no reminding of the potentially serious consequences which arise if she were to fail to comply

with the terms of this Order, particularly, in circumstances where she has sworn that she will travel to Poland as soon as she is given the '*all clear'* to do so.[22]

Conclusion

146. In circumstances where both parties had availed of legal aid, the trial judge did not consider it appropriate or necessary to make any order as to costs. If the parties' costs in this appeal are also covered by legal did then I would propose to make no order as to costs.

147. If, however, either party wishes to contend for an order in respect of costs, he or she will have liberty to deliver a written submission not exceeding 2,000 words within 28 days of the delivery of this judgment and the other party will have 28 days to respond. In default, my proposal to make no order as to costs will take effect. The Court is in a position to hear the parties in respect of any further orders that may be required.

148. The operative part of the Order concerning Jan's return to Poland will take immediate effect with a stay being placed thereon until 15 September 2020. As noted above, on or before that date, Jan is to be returned to the state of his habitual residence.

149. For the reasons set out in this judgment I would allow the appeal.

Noonan and Binchy JJ. have read and considered this judgment and they have indicated that they are in agreement with its reasoning and with the conclusions reached herein.

[22] At para. 10 her affidavit of 20 January 2020.