THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 302

Appeal Number: 2020/215

Whelan J.
Binchy J.
Pilkington J.

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991
AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF COUNCIL REGULATION 2201/2003
AND IN THE MATTER OF E. AND O. (MINORS)

BETWEEN/

J.V.

RESPONDENT

- AND –

Q.I.

APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 9th day of November 2020

A. Introduction

1. This is an appeal from an order of the High Court (Gearty J.) of the 14th October, 2020 that the two children named in the title hereof be returned to the jurisdiction of the courts of Belgium on or before Saturday the 24th October, 2020 subject to a stay in the event of an appeal. The said order was made pursuant to Art. 12 of the Hague Convention and Regulation (EC) 2201/2003 of the 27th November, 2003. She further ordered continuation of an order made in the High Court on the 27th August, 2020 that the appellant her servants or agents or any person having notice of the making of same be restrained from removing the said minors out of this jurisdiction until further order with liberty to the respondent to inform the relevant Garda and Port Authorities of the making of the same. The orders of the High Court were made for the reasons set out in the *ex tempore* judgment of Ms. Justice Gearty delivered on the 14th October 2020.

2. The proceedings were instituted on the 20th August, 2020 by J.V. (hereinafter the father) pursuant to the Hague Convention on Civil Aspects of International Child Abduction (the Hague Convention) and Council Regulation 2201/2003 of the 27th November, 2003 (Revised Brussels II Regulation). The Hague Convention was implemented in Ireland by virtue of the Child Abduction and Enforcement of Custody Orders Act, 1991. Section 6 of the said Act provides that the Hague Convention is to have the force of law in the State. The primary aims of the Hague Convention are expressed in Art. 1 as follows:-

> "(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 States."

3. Expedition and promptitude are core values of the Hague Convention. To that end Art. 2 obliges contracting States "to take all appropriate measures to secure… the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available." Article 11 enjoins the relevant administrative or judicial authorities of contracting States to "act expeditiously in proceedings for the return of children." It further entitles an applicant or the Central Authority of a requested State to request a statement of the reasons for delay where a decision has not been reached within six weeks from the date of the commencement of the proceedings.

4. Section 38(2) of the 1991 Act provides "rules of court may make provision for the expeditious hearing of an application under Part II or Part III of this Act." Part II pertains to the Hague Convention.

B. Background Facts

5. The father and mother married one another on the 4th January, 2004 in Nigeria. The father is a Belgian national and the mother, born in Nigeria, is also a Belgian national. Their son E. was born in October 2009 and at the date of institution of the within proceedings was aged ten years. He is now aged eleven. Their second son O. was born in August 2012 and at the date of the institution of the within proceedings was aged seven. He is now aged eight years. The children were born in Belgium. At all material times from their respective births the children resided in Belgium. They have two half-siblings who also resides in Belgium.

6. The marital relationship between the parties broke down in or about the year 2016. On the 7th November, 2016 the father and mother entered into an agreement relating to the marital breakdown which was made a rule of court. It was further approved by Court order on the 29th March, 2018. It prohibited either parent from removing the children from the jurisdiction of the courts of Belgium.

7. In or about the month of September 2019 the mother moved to reside in Ireland to pursue a new relationship. There is a child born of the said relationship. Thus it is not in dispute between the parties that the children were at all material times habitually resident

within the jurisdiction of the courts of the Kingdom of Belgium and that the applicant father was at all material times the holder of rights of custody in regard to both children for the purposes of the Hague Convention and the Revised Brussels II Regulation.

8. At all material times from September 2019 the children resided with the father and under his care and control in the city of Antwerp. His parents assisted in the care of the children. They too reside in Antwerp. Following her relocation to Ireland, the mother travelled to Antwerp for access on one occasion in November 2019.

9. On the 19th December, 2019 the Antwerp Court of First Instance Family and Juvenile Court Section made orders confirming its earlier judgment made on the 7th November, 2016 which was varied in part to provide that the children be registered at the address of their father in Antwerp and have their main residence there. The Order also provided: "The contact between the mother and children shall take place in mutual consultation with father." There was an order for maintenance payable by the mother to the father. It was fixed at €119 per month for each child. The previous orders of the court including the order restraining the removal of the children from the jurisdiction of the courts of Belgium continued in full force and effect.

10. On 9th July 2020, as hereinafter particularised, the mother collected the children from the father for the purpose of a few days access with them in Belgium and removed them to Ireland on 10th July 2020.

11. On the 20th August, 2020 a Special Summons issued. It recited that the High Court had jurisdiction to hear and determine the application by virtue of the provisions of Art. 11 of the Revised Brussels II Regulation and sought various ancillary reliefs together with a declaration that the order made on the 19th December, 2019 was enforceable in this State and an order pursuant to Art. 12 of the Hague Convention and/or Art. 11 of the Council Regulation for the return forthwith of the minors to the place of their habitual residence.

12. In accordance with the usual practice and given the urgency arising, the grounding affidavit in support of the application was sworn by Geraldine Broderick a solicitor at Smithfield Law Centre based on instructions provided by the father. The said grounding affidavit deposed as to the parties entering into an agreement on the 7th November, 2016 pertaining to the breakdown of the marriage which agreement was made a rule of court and that same was further approved by the Antwerp court on the 29th March, 2018. It deposes that the father petitioned for the establishment of the residence of the children to be with him as the mother had moved out of the country and that the mother did not appear at the hearing on the 19th December, 2019. The affidavit deposed that the mother had picked up the children for access on the 9th July, 2020 in Antwerp and that vacation access with the children had been agreed at a named hotel in Belgium from the 9th to the 14th July, 2020. When the father telephoned the hotel on the 10th July, 2020 they were not there.

13. It also deposes to a message received by the father from the mother following the removal of the children by her from Belgium when, *inter alia*, "she blamed the applicant in light of the court decision in his favour on the 19th December 2019."

14. The said proceedings and grounding affidavit with exhibits were served upon the mother on the 21st August 2020 with the assistance of an Garda Síochána. The affidavit of service records:-

> "She was very unco-operative and belligerent. She wanted to take photographs of myself and the two gardaí. She also asked the gardaí to produce their identity cards, notwithstanding that they had already called to the house two weeks previously."

She was initially unwilling to comply with the court order but did hand over the children's identity cards when persuaded to do so by members of an Garda Síochána present.

C. Mother's Replying Affidavits

15. On the 3rd and 17th September, 2020 the mother swore affidavits. They appear to significantly overlap as to content – the later affidavit containing some additional averments. The mother did not file her replying affidavit within the time allowed and a further order was made on Wednesday 23rd September, 2020 extending time for a period of ten days from that date for the filing and serving of a further replying affidavit.

16. Issues surrounding the appellant mother's further affidavit again exercised the court on the 7th October, 2020 wherein the court ordered that she be at liberty to file in court on that day a copy of the affidavit sworn by her on the 17th September, 2020 (the original having been sent in for filing to the High Court Central Office and no record of its filing being forthcoming) and to file and serve legal submissions by email by lunchtime on the 7th October, 2020.

17. She deposed that she is representing herself and it is plain that her affidavits were drafted without legal assistance. Although not legally represented in the court below she was represented at the hearing of this appeal. In the context of these proceedings and submissions and arguments advanced to this court in the course of this appeal the appellant's averments are noteworthy in a number of material respects. Firstly, she does not dispute the validity of the original agreement and orders pertaining to the parties and the children of the 7th November, 2016 as further approved by the Belgian courts on the 29th March, 2018 and which were the subject of further modifications by the orders on the 19th December, 2019. She does not deny that she failed to appear at the court in Belgium on the 19th December, 2019 when that court made orders that the children's main residence be with the father in Antwerp with access to be agreed for the mother between the parties. Nowhere is it suggested that she was unaware of the said proceedings or of the application and orders made by the Belgian Court on the 19th December, 2019 and the import of same (an assertion made by her counsel in the course of the Appeal hearing). Significantly, she does not dispute that she visited Antwerp on the 9th July, 2020 and collected the children ostensibly for access. Neither does she deny that

she had indicated she was spending some days with them until the 14th July at a named hotel in Belgium for the purposes of access. She does not deny that she asserted on the 11th July, 2020 in telephone communications and messages with the father that she had gone to Nigeria with the children, that she would be gone for a year, that the children would go to school in Nigeria, that the father was to blame for the state of affairs because of the court decision made on the 19th December, 2019. All of these are very specific averments to be found in particular at paras. 12 and 16 of the grounding affidavit of Geraldine Broderick and called for a clear response from her.

18. The affidavits of the mother state that on the 13th July, 2020 the two children were in Ireland in "my registered address and with their identity cards." The flight document attached to the appellant's affidavit, Evident No 4 shows that they were booked on a flight to Ireland on Friday 10th July 2020 scheduled to depart at 9.50 and to arrive in Dublin at 10.35 a.m. The children had no checked-in luggage. Nowhere does she assert that the father was aware of her intention to remove the children to Ireland on 10th July or that she disclosed to him her plan when she collected the children for access the previous day. At paragraph ten she states:-

> "I contacted the Government House in Antwerpen … where the children are registered regarding the situation of my children that they are in high risk of grave harm."

At paragraph twelve she deposes:-

> "I am pleading because of the high rick [*sic*] of grave harm and physically emotionally and psychological pain they have passed through, they should not return to Belgium because […] (the father) goes to work at 6am, it has always been like that for the pass [*sic*] twenty years even in the time of the marriage. His father who is 94 year old will come for the children around 7am to bring the children school and his mother of 92 year old will pick them up from school."

