THE COURT OF APPEAL

CIVIL

High Court Record Number: 2022 5 HLC

Court of Appeal Record Number: 2022/185

Unapproved **Neutral Citation Number [2022] IECA 194**

No Redactions Needed

Birmingham P.
Costello J.
Allen 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 T. AND P., MINORS.

(CHILD ABDUCTION: GRAVE RISK/VIEWS OF THE CHILD)

BETWEEN

L.F.

APPLICANT/
RESPONDENT

- AND –

S.C.

RESPONDENT/
APPELLANT

JUDGMENT of Ms. Justice Costello delivered ex tempore on the 5th day of August 2022

Introduction

1. This is an appeal of the judgment and order of the High Court (Gearty J.) of 14 July 2022 ordering that the two children, called Tara and Paul for the purposes of the judgment, named in the title of the proceedings, be returned to the jurisdiction of the Courts of England and Wales, the place of their habitual residence, within ten days pursuant to Article 12 of the Hague Convention. The decision on the appeal will not determine the issues of custody, access and the welfare of the children which remain to be decided. The appeal is a limited one relating to the issue of jurisdiction i.e. which court will, in the future, determine these crucial matters.

Background

2. The applicant is the father of Tara and is named as such on her birth certificate. He is not named on Paul's birth certificate, but he has always acted as his father and has custody rights in respect of Paul pursuant to an order of the Family Court made on 21 August, 2021. Both children are British citizens and have lived in England since birth. The children are currently aged seven and six and prior to their removal to this jurisdiction, went to school in England. They lived with both parents. When the mother experienced difficulties unrelated to the events in these proceedings, her mother (the children's grandmother) and the father between them cared for the children and ensured that they attended school.

3. There are family law proceedings between the parties in the relevant local English court. A Child Arrangements Order was made on 16 August 2021. As appears from the order, which was exhibited in the proceedings, the parties agreed to an order granting shared custody of the children. They also agreed (without any admission on either part) that neither one of them would take illegal drugs or drink to excess while in charge of the children and they each undertook to hand over or collect the children on time or to make

contact if late or in an emergency. Thus, it is not contested that the children's habitual residence is England, that the father has custody of the children, that he was exercising his right to custody, and that there are proceedings in relation to the family and, in particular, the custody and welfare of the children, before the local court.

4. In late February 2022, they were removed by their mother to this jurisdiction without the consent of their father.

5. On 3 March 2022, the father applied for the return of the children pursuant to Article 12 of the Hague Convention.

6. Following the abduction of the children to Ireland and the institution of these proceedings on 3 March 2022, the father applied to the relevant Family Court in England on 11 May 2022. The court made an order that if the Irish court orders that the children are to be returned to England and Wales, they are to be delivered to the father and are to remain with him for five days. The Family Court further directed that if the children are returned, there will be an urgent hearing within five days of their return. The mother was a party to those proceedings and agreed that, should the children be returned, they would spend their first few days with their father.

7. It was not contested that the children were each habitually resident in England, that there were family law proceedings in being before the local English courts and that the father did not consent to the removal of the children to Ireland. The High Court held that the father had established the wrongful removal of the children within the meaning of Article 12 of the Convention. This finding has not been appealed.

Opposition to the return of the children

Grave risk

8. The return of the children was opposed based on the defence of grave risk and the views of the children as provide in Article 13 of the Convention. The mother asserted that

on at least two occasions the father was drinking excessively when he was in charge of the children and on this basis, she says, that they are at grave risk of harm such that a refusal to return is warranted. The mother argued that she had developed concerns about the children's welfare after the conclusion of the initial court proceedings in England on 16th August, 2021. She had been interviewed about the