19. She attached WhatsApp messages from her children indicating that she received messages from them saying how much they missed and loved her. At paragraph thirteen she deposes that because of the lockdown she couldn't go and see them which is not inconsistent with the assertions of the father that he understood the purpose of her visit on the 9th July, 2020 was to have access with the children between 9th and 14th July 2020 in Belgium. She seeks that the court consider "the high level of psychologically suffer and emotion injury and also the high level of grave harm in their situation." She seeks full legal custody "like the Belgium authority have corporate." [*sic*] The affidavit asserts that the children are "in risk of grave harm and intolerable situation." That she was "in shock seeing them suffer physical and emotional injury."

D. Evident 2

20. A document described as "Evident 2" was provided. It is not exhibited to her Affidavit in any conventional sense. This document is handwritten in the English language. It is dated 09.09.2019 "I [Mother] allow E and O to stay with [their father] until I rent a house in

Ireland. I will come back to collect my children to stay with me in Ireland." There would appear to be signatures or some initials appended thereto. At the trial she contended that the father's signature was appended to the document. He strenuously denied that.

21. The documents she provided included document "Evident Number 5" which appears to be a chain of communication between her and a helpdesk in Brussels concerning the identity cards of the two children. In an email of the 27th July, 2020 at 2.44 she wrote:-

> "The children are with me in Ireland where I live and work. On the 9/07/20 at 12.45 is the day I went to […] [the father's house]. The address is […] Antwerp. [the father] gave me the identity cards himself. These cards were necessary for the children to go on holiday. The bad circumstances for the children are the reason I decided to take the children with me to Ireland. The children will not come back.
>
> [The father] always leaves for work at 6 o'clock in the morning and the children are all alone. Until the moment his father of 92 years old comes to take the children to school at 7 o'clock. This situation is unacceptable and they have lost a terrible amount of weight. This has been happening since 12/09/2019 when I went to Ireland to work. This means that the children have been living in poor conditions for 9 months.
>
> I'm obliged to protect my children and to take care of my children. That is why I took my children to Ireland where I live. The identity cards of the children are in my possession and the children are staying with me. The police came already to my house to check the children and to see if they are healthy. […]" [emphasis added]

In response the Belgian FPS Home Affairs – SPF Interior Helpdesk advised her that –

> "The consequences of these reports will mean that the ID cards will be blocked. Unfortunately, this action cannot be reversed. Please contact the municipality or diplomatic department where both children are registered to apply for new kids – ID's."

The communication continues –

> "The question that needs to be asked here is whether the father still has parental authority. If he does not have this, the block can be refused as he will no longer be able to act on behalf of the children."

22. It is noteworthy that in this engagement last July with the Belgian authorities at high level in the days and weeks following her removal of the children from Belgium, several weeks prior to the institution of Hague Convention proceedings, the mother does not assert that the father consented to the removal of the children from the jurisdiction of the Kingdom of Belgium to Ireland or that he had previously signed a document to that effect. Neither does she put forward any evidence or even assert that he did not have parental authority and rights of custody in regard to the children, including the right that they reside with

him. Had "Evident 2" been forthcoming in July 2020 one would expect that the mother would have provided it to the Belgian FPS Home Affairs Help Desk.

23. It is also of significance, in my view, that the appellant mother asserts in the email exchange with Belgian Home Affairs that the reason she procured the children's ID cards on the 9th July, 2020 was because they were "necessary for the children to go on holiday." This tends to undermine any proposition that the father provided the ID cards to her based on an alleged agreement allowing her to remove the children to Ireland. This also tends to corroborate the father's contentions that she procured the children's ID documentation from him on the 9th July 2020 on the basis that same were required to prove their identity at a Belgian hotel where she had asserted she would spend time with the children for the purposes of holiday access.

24. Further, in my view it is of importance that the reason she gives for removing the children from Belgium does not at any level encompass an assertion of prior consent on the part of the father. Neither does she assert that he even had knowledge that she was removing the children from Belgium. A perusal of her email chain in its totality indicates no suggestion by her that the father consented to the removal of the children from Belgium: "The bad circumstances for the children are the reason I decided to take the children with me to Ireland. The children will not come back." Such assertions are more consistent with a non-consensual unilateral act of removal engaged upon by the mother. Her various criticisms are directed towards the father, his parents, the living conditions of the children in the home and alleged weight loss of the children. A significant number of generalised allegations are made. None asserts consent.

25. In her affidavit of 17th September 2020 which was apparently filed on or after 7th October, she deposes that the children "must remain in Ireland for their safety" (Para. 16(b)) and that the court should not return the children to Belgium by reason that "they are more happier in Ireland, M. is finally playing soccer that was his dream he was never given that chance in Belgium."

26. Meanwhile the proceedings progressed before the High Court during the long vacation. An order was made restraining her from removing the children out of the jurisdiction otherwise than (on notice to the father) for the purpose of restoring them to the place of their habitual residence in Belgium. On the 27th August, 2020 the High Court ordered, *inter alia* a continuation of existing orders and that the solicitor for the father continue to hold the passports and identity cards of the children pending determination of the proceedings. It was also necessary to have the High Court intervene and make orders (MacGrath J.) in respect of access between the father and the children pending the hearing.

27. It was suggested at the hearing of this appeal that the mother had been advised about her rights regarding her entitlement to apply for legal representation and this court was informed that she had stated to the judge that she wished to represent herself.

28. On the 9th September, 2020 the High Court (Gearty J.) made an order pursuant to Art. 11(2) of the Revised Brussels II Regulation that a named Clinical Psychologist interview the two children in relation to a series of matters listed in the order and report to the court on the interview for the purposes of the court ensuring that the said children are given an opportunity to express their views and be heard in the proceedings. Article 11(2) of the said Regulation provides:-

> "When applying Articles 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."

29. Thus, a predominant purpose of the Expert Report was to ensure that the children's voice be heard in the proceedings insofar as appropriate, a measure that clearly accords with Art. 12 of the UN Convention on the Rights of the Child. The order directing the said report had annexed to it a very comprehensive schedule incorporating information for the interview and assessment of children in child abduction cases. Thus it is clear from the schedule itself at Clause 6 which addresses the purpose and status of the report that:-

> "The primary purpose of the report to be prepared by the child professional, following the interview and assessment of the child, is to enable the child to express his/her views to the judge and to assist the judge in making decisions on the issues in respect of which the court has jurisdiction in child abduction proceedings under the Hague Convention and Brussels II Bis Regulation. … The report of the child professional is that person's evidence in the proceedings. S/he will only be required to attend court for the oral hearing if required by the judge or either of the parties."

E. Affidavits of Father

30. The father's affidavit of the 2nd October, 2020 is available in translation. It asserts that the various welfare matters raised by the mother can be considered by the appropriate courts in the Kingdom of Belgium being the State of the children's habitual residence. He asserts that the mother unilaterally and without any notice removed the children from their home in Belgium. He deposes that she made a choice to move to Ireland in September, 2019 and that she was not precluded from seeing the children at any time. He asserts his belief that when she visited on the 9th July 2020 she had already decided to remove the children to Ireland. He states that there was never any booking in the hotel where the mother had claimed she was taking the children for a few days' access. He asserts that the conduct of the mother was entirely premeditated. He deposes that photographs of the children attached to her affidavits show no evidence of either physical or emotional injury as alleged by her. He exhibits material including reports from the children's school to evidence that the mother was not particularly involved with their education prior to her leaving for Ireland in September, 2019. He asserts that the document: "Evident 2 is a false document. The signature is a forgery. This can be seen clearly when the signature is compared with other signatures freely given in other documents. The document being relied upon by the respondent is also written in English

whereas the document written to register the children with me by the respondent is in Dutch." He deposes that he did not sign the said document "nor did I agree to what the respondent suggests."

31. He deposes that they both signed a different document on the 9th September, 2019 which was submitted by him as part of the court proceedings in October 2019 where the mother had consented to the children being deregistered from living with her and registered as living with the father by reason that she had gone to live abroad.

> "The [mother] alters her claim (which I suggest is contradictory) as to her grounds for the wrongful removal of the children to Ireland. Firstly she claims that she was so shocked about the welfare of the children in July that prompted her action and yet she suggests that there was an agreement as far back as September 2019 that the children could move to Ireland."

32. He exhibits communication from the Belgian hotel where the mother was to have taken the children on 9th July for access:-

> "We can confirm that we have never received a reservation in the name of [the mother] or in the name of the children E. and/or O. These people did not stay with us in 2020 either."

33. An exhibit from the school principal in Antwerp states that, contrary to averments in the affidavit of the mother, it was the father who picked up the children from school every evening apart from Wednesdays when they were picked up by their grandmother, That the children were always well-kept and always brought a healthy lunch. School reports regarding both children were exhibited which noted:-

> "Parents are divorced, contact is still difficult. The father can always be reached, but the mother no longer follows up on E."

The said report was the 13th July, 2018. In a report on E. dated the 9th July, 2019 the school recorded:-

> "Father always pays close attention, but mother does not seem to follow up on E. When he was with his mother, he would always arrive a little late at school."

In an evaluation of the child O. on the 14th July, 2020 the school report states:-

> "Mother moved to Ireland early this year with her new family. This is hard for E., O. and the father. The mother is not allowed to pick up the kids from school. Legal documents in this respect were submitted to the secretariat."

34. The father deposes as to the circumstances leading to his obtaining the orders of the 19th December, 2019. Exhibit E of the father's affidavit is from the Court of First Instance Antwerp. The communication states:-

> "We have received your email message on the 10/09/2020. I hereby confirm that the enclosed true copy – a handwritten request of party [mother's name] to adjust the court order of the 28/03/2018 – concerns a transcript of document 27 in the aforementioned file.
>
> Yours sincerely, the Executive Clerk."

35. The attached document includes a photograph of a communication from, *inter alia* an Irish telephone number in response to a text request from the father "can you send me copy of your passport two side to change the adres of the children they ask it please." [*sic*] The response from the mother is "ok" and a photograph of a Belgian passport of the mother. In his affidavit the father explains that the photocopies refer to "a true copy of this verification from the court office and text communication to and from the [mother] (together with certified translations thereof)." The mother offered no denial that she sent it.

36. The father deposes that on 10th July he did not know for sure whether the children were in Ireland or Nigeria when he made a complaint to the Belgian police about their identity cards as he had received text communications from the mother stating that the children were in Nigeria. The exhibit in question incorporates a text from the mother which states *inter alia*, "They look so bad, you cannot even take care of yourself, not to talk of the children. They are not coming back. They will go to school here in Nigeria okay? I will take good care of them."

37. Contrary to the said communication from the mother, I observe that it is clear that at no time were the children in Nigeria and they were at all material times in Ireland. The father poses the rhetorical query "If there was an agreement that the children would come to live with her in Ireland, why was she lying to me about where the children in fact were?" The father emphasises that the mother in her engagement with the Belgian authorities regarding the cancellation of the children's ID cards made no reference to any agreement of September 2019 such as Evident 2. He asserts that had the mother been concerned regarding his care of the children she could have brought a court application seeking to relocate the children to Ireland. "She did not do so and I believe she did not do so as she knew there was no basis to the allegations." He contends that at a point when the mother obtained reissue of the travel cards for the children on or about 26th August, 2020 the Antwerp authorities were unaware of the wrongful removal of the children by her. "Unilateral registration of the children in Ireland is simply acknowledging where the children are residing. This does not provide any adjudication on where the children are supposed to be living." The father contends that the mother when exercising access with the children in November 2019 had "no complaints about their care" or at any time prior to then. He further deposes that he:-

> "rearranged my work so as to be available to care for them and meet their needs. They have lost out on their immediate family, their extended family, their friends, their school and sporting activities. The children had very limited English as they

spoke Dutch in their daily lives and they were uprooted from their familiar environment in a country that speaks mainly English."

The father deposes that the mother was notified by the Antwerp Court on 20th January, 2020 of the making of the orders of the 19th December, 2019. She never appealed the said order.

38. It is worthy of note, in my view, that the mother did not dispute these averments at the hearing before the High Court where she represented herself and accordingly had a full opportunity to raise any matters she considered relevant or material with the trial judge. Neither was any explanation tendered for the fact that she omitted to refer to the disputed document "Evident 2" when she engaged in July 2020 with officialdom in Brussels regarding the renewal of the children's identity cards.

F. Judgment Appealed Against

39. The judgment of the High Court was delivered *ex tempore* on the 14th October, 2020 and contains a comprehensive analysis of the facts. At paragraph 1.5 the judge notes:-

> "The application is made pursuant to Art. 12 of the Hague Convention and pursuant to EC Regulation 2201/2003 which provides that where a child has been wrongfully removed in terms of Article 3 and proceedings are commenced within one year of that removal the authority in the contracting State where the child is shall order the return of the child forthwith."

The court noted the position of the mother as follows:-

> "The respondent appeared in person and argued that the applicant did not have custody of the children. She also defended her removal of the children on the basis that they were in grave risk of harm if they are returned to him. She argued that they were underweight at the time of their removal, that they were left in the care of elderly grandparents which put them in grave risk of harm and that they both wanted to remain with her." (Para. 1.6)

40. The court then proceeded to analyse the burden of proof on the applicant in accordance with the jurisprudence and in particular the decision in *M.S. v. A.R.* [2019] IESC 10. She observed that once the applicant makes out the case of having rights of custody and parental responsibility in respect of the children, that he was exercising those rights at the material time and that the children were removed from their place of habitual residence in breach of the said rights the burden then shifts to the mother to establish a defence. She observed that:-

> "Even if this is defence made out, a defence only permits the court a discretion as to whether or not to return the child. Likewise an objection from a sufficiently mature child affords a discretion to the court. Neither finding is determinative of the issue and the court must, under Article 13, 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.'"

41. It was not in contention that the children were at all material times prior to the 10th July, 2020 habitually resident in the Kingdom of Belgium.

42. The court noted the agreement of the 7th November, 2016 entered into by the parents whereby the children would reside with both with custody alternated on a weekly basis. The court observed that:-

> " 'Neither parent was to bring the children outside the jurisdiction without the consent of the other'. The court further noted that on the 19th September, 2019 the respondent mother 'agreed that the children should have their residence registered with the applicant. From that date they were in his sole custody as she was moving to Ireland. In a text from the respondent dated 21st October, 2019 he seeks documents from the respondent to register the children at his address, to which he responds 'okay'. Underneath this is a photograph clearly identifiable as her passport being provided as a result of his request. On the same day the applicant lodged his application to register the children at his address. As part of that application, he handed in a handwritten note from the respondent confirming that the children were to be registered at the applicant's address as she was moving to Ireland.' " (Para. 2.4)

43. Regarding proceedings before the Belgian courts she made the following findings:-

> "2.5 On the 19th December, 2019 a Belgian Court registered the children at the applicant's address. The respondent did not appear at this hearing. Both the applicant and the court itself sent a copy of the court order to the respondent's email address. A court official confirmed this communication and the respondent herself read out her email address during this hearing; it is the same one used by the court in Belgium. This court is satisfied that the respondent received that court order. There was no appeal of the order. The order was silent as to any future address of the children and repeated that neither child could be removed by a parent from the jurisdiction without the written permission of the other parent."

44. The court noted that the mother had travelled to Belgium and exercised access with the two children in November 2019. She also had frequent telephone access with the children. Regarding the mother's contention that the arrangement for the children to reside in Belgium was temporary pending her settling in a new country and that the children were expected to move to reside with her the trial judge found at paragraph 2.7:-

> "There is no credible evidence to support that assertion. There is no mention of it in any text or email, although a number of texts and emails were exhibited. There is a handwritten noted dated 9th September, 2019, which appears to be signed by the applicant but he contests this and avers that it is not his signature. <u>The signature can be contrasted with other signatures of the applicant and it may have been written by the respondent</u>. What is clear is that the note is written in English which is not the applicant's first language, and it appears to be an agreement contrary to

that made in 2016 and repeated in the court document in December 2019, and is the sole evidence of any intention that the children were to move to Ireland to live with their mother. If this was the applicant's signature these proceedings would not be necessary. The document bears the same date as the handwritten note of the respondent already referred to which was handed in to the Belgian court as part of the application to register the children at their father's address. In the latter document the respondent confirms that the children are to live with the applicant 'because I live abroad'. There was no reference to future plans or to it being a temporary arrangement. The document relied on by the respondent is not credible either in its form or its contents given the details recorded in the original settlement in relation to the children and the events of July 2020 set out below, which also informed the court's conclusion as to the disputed note exhibited by the respondent." [emphasis added]

45. The trial judge at 2.8 considered events subsequent to the month of September 2019 including the consent of the mother to the proposed Court Orders embodied in the text of the 21st October, 2019 as aforesaid and the court order made on the 19th December, 2019 which had ruled that ongoing residence of the children was to be with their father in Belgium. The court noted the terms of the said order in regard to access with the mother as she was abroad and in particular its provision that "neither child is to be removed from the jurisdiction without the permission of the other." The judgment considers the events surrounding the children coming to be in the care of the mother on the 9th July, 2020 noting that there had been an agreement between the parents that the mother would have access to the children from the 9th to the 14th July, 2020. That when the father discovered that they were not at the hotel in Belgium at which the mother had stated they were staying for access he acted to make a formal complaint to the Belgian authorities and the children's identity cards were blocked and an investigation undertaken which led to the institution of the within proceedings. The court had particular regard to the email communications between the mother and the Belgian General Management of Institutions and Population Department where the mother identified the reason why she took the children's identity documents as being that "they were necessary for the children to go on holiday." It was also observed that the text of the said email of the 27th July, 2020 stated that "[…] 'bad circumstances' are the reason I decided to take the children with me to Ireland. The children will not come back." The court also had regard to the contents of an email sent by the mother to the father on the 12th July, 2020 in evaluating the contention that the father had consented to the removal of the children. The trial judge concluded that the post-removal text communication by the mother:-

> "[…] shows that the respondent sought on the 12th July to characterise her decision to keep the children as one that was based on their appearance not on an agreement between the parties that they would join her in Ireland. It is also significant that she sought to mislead the applicant as to where they were: in Nigeria. Presumably this was done to dissuade him from seeking their return."

The learned judge concluded that the father had lawful custody of the children in July of 2020 and was exercising his said rights and that there was no agreement that the children would travel to Ireland with their mother. The court concluded that the mother had unlawfully removed the children from Belgium. "All of the credible evidence in this case strongly supports this conclusion."

46. The judgment then turns to the defences being raised by the mother. These included a contention that there was a grave risk that return would expose the children to harm or place them in an intolerable situation and the question of whether the children objected to being returned. With regard to the various defences being advanced by the mother the trial judge noted at paragraph 3.3:-

> "The respondent's arguments are in one respect, implausible, in the second she misunderstands the nature of the risk in question and in the third instance she misunderstands the nature of the expert's report insofar as it does not appear to this court to establish any meaningful objection on the part of either child to the prospect of return, still less one which would persuade the court to exercise a discretion not to return the children."

47. The said observations were directed towards the A13 defences of consent, grave risk and the objections of the children respectively. The court noted that in support of the claim that the return would expose the children to grave risk. The mother had contended that they were not cared for with the father and were underfed. The court found that those assertions were "directly refuted by the contemporaneous records from their school which made it clear that until their removal in July 2020, both children arrived each day at school with a healthy lunch." The court concluded that "It is not credible to suggest that there were nutritional issues with either child at any time up to the date of their removal". The court also had regard to school reports confirming that both children were well known and well-liked by students and staff and that further when there was a need to contact a parent for any reason "it was usually the father who responded and that the respondent was rarely available. This includes the years when she was residing with the children in Belgium.". (Para. 4.2)

48. With regard to assertions made by the appellant concerning input into the care of the children in Belgium by their paternal grandparents the court noted that the mother was unable to state how she had attributed specific ages to the father's parents. "She appears to have simply guessed at them and then sworn that this information was accurate. … There appears to be no factual basis for a fear that any child would come to harm while in their care." With regard to contentions of grave risk based on news items concerning other wholly unconnected children involved in accidents the court noted:-

> "There is not only no evidence of risk, there is no logical connection between this news item and the position of these children. The respondent can only assert and speculate as to the possible and theoretical harm that might befall any child but which is most unlikely. Instead of pointing to a grave risk of harm she is speculating as to remote risk of grave harm which is no more than presents in

every human life. This court finds no risk of harm let alone grave risks of the kind that would affect a decision to return these children. As to the suggestion that the applicant or his parents cannot provide emotional support to the children, this is not only unsupported by evidence, it is contradicted by the evidence of the children's happy everyday life in Belgium which does not suggest any lack of emotional support generally."

49. Regarding the views of the child and the assertion of the mother that they wished to reside with her in Ireland an expert report was prepared by a clinical psychologist on foot of the order referred to above. The said report is dated 22nd September, 2020. Both children were interviewed assisted by an interpreter. Dutch is their first language. The court in considering the said report noted that the older boy when asked, "… said he would like to remain in Ireland but related this to swimming in rivers." The Court noted at 5.3 that he had a degree of maturity equal to his age which at the time was ten years – "His age would tend to conform '*with what might be seen as the right behaviour and would often seek to conform as a means of securing approval of those he cares about*.' This was significant, he concluded, and E's '*responses would most likely shape either directly or indirectly by the parent in closest proximity, namely his mother*.' The said child was under the impression that his father was aware he was travelling to Ireland and had agreed to same." (Para. 5.4) E. had stated he did not object to living with his father and he did not wish to return to Belgium. The expert report had concluded this was "*less likely to be his own opinion*." He had not reported negative experiences of either school or home in Belgium. The second child had expressed the view that he was not happy in Ireland and the court noted that he had considered school in Belgium was nicer and that he missed his father. A reason identified by him for wanting to stay in Ireland was that he would learn another language. The expert concluded that his expressed objections were unlikely to have been independently formed. The court observed in its analysis of the report insofar as it pertained to the younger child that:-

> "Based on his age and development he found that […] he had capacity to express views on simple choices but the expert concluded that […] did not have the capacity for decision making which requires taking into account a variety of factors which have a significant impact on his future development." (Para.5.5)

The expert had found the stated objections to be "unconvincing". The trial judge concluded in regard to the contention that the children objected to being returned as follows:-

"5.7 This court cannot conclude that either child objected to being returned to Belgium in any meaningful or convincing way. The court accepts the expert's reasoning in this regard and agrees with it on the same available evidence. The stated preferences which they appear to be rather than objections in reality are both unconvincing and contradicted by other statements by the children as to their lives in Belgium. In any event the expert has also concluded that while one child has the maturity to make decisions of this nature he appears to be trying to conform with

what his mother wants and the other child does not have the requisite maturity. In these circumstances while it is not necessary to express a view given the finding that the preferences do not amount to an objection to being returned the court accepts the expert's views as to the maturity of the children also and his reasoning and conclusions as to their stated views."

50. The trial judge concluded that the children were removed from their habitual residence without the father's consent and same was a wrongful removal by the mother. Having rejected all the defences advanced by the mother the court directed that the children should be returned to Belgium forthwith.

G. The Notice of Appeal

51. The Notice of Appeal as amended by a letter of the 27th October, 2020 and as modified at the hearing of the appeal appeared to distil down into three separate issues, firstly that the trial judge erred in her approach to the issue of consent and erred in not seeking to resolve the conflict of fact between the parents by hearing oral evidence or affording the mother an opportunity to cross-examine the father. "Without hearing evidence on the fact of the existence of the note the trial judge was not in a position to make a finding on consent." Secondly, it was contended that a grave risk was attendant on the return of the children by virtue of the Coronavirus pandemic which "would expose them to a grave risk of contracting the disease." It was also contended there was a grave risk of harm to the children if a summary return proceeds by reason of "serious abuse or neglect or extraordinary emotional dependence" it being contended that the father "constantly neglect (sic) this children for his 87 year old parent." It was further contended that in light of the Hague Convention and Art. 24 of the Charter on Fundamental Rights of the European Union the views of the children should have been taken into consideration "on matters which concern them in accordance with their age and maturity." It was contended that the court had misinterpreted the law and neglected the children's point of view and their wellbeing.

Discussion

H. The Revised Brussels II Regulation

52. Whilst it was contended on behalf of the appellant that the father had not placed reliance on the Revised Brussels II Regulation that does not appear to be the case as a perusal of the summons and grounding documentation make clear. As is observed by "Lowe, Everall and Nicholls "*International Movement of Children*", 2nd Edition 2016:-

> "The basic scheme of the revised regulation is:
>
> (a) to preserve the pre-eminence of the 1980 Convention for dealing with applications for the return of abducted children but nevertheless to give some direction on how that Convention should be applied as between Member States
>
> […]; and
>
> (b) to govern the position in cases where a court refuses to make a return order under the Convention."

In reaching her conclusions however the trial judge quite correctly focused on the provisions of the Hague Convention as is evident from 6.4 of the judgment.

I. Oral Evidence

53. The provisions of the Hague Convention became operative in this State on the 1st October, 1991 almost three decades of jurisprudence makes clear that it is incumbent on the courts to ensure the expeditious disposition of such applications and that the provisions of the Convention itself are not used as an instrument of delay. On no account should the Court stray into a consideration of welfare issues which are exclusively the domain of the Courts of the State of the child's habitual residence.

54. That approach is reinforced in the Revised Brussels II Regulation where Art. 11(3) expressly provides:-

> "A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.
>
> Without prejudice to the first sub-paragraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged."

55. Order 133, rule 5 of the Rules of the Superior Courts provides as follows:-

> "5(1) The court shall, at the earliest opportunity give such directions as are necessary to provide for an expeditious hearing of the matter and all parties shall comply therewith.
>
> (2) Applications shall be heard on the basis of affidavit evidence only. The court, at its discretion, may, in exceptional circumstances, direct or permit oral evidence to be adduced."

The said Statutory Instrument became operative amending the Rules of the Superior Courts on the 20th March, 2001.

56. The courts over the past three decades in deference to the spirit and intendment of the Hague Convention have sparingly exercised their discretion to allow parties the right to adduce oral evidence.

57. It is noteworthy that in the instant case the mother did not seek at the trial to cross-examine the father on the content of his affidavits.

58. It will be recalled that the English courts in *Re. F. (a Minor) (Child Abduction)* [1992] 1 FLR 548 considered how a court is to approach disputed evidence on affidavit in child abduction cases. Butler-Sloss L.J. observed at pp. 553 – 554:-

> "If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available or, as in this case, there was no application to call it, how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision,

thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case."

59. The Supreme Court has on a number of occasions including Keane J. in *A.C.W. v. Ireland [1994]* 3 IR 232 and Murray J. in *Nottinghamshire County Council v. K.B. & Ors.* 15th December, 2011 emphasised the peremptory nature of proceedings under the Convention and followed the approach of the English decision of *P. v. P. (Minors) (Child Abduction)* [1992] 1 FLR 155 at p. 158 which states:-

> "The whole jurisdiction under the Convention is, by its nature and purpose, peremptory. Its underlying assumption is that the courts of all its signatories are equally capable of ensuring a fair hearing to the parties, and a skilled and humane evaluation of the issues of child welfare involved. Its underlying purpose is to ensure stability for children, by putting a brisk end to the efforts of parents to have their children's future decided where they want and when they want by removing them from their country of residence to another jurisdiction chosen arbitrarily by the absconding parent."

60. Thus, central to the approach of the trial judge in evaluating the defence of consent was whether on the evidence before her the appellant mother had purported to place reliance upon the disputed "Evident 2" document. What the trial judge had to determine in the context of the defence of consent pursuant to Art. 13(a) of the Hague Convention was the circumstances obtaining on the 9th September, 2019 and material developments in the ensuing months and the appellant's conduct and engagement with court proceedings in Belgium concerning the welfare of the children. Further, the court was entitled to have regard to whether the mother purported to rely on the disputed "Evident 2" document in the crucial months of July and August 2020 in the context of her removing the children from the jurisdiction of Belgium and her engagement with State authorities in that jurisdiction. The burden rested with the mother to established to the satisfaction of the court that the consent contended for was, free and informed, clear, positive and unequivocal.

61. The normal procedure is that proceedings pursuant to the Hague Convention are heard on affidavit. This accords with the spirit and intendment of the Convention and the Revised Regulation. Order 133, rule 5 of the Rules of the Superior Courts accords with that approach. However it is clear that where there are irreconcilable differences emerging between the parties on the affidavit evidence pertaining to matters of crucial importance which are not otherwise capable of resolution without the hearing of oral evidence then if the court considers it necessary to do so and remains otherwise unable to resolve the

issue the trial judge is entitled in her discretion, contrary to the normal convention, to hear oral evidence to determine a specific narrow issue such as whether or not the child in question was moved abroad by reason of and in reliance upon a true and informed consent of the left behind parent to a permanent removal of the child which consent was unequivocal and positive and continued to be operative as of the date of the removal such that the removing parent was entitled to and did actively and directly place reliance upon it for the purpose of effectuating the said removal.

62. By the same token its incumbent on the court to keep oral hearings to a minimum and consider in particular whether a hearing of oral evidence would on the facts be capable of swiftly and definitively determining a crucial issue of fact. It is clear from the authorities particularly decisions of the English courts such as *C. v. H. (Abduction: Consent)* [2009] EWHC 2660 *per* Munby J. that the burden rests with a parent who removes a child to establish the defence of consent "on the face of the documentation" and if he or she cannot do so "oral evidence is unlikely to affect the issue and will not be entertained." This also accords with the decision of the English Court of Appeal in *Re. K. (A Child) (Abduction: Case Management)* [2011] EWCA Civ. 1546.

63. The court is entitled to scrutinise the surrounding facts and available evidence including circumstantial, particularly in circumstances such as emerged in the instant case where there was a fundamental dispute between the parties as to the very existence of consent on any basis and where the validity of the document produced by the appellant for the first time in September 2020 was impugned by the father who asserted his signature was a forgery.

J. Article 13 – Consent

64. The court will have regard to whether the evidence, viewed in the round, supports an alleged consent being operative and enforceable at the time of actual removal or whether intervening facts and circumstances are likely on balance to have superseded any such an agreement. The court is entitled to have regard to the immediate facts and circumstances surrounding the removal of the children in the context of the lived realities of the family and to scrutinise the acts and representations of each parent contemporaneous with and immediately subsequent to the removal, bearing in mind that the burden of proving on the balance of probabilities a valid operative consent rests on the parent who asserts affords a defence to an otherwise wrongful removal. Each case will proceed on its own facts and considerations such as the passage of time or intervening events such as intervening court proceedings or subsequent court orders pertaining to the children, which are either inconsistent with or substantially or materially undermine any purported agreement will all be relevant. The court must be satisfied that the left behind parent gave a consent embodied in the asserted agreement which in substance was freely given, informed, unequivocal and that it was operative and actively relied upon at the date of removal. In particular the consent must operate and be clear as to its intent and that it was not for the purposes of some temporary or short-term arrangement.

65. The burden of proof rested on the mother in relation to her claim that the father had given his prior consent in writing to the removal. To discharge that burden it was

incumbent on the mother to prove on the balance of probabilities that the document she produced was a valid consent of the father. In the instant case the consent relied upon was a document to which a purported signature attributed by the mother to the father was appended. The father denied that it was a signature. The burden rested with the mother to clearly establish the defence of consent on the balance of probabilities. The English Court of Appeal in *Re. P.J. (Children) (Abduction: Habitual Residence: Consent)* [2009] EWCA 588 observed that to be valid a consent must be "clear and unequivocal".

66. The defence of consent is specifically dealt with pursuant to Art. 13(a) of the Hague Convention and where established offers an exception to the obligation to effect a summary return of a child. Where established by a respondent the discretion of the trial judge is engaged.

K. The Child Objects – Article 13

67. A summary return of children pursuant to Art.12 of the Hague Convention can be refused where a court "[…] 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." There is extensive jurisprudence in this jurisdiction on the issue including *M.S. v. A.R.* [2019] IESC 10. A useful analysis is also to be found in the landmark decisions of the English Court of Appeal in *Re. M. (Children) (Abduction: Child's Objections)* [2015] EWCA Civ. 26 a judgment of Black L.J. as well as the earlier decision of Balcombe L.J. in *Re. S. (Minors) (abduction: Custody Rights)* [1993] 2 WLR 775.

68. Whether a child objects to being returned together with their age are questions of fact. The degree of maturity of a child is likewise a question of fact. As is clear from the extensive jurisprudence there is no chronological threshold below which the views of the child will not be taken into account though in the case of young children the court will have regard to the relative degree of maturity and in particular whether any third party may have exerted influence or pressure over them and whether the views represent their genuine independent position.

69. The plain language of Art. 13 makes clear that the child's views must amount to an objection to being returned to the State of habitual residence before an exception pursuant to Art. 13 is established. In general, the expression by a child of a mere preference to remain with one parent is insufficient to meet the threshold. As has been held the word "objects" in Art. 13 imports a strength of feeling which goes beyond the usual ascertainment of the wishes of a child in a routine custody dispute.

70. The jurisprudence emphasises that the return of the child is not specifically to the care of a particular individual parent or carer but to the country of habitual residence. However, in cases, including the instant case, it is clear that a summary return will result in the children living with their father.

71. In the decision in *Re. M.* [2015] EWCA Civ. 26 Black L.J. observed:-

> "Anything less than an objection will therefore not do. This idea has sometimes been expressed by contrasting 'objections' with 'preferences' ".

In the text 'Clarke, Hall and Morrison" at paragraph 450 the authors observe:-

> "Noting Balcombe LJ's earlier objection to the importation of gloss on the words of Art. 13 but equally pointing to the implicit approval of the phraseology by the Supreme Court in *Re. L.C. (Children) (Reunite International Child Abduction Centre, Intervening)* [2014] UKSC 1, Black LJ. concluded that the reference to 'preference' was neither a gloss on the Convention nor a term of art, but rather as one way of summarising that, for reasons which will differ from case to case, the child's views fall short of an objection."

The authors continue:-

> "In short, it is clear that a mere preference to remain with one parent is insufficient to establish the 'objection' exception."

I respectfully agree.

72. In the instant case comprehensive interviews took place with the children and a detailed 18 page report was furnished to the court.

73. Regard must also be had to the words "to take into account" in Art. 13. Even where a child's objections are clearly articulated in the context of the exercise of discretion the court must have regard to all other relevant considerations including the Convention consideration of prompt return of children who have been wrongfully removed or retained.

L. Grave Risk

74. The mother contends that in light of the Covid-19 pandemic there is a grave risk that were the children to be returned to the jurisdiction of the Kingdom of Belgium, the State of their habitual residence relying on a contention that Belgium has higher coronavirus cases in the past 14 days and that Antwerp also had reported more than 3,000 new cases in the past 14 days thus the return of the children she contends would give rise to a "grave risk" that they would be exposed to physical and psychological harm. Further, international travel during the coronavirus pandemic would expose the two children to a grave risk of contracting the disease. It was also contended there was a grave risk of harm and of serious abuse or neglect. To meet the threshold in Art. 13 the risk to the children must be "grave". It is insufficient for the risk to be "real". The word "grave" in Art. 13 characterises the risk rather than the harm.

75. As is clear from the language in Art. 13(b) it is orientated towards the future circumstances and the situation as will confront the children in the event that they are returned forthwith to the Kingdom of Belgium. Important in that context would be any protective measures as could be put in place or secured, whether by means of undertakings given by the father or otherwise to ensure that the children are secure and

that any short term risk is addressed pending determination of all issues concerning their welfare and future care and custody in the country of their habitual residence.

76. It will be recalled also that in circumstances where the Revised Brussels II Regulation applies, Art. 11(4) of the said Regulation operates so that a court cannot refuse to return children on the basis of Art. 13(b) of the Hague Convention if it is established that adequate arrangements have been put in place to secure the protection of the children after they return.

77. The court is entitled to take judicial notice of the pandemic which is worldwide in its extent and it is not confined to Belgium. Belgium is a contracting party to the Revised Brussels II Regulations. In evaluating risks contended to constitute grave risks of serious harm within the meaning of Art. 13(b) of the Hague Convention the court is entitled to have regard to the international nature of the pandemic, the uncertainty regarding its duration, whether measures are being taken within the jurisdiction of the requested State to protect the health of the citizenry including children and to evaluate whether a sensible and pragmatic solution may be achieved to address any concerns through the imposition of undertakings on the applicant directed towards the protection of the welfare, health and safety of the children in the context of ascertained risks of the pandemic attendant on their summary return to the jurisdiction of the requesting State being the Kingdom of Belgium.

M. *M.S. v. A.R.* 9th February, 2019, Supreme Court

78. The Supreme Court judgment helpfully distilled the principles governing the approach of the trial judge when it is contended, *inter alia*, that a child objects to the summary return. The following excerpt from the judgment is illustrative of the approach.

> "60. Where, as here the application for return is from a Member State of the EU, the court is obliged, pursuant to Art. 11 of the Regulation to give a child an opportunity to be heard during the proceedings, 'unless this appears inappropriate having regard to his or her age or degree of maturity'. Where evidence is put before a trial court that a child objects to return, then the judge should immediately consider whether that evidence is sufficient to enable the court to determine the issue of the child's objections. If not, it should take appropriate steps to enable appropriate evidence be obtained and given to enable the court decide all relevant issues. Such proceedings are not purely *inter partes* adversary proceedings between the parents. The court owes a duty to the children who are the object of the application to hear the children and potentially to take into account their view subject to age and maturity.
>
> 61. The court should then consider the issue of child's objection in accordance with the three stage approach identified by Potter P. in the English Court of Appeal in *Re. M. (Abduction: Child's Objections)*. The first question as to whether or not objections to return are made out is a question of fact to be determined by a trial judge on all the evidence adduced. The objection to return must, in general, be to the State of habitual residence and not to living with the particular parent. However in a limited

number of factual situations the two questions may be so inexorably linked as to be incapable of separation. The second question as to whether the age and maturity of the child are such that it is appropriate for a court to take account of his views, is also a question of fact to be determined by the trial judge. The trial judge should make clear findings of fact in relation to the first two questions and where feasible, also make findings as to the reasons for and basis for the child's objections."

79. That judgment of the Supreme Court, paragraph 73, is also germane to the approach that this court ought to adopt and in particular to the issue whether I should accede to the mother's application to remit this case to the High Court - to enable her to adduce oral evidence and cross-examine the father on foot of his affidavits - in the event that she succeeds on her appeal in any respect:-

> "73. The second issue in dispute on the appeal to this court was the decision of the Court of Appeal not to remit the matter to the High Court, but rather determine the issues in dispute before it on the evidence before the High Court, all of which was either on affidavit or in the form of the report furnished by the court by Dr. Nolan. There was no oral evidence.
>
> 74. It is not in dispute that the Court of Appeal, once it held that the trial judge had been in error in his approach to the consideration of A.'s objections to return to Poland, had the jurisdictional option, identified by Whelan J. at para. 75 of her judgment, of either remitting the matter to the High Court or considering the issue of A.'s objections in accordance with law on the evidence before the High Court. What is disputed is that it was permissible for the Court of Appeal to exercise its discretion in favour of the latter approach, by reason of the limited evidence available to the court in relation to A.'s objections.
>
> 75. Which approach should be taken by an appellate court on a return application under the Convention will depend upon the particular facts and circumstances of each appeal. Both parties correctly agree that the Court of Appeal did have jurisdiction to remit. However, an appellate court does also have jurisdiction to exercise its own discretion where Art. 13 applies: see *inter alia P. v. B. (No.2) (Child Abduction: Delay)* [1999] 4 IR 185*, Minister for Justice (E.M.) v. J.M.* [2003] 3 IR 178 and *Re. M. (Abduction: Rights of Custody)*, as referred to above."

In a conclusion Finlay Geoghegan J. observed:-

> "110. Having determined that the High Court judge was in error, the Court of Appeal had the option of either remitting the application for return to the High Court with or without directions or deciding to determine the application for return on the evidence before the High Court in accordance with law."

N. Application of the Within Principles to the Facts of the Instant Case.

80. I am satisfied that the trial judge fell into error in purporting to carry out an analysis of the handwritten document Evident 2 and make an implicit inferential finding as to the

identity of the individual who forged the father's signature. There was simply no probative evidence before the court on which it could safely rely to determine who appended the signature of the father to that document. The view expressed at 2.7 "The signature can be contrasted with other signatures of the Applicant and it may have been written by the Respondent." is not soundly based and cannot be inferred from the evidence. Such a finding was not necessary to determine the Article 13 (a) consent issue. Furthermore, the trial judge erred in her assertion "if this was the applicant's signature, these proceedings would not be necessary." It remains to be considered hereafter as to whether there were grounds otherwise on which the trial judge could have relied to conclude that the Respondent had failed to discharge the burden of proof required to establish the defence of consent on the balance of probabilities.

81. The proposition advanced at the hearing of this appeal on behalf of the mother that oral evidence would have resolved matters is wholly fanciful insofar as inevitably in light of the affidavits there would simply have been a "swearing match" between the parents as to whether the purported signature was the fathers or not.

82. The issue of authenticity would be immaterial in my view if the court order of 19th December 2019 had superseded any previous arrangements – and in my view it did for the reasons stated hereafter- as the court order was fundamentally inconsistent with Evident 2.

83. However, on the evidence before her, the trial judge was perfectly entitled to harbour very significant reservations regarding the validity of the document. She was entitled, in my view, to conclude as she did at para. 2.7; "The document relied on by the Respondent is not credible either in its form or its contents." for the reasons set out in her judgment.

84. The subsequent order obtained on notice to the mother and which said order - as the trial judge correctly found - had been served on the mother superseded any prior understanding or expectation of the mother however she came to hold same. As the trial judge also correctly found there was clear evidence of service of the order upon her and her decision not to appeal the order in all the circumstances called for an explanation. The trial judge was correct in her conclusion that the defence of consent was not made out. The Evident 2 document leaving aside all concerns regarding its validity even were it shown to have existed on the 19th December, 2019 (and there was no shred of evidence for such a proposition), was wholly superseded by the order in relation to custody of the children made on that date.

85. In all the circumstances on the evidence before the trial judge she was entitled to conclude that the mother had failed to discharge the burden of proof to establish consent of the father to removal of the two children from the Kingdom of Belgium. In accordance with the jurisprudence in this jurisdiction and in England and Wales including in Re. *P-J (Children) (Abduction: Consent)* [2009] EWCA Civ. 588, *SR v. MMR* [2006] IESC 7 and the decision in *Re. K. (Abduction: Consent)* [1997] 2 FLR 212 the trial judge was entitled to conclude that the mother had failed to prove consent on the balance of probabilities

based on the disputed Evident 2 document having failed to satisfy the court that the document was operative or that the alleged consent was positive, unequivocal and real.

O. Grave risk – Pandemic

86. This court, in a decision delivered earlier this year in *C. v. G. [2020]* IECA 233 considered the issue of grave risk in the context of the Covid-19 pandemic, Power J. observing:-

> "75. Judicial notice of the pandemic has been taken by some courts when dealing with applications under the Convention. For example, in *Walpole, Secretary Department of Communities & Justice* [2020] Fam CAFC 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."

87. Power J. further observed at paragraph 81 of her judgment that "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 […]" The court had also considered the decision of *K.R. v. H.H. (otherwise in Re. P.T)* [2020] EWHC 834 (Fam) where Rees J. took into account then current UK Government advice. It is noteworthy in the latter case that the court took into account that there was no evidence adduced that either Spain or England was more or less safe than the other. Furthermore, regard was had to the fact that international flights were still operating whereby it could be inferred that while the risk of infection was higher for those engaged in air travel it was not so high as to merit either government terminating flights entirely.

88. It will be recalled that Denham J. delivering the judgment of the Supreme Court in *SR v. MMR* 16th February 2016 observed at 6.3:-

> "The test as to 'grave risk' imposes a heavy burden on the mother. In *AS. v. PS* [1998] 2 IR 244 it was pointed out that the defence of 'grave risk' is 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. It should be construed strictly. It is a situation of grave risk – an intolerable situation. In *R.V. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 IR416 Barron J. adopted the analysis in *Friedrich v. Friedrich* [1996] 78 F.3d 1060 which set out that a grave risk of harm under the Convention can exist in only two situations. These are (a) returning a child to an imminent danger prior to resolution of the custody dispute e.g. a warzone, famine or disease and (b) returning a child where there is a grave risk of harm in cases where there is a serious abuse or neglect or emotional dependence, where the court in the country of habitual residence may be incapable or unwilling to give the child adequate protection. The law has been

addressed further in Irish cases such as *M.S.H. v. L.H. (Child Abduction: Custody)* [2000] 3 IR 390."

89. The return sought is of the children to the State of their habitual residence and there is no obligation on the mother to return. The children are now 11 and 8 respectively. They fall into a category of reduced risk. Primary schools are open in Ireland and in Belgium. The children are on mid-term break and the schools are due to resume on or about the 12th November, 2020. The father, through his counsel, has expressed a willingness and commitment to travel by air to Dublin Airport for the purposes of collecting the children and escorting them back to Belgium and remain airside thereby obviating the legal obligation of quarantine.

90. The arguments of grave risk were directed to the fact that the pandemic at the date of the hearing was more advanced in Belgium than Ireland such that the children would be at greater risk in Belgium than were they to remain here Further that international travel increased the risk of infection. It remains the position and I take judicial notice of the fact that those considered most at risk of serious complications from the virus are the elderly and those with underlying health conditions. There was no evidence beyond media reports from which one could draw a conclusion that either Ireland or Belgium was more or less safe than the other.

91. As observed by Rees J., I can infer from the continuation of international flights between the two States that "the risk of infection posed by air travel, whilst no doubt significantly greater than normal, is not so high that either government has felt necessary to end flights altogether."

92. The appellant contended that there was now more information emerging concerning "Long Covid" where persons infected suffer symptoms over a protracted period and that this was an important consideration that should be evaluated by the court.

93. A claim of grave risk of physical harm within the meaning of Art. 13(1)(b) of the Hague Convention has rarely been invoked in its own right. In evaluating "physical harm" risk the court must have regard to the acknowledged harm to children who are not returned to the State of their habitual residence as is enshrined in the Preamble to the Hague Convention which states its objective as *inter alia* "desiring to protect children internationally from the harmful effect of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence […]".

94. I am satisfied that regard must be had to the high threshold inherent in the concept of grave risk in the context of Art. 13 of the Hague Convention as adumbrated in the jurisprudence particularly the Supreme Court decision in *K(R) v. K(J.)*. One factor to be considered, where relevant, is whether the return would involve a child being returned to a "zone of disease" in light of the *Friedrich v. Friedrich* jurisprudence derived from the decision of the U. S. Court of Appeals for the Sixth Circuit 125 A.L.R. Fed. 703 of 1993.

95. Balanced against hypothetical risks regard must be had to the fact that children are in general acknowledged by experts to be at low risk of contracting Covid-19 and where contracted they normally suffer minor symptoms. Official advice in regard to Covid-19 suggests that most children with Covid-19 have mild symptoms or have no symptoms at all. However, some children can get severely ill from Covid-19. The approach of the trial judge with regard to the issues of grave risk advanced by the mother at the hearing was entirely correct and in accordance with the jurisprudence. In particular, she correctly concluded that there was no factual basis for a fear that either child would come to harm if returned to Belgium. The court had regard to the very extensive school reports exhibited which demonstrated the high level of care and attention provided by the father to the children including school lunches and significantly undermined the assertions of the mother in that regard. Indeed it is noteworthy that the said reports recorded significant deficits on the part of the mother in her engagement with the school in the context of the children's education.

96. It will be recalled that the pandemic was continuing, albeit at a significantly lower level than it currently is at, at the time that the mother removed the children from the jurisdiction of the courts of Belgium in July of this year.

97. In coming to a conclusion that the trial judge was correct and that the high threshold has not been met in this case to establish grave risk of physical harm I have regard to the fact that elementary and primary schools are open for children of like ages to these children both in Belgium and in Ireland. Travel, including international travel, must necessarily carry or import some element of risk. The necessity for travel has been brought about by the wrongful removal of the children by their mother which took place at a time when the pandemic had not abated. I am satisfied that in the circumstances insofar as there are concerns in the context of the Covid-19 pandemic surrounding the children's travel arrangements to Belgium same can be addressed by appropriate undertakings on the part of the father.

P. Views of the Children

98. The order directing the report to the court from an independent professional regarding the children was made on the 9th September, 2020 and was comprehensive in its terms and had annexed to it the detailed information note which had been prepared for the general information and assistance of an interviewer who may not be familiar with applications made to the High Court pursuant to the Hague Convention. Furthermore, having regard to the ambit of the order, it was a measure which complied with Art. 11(2) of the revised Brussels II Regulation. That note made reference in particular to the Supreme Court decision of Denham C.J. in *U.A. v. U.T.N.* [2011] IESC 39 where she stated in the context of a defence that a child objected to the return that:-

> "32. […] The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return

a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views."

99. In the past the High Court has had regard to and followed the approach Potter P. in *M. (Abduction: Childs Objections)* [2007] EWCA Civ. 260 with which I agree. The mother places reliance also on the decision in *C.A. v. C.A. (Otherwise C. McC)* [2010] 2 IR 162 where the High Court observed:-

"[33] Counsel for both parties were in agreement, correctly, that the children's objections are not determinative but rather must be taken into account and balanced against the general policy of the Convention. Counsel for the mother made two further submissions in relation to how the court should approach the exercise of its discretion. First, he submitted that there is an increasing policy requiring courts to have regard to the views of the child. He referred in particular to art. 12 of the United Nations Convention on the Rights of the Child 1989 to which Ireland has acceded, albeit not implemented into Irish law, and art. 11(2) of the Regulation which applies to this application. I accept that there is such a policy and this appears to be a matter which has already been considered by the courts in their approach to the exercise of discretion under art. 13 where a child's objections are made out."

100. Assistance can also be gleaned from the decision in Re. *M. (Children) (Abduction: Childs Objections)* [2015] EWCA Civ. 26 where Black L.J. in a judgment of the English Court of Appeal reviewed an extensive corpus of jurisprudence on the issue which appears suggesting that the approach to the child's objections defence is to break the matter down into two distinct stages namely the "gateway stage" and the "discretion stage":-

"The gateway stage has two parts in that it has been to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with Article 12. If the gateway elements are established, the court may return him or her but it is not obliged to do so."

The second stage is the discretion stage.

101. The approach of Potter P. and Black L.J. are, in my view, in substance the same and accord with our jurisprudence including *M.S. v. A.R.* It is clear that the older child expressed a personal preference to remain in Ireland and not to return to Belgium. The older child recounted that he was nervous when he was leaving Belgium and that he did not know where he was going. His preference was based on the fact that he "liked Ireland because he enjoyed swimming in the rivers and because he has made many friends". The interviewer found the older boy's responses inconsistent and somewhat defensive. He did not identify any ground on which he objected returning to Belgium nor did he identify any issue or fact which would or might transpire were he to return to Belgium to which he

objected. The younger child, whilst expressing a wish to remain in Ireland at the same time it is clear from the report, was deeply conflicted:-

> "[...] was looking rather sad and when asked why he looked sad he responded by saying that he was 'not so happy' and that the current situation was difficult. He was asked what was most difficult for him at the moment to which he replied 'School in Belgium was nicer' and that he missed his father."

The younger child was unable to identify any reason why he did not wish to return to Belgium. It is clear however that the respective views of the children taken at their highest do not amount to objections and as such do not give rise to an Art. 13 exception. The personal preferences of the children as expressed to the interviewer never amounted in either case to more than a mere preference expressed by the child.

102. Whether one characterises the views expressed by the children as preferences or otherwise it is clear having regard to the jurisprudence that the views of the children fell short of an objection to return to the Kingdom of Belgium the country of their habitual residence and accordingly that A13 defence was not made out as the trial judge correctly held.

Q. Consideration of the Issue of Consent in Light of Evidence Before the High Court

103. In my view the defence of consent can be evaluated and disposed of without any necessity to resort to forensic findings regarding the disputed Evident 2 document and without any necessity to entertain oral evidence with all its attendant delays. As M.*S. v. A.R.* clearly provides at paragraph 110 (*ante*), I am entitled to determine this aspect of the application for summary return of the children in accordance with law having regard to the evidence which was before the High Court.

104. The following salient facts and evidence relevant to the defence of Consent were before the trial judge:-

(a) The disputed Evident 2 document bears the date the 2nd of September 2019 which is the same date as an agreement signed by the mother in the Dutch language consenting to the registration of the two children at their father's address in Antwerp "because I live abroad".

(b) There was no evidence before the High Court that the mother had ever supplied a copy of the disputed Evident 2 document to the father prior to annexing it to her affidavit in September 2020.

(c) The document is fundamentally inconsistent with the communication and assent of the mother embodied in a text sent on or about the 21st October, 2019 in response to the father seeking documentation to make the Court application and secure registration of the children at his address in Antwerp.

(d) There was ample evidence before the trial judge arising from the said text communications that in October 2019 the mother was aware that the father was lodging an application to register the children at his address in Antwerp.

(e) It would have been evident to the mother on the 9th September, 2019 that the father required her consent to vary the court orders in circumstances where the relationship between the parties had been governed by court orders since November 2016 and which said orders had been varied in 2018. The Orders at all material times had embodied an express provision that neither parent was to bring either child out of the jurisdiction of the courts of Belgium without the consent of the other.

(f) It must have been obvious to the mother in light of the agreement she signed on the 9th September, 2019 that the children were to reside with their father in Antwerp. That fact, coupled with her communications on or about the 21st October, 2019, demonstrate on the balance of probabilities that she knew that the father was proceeding to formalise the future residence of the children with him in Antwerp and to that end was proceeding to vary the orders and seek further orders from the Family and Juvenile Court in Antwerp which is precisely what he proceeded to do.

(g) It is clear, as the trial judge correctly found at 2.4, that to that end the mother had supplied photographic ID including pages from her passport in response to his request.

(h) The mother did not seek to rely on the disputed Evident 2 document or take any step to bring it to the attention of the Antwerp Court of First Instance in the said proceedings.

(i) In November 2019 she was present in Belgium for access to the children and at that point took no step to raise the disputed Evident 2 document with the father or furnish it to the Family and Juvenile Court Section.

(j) Had the document Evident 2 existed in November 2019 or at the least had the mother believed that it conferred rights upon her to remove the children at any time from the jurisdiction of the courts of Belgium it was incumbent upon her to bring it to the attention of the Antwerp court.

(k) Counsel at the hearing of the appeal purported to assert that the mother had been unaware of the court proceedings in December 2019 or of the making of the orders. This assertion is contradicted by other evidence that was before the trial judge and of course was not asserted by the mother before the High Court. It is apparent from the face of the order itself of the Antwerp Court of First Instance on the 19th December, 2019 that it was made on notice to her.

(l) Of particular importance are the following recitals:-

"The case was brought before this court again by a petition that was filed at the Registry by the father and registered on the 21/10/2019."

Part 1 also recites:-

"Although the defendant was validly summoned, she did not appear nor was she legally represented at the hearing. Default was established." [emphasis added]

Thus there is clear evidence from the face of the order itself that from the perspective of the Antwerp Court the mother was validly summonsed and elected not to attend.

(m) The 19 December 2019 Order is thus recognised and enforceable under the Hague Convention Article 3 as creating rights of custody in favour of the father "[...] by reason of a judicial or administrative decision"

(n) Furthermore it was also asserted that the mother had not been served with a copy of the order. However there was evidence before the trial judge that both the father and the court itself had sent a copy of the court order to the mother's email address. The mother further confirmed the said email address as being hers at the trial of the action. The High Court was accordingly entitled to proceed on the basis that the mother was aware of the order and of its provisions.

(o) The mother never appealed the order of the Antwerp court. Her failure to disclose document "Evident 2" to the Antwerp court is consistent only, to put it at its most neutral, with her not relying on any such document at the time.

(p) In the context of her travel to Belgium in July 2020 there is no suggestion that she had disclosed to the father that she was travelling to Belgium for the purposes of removing the children permanently from that jurisdiction based on the disputed "Evident 2" document. All the evidence points the other way.

(q) She has not disputed the father's contentions regarding key elements of events on the 9th and 10th July, 2020 including the following:-

(i) That the arrangement between the parents was in respect of holiday access in Belgium by the mother to the children.

(ii) That she informed the father that she had booked a specific hotel where they would be staying between the 9th and 14th July, 2020.

(iii) That she sought the passports of the children from the father. He was resistant to providing them. That ultimately he agreed to provide them to her on the basis of her (false) assertion that she required them for identity purposes when booking into the Belgian hotel.

(iv) The children took only clothes for a few days' holidays.

(v) There was no communication or engagement with the Belgian school where the children attended or the paternal grandparents of the children who play an important role in their welfare and care that they were never returning to Antwerp.

(vi) There is no evidence whatsoever that the mother purported to rely on the disputed Evident 2 document when she procured the children and their passports on the 9th July, 2020. She did not purport to rely on the disputed document in the context of securing their removal from Belgium.

(vii) Had she considered that she had a valid document in her possession signed by the father entitling her to remove the children from Belgium she would not have needed to engage in the subterfuge and deceptions which she did to achieve that removal on 10th July last.

(r) The communications by the mother with the father on 11th July 2020 after she had removed the children without his knowledge from the jurisdiction of the courts of Belgium are also inconsistent with her purporting to rely on any document which effected the consent of the father to such removal. She falsely alleged that she was in Nigeria with the children, that they would attend schooling there, that they would be residing there for one year. She made no reference to the disputed "Evident 2" document in her communications with him.

(s) Subsequently, in her engagement in July2020 with authorities in Brussels seeking to set aside the annulment of the children's travel cards, at no time does she assert that the father gave his consent to the removal asserting instead various issues directed at the welfare of the children and making references to the fact that at times they were cared for by their grandparents.

(t) When the Gardaí attended with the summons server for the purpose of effecting service of the proceedings upon her at no time did the mother produce the document "Evident 2" as justifying her conduct. One would have thought in circumstances where a parent purported to assert that written consent of the holder of rights of custody had been given to a removal of the children to Ireland that the first step to be taken when confronted of service of child abduction proceedings in August 2020 would be to produce the document to the summons server Jim Ward and the Gardaí. It is clear from the affidavit of Jim Ward that this did not occur.

(u) Finally, even on its own terms, the text of the Evident 2 document falls well short of a consent on the part of the father to the removal of the children from Belgium to have them reside in Ireland. It is no more than a note from the mother, allegedly expressing her intentions, upon which she alleged the father's signature is endorsed.

105. The disputed document "Evident 2" first came to light and was relied on by the mother subsequent to service upon her of the child abduction proceedings which included exhibit GB 8 in the Affidavit of Geraldine Broderick sworn on the 20th August, 2020. That exhibit

encompasses a Police Report by the father arising from the removal of the children and complaining of an alleged parental abduction by the mother. That statement included the following excerpts:-

> "On 09/07 [the mother] came to the door. I let her take the children and gave them luggage for about five days. I also gave them both travel passports. [The mother] insisted on this because they would be needed for checking in at the hotel. I thought this was strange, but I finally agreed. […] My ex-wife has been living in Ireland since 9 September, together with her new boyfriend […] . Prior to this, in August [2019] I had had a telephone conversation with her in which she said she was going to leave, that the children would stay with me for the time being but that once she was settled, she was going to come and collect the children. I took legal action on this and this resulted in the recent judgment granting me full guardianship and responsibility.
>
> [Mother] was very annoyed about this, I think she was hoping I wouldn't do anything. She was supposed to pay me alimony from October but I have never seen anything."

106. This points to an apparent threat having been made by the Mother in August 2019 that she would remove the children from the father's care. She did not deny this when she conducted her defence before the High Court. There is no probative evidence that the father agreed to such a course of action but there is clear evidence that he did not agree as his conduct in bringing proceedings on notice to the mother before the Antwerp courts demonstrates. This resulted in orders which wholly superseded any prior agreement - assuming that such ever existed - between the parties in regard to the future place of residence of the children.

107. The mother failed to establish the consent of the father on any basis to her removal of the children from Belgium.

R. Conclusions

(1) It is not in contention that the children were at all material times habitually resident in the Kingdom of Belgium.

(2) At the relevant date on or about the 10th July, 2020 the applicant was the holder of rights of custody. The rights of custody of the parents at that date were governed by the terms of an order made on notice to the mother but in her absence on the 19th December, 2019 which said order was served upon her by the court on or about the 20th January, 2020 as the trial judge correctly found. There was evidence before the trial judge that the father had also served a copy of the orders upon her.

(3) The mother in the month of September 2020 in an affidavit belatedly filed by her contended that the father had given his written consent to her removing the children. However there was ample evidence before the trial judge on which she

was entitled to rely to demonstrate that the mother had not placed any reliance on the said document at any time from the month of September 2019 to September 2020 in various circumstances where she could reasonably have been expected to do so and in particular did not purport to rely on the said document for the purposes of taking the children away from the care of their father on or about the 9th July, 2020.

(4) Further, it was demonstrable on the evidence that the document, assuming for argument's sake alone that it had existed on and from September 2019, had been superseded by significant legal events and in particular by the engagement by the mother and clear assent by her to the process whereby the father moved an application before the Antwerp courts on the 19th December, 2019 and obtained an order which on its face clearly indicates that the mother had been served and was aware of the proceedings and the terms of which said order are fundamentally inconsistent with the disputed document.

(5) Given the summary and urgent nature of child abduction proceedings it was not open to the court to embark upon an enquiry as to whether a signature ascribed to the father on a document produced for the first time in the month of September 2020 was written by the mother. There was no evidence upon which such a finding could safely be made. An oral hearing or cross examination of deponents on their affidavits would not have resolved the issue. The launching into a lengthy Plenary hearing with forensic reports being commissioned and such expert witnesses being cross examined is not an approach countenanced by the Convention or the Rules. The burden of proof fell on the mother to prove consent on the balance of probabilities. Her version of events advanced to establish consent was uncompelling and inherently improbable and unreliable.

(6) Accordingly, the trial judge was entitled to conclude that the appellant had failed to establish the defence of consent.

(7) It was also open to the trial judge to conclude quite apart from the orders made on the 19th December, 2019, that the document having regard to its form and content was not sufficient to establish Hague Convention consent by the father to the conduct of the mother having due regard to the surrounding circumstances.

(8) The trial judge correctly concluded that there was no evidence that the summary return of the children to the jurisdiction of the Kingdom of Belgium would expose the children to grave risk within the meaning of Art. 13(1)(b) of the Hague Convention.

(9) Additional arguments and submissions on the part of the appellant mother at the hearing of the appeal to the effect that the Covid-19 pandemic presented a new ground for grave risk has not met the A13 threshold. Any such risk can to significant extent can be addressed and countenanced by the giving of undertakings on the part of the father for the purposes of ensuring the safety and welfare of the

children in the process of effectuating their summary return to the requesting State, being the Kingdom of Belgium their habitual residence.

(10) The trial judge correctly assessed the expert report carried out by a clinical psychologist on or about the 22nd September, 2020 in respect of both children. There was real concern, as the court noted at 5.4, in the case of one child that the views expressed were "less likely to be his own opinion. […]" "[…] expressed a preference to live with his mother but this preference was not related to a 'desire to be closer to his mother'". In the case of the younger child it is clear that the assessment concluded that he was not so happy in Ireland for the reasons stated in the report. Furthermore and of concern was the professional expert's view and conclusion that this child "expressed objections were unlikely to have been independently formed. […] views most likely would be governed by his immediate environment, according to the report." It is clear that the expert had concerns about the requisite maturity of the younger child who was barely eight years old at the time of the interview. However I am satisfied that the trial judge correctly addressed the issue of the views and wishes of the children and was correct in her conclusion that it was unnecessary for her to express any view regarding the issue of maturity in circumstances where at its height the expression of views given by the children were that of preferences and did not amount in either case to an objection to being returned to the Kingdom of Belgium.

(11) Had any defence been established by the Appellant under the Convention, such as would open the door for the exercise of judicial discretion, in light of the jurisprudence including the Supreme Court decision in *M.S. v. A.R.* 9th February, 2019, considering the facts and on the evidence including the conduct of the mother, bearing in mind the spirit and intendment of the Hague Convention, I would have had no hesitation in exercising that discretion to order the return of the two children forthwith to the Kingdom of Belgium.

S. Undertakings

In light of the Covid-19 pandemic the following undertakings are required from the father to facilitate a minimising of risk to the children in the context of their summary return:-

(i) That he will undertake to travel to Ireland for the purposes of collecting the children to secure their summary return to the Kingdom of Belgium. That he will do so on or before Thursday 12th November, 2020.

(ii) That he will adhere to expert advice and in particular not take a step which requires him to quarantine in this jurisdiction in order that he can travel with the children back to Belgium.

108. It is important particularly in light of the Covid-19 pandemic to ensure a smooth and calm transition of the children from their current place of residence with the mother in a location outside of Dublin to Dublin Airport on the date on which the father travels to Ireland to collect the children for the purposes of their summary return to their habitual

residence in the Kingdom of Belgium. I direct that the mother co-operate in facilitating the return of the children and that she should make both children available for collection at an agreed time and neutral location for the purposes of effecting their summary return to the Kingdom of Belgium forthwith.

109. I would dismiss the appeal for the reasons stated and, subject to the above undertakings being given in writing by the father direct the summary return of the minors forthwith to the jurisdiction of the courts of the Kingdom of Belgium.

110. Since this judgment is being delivered electronically, Binchy and Pilkington JJ. confirm their agreement to the within judgment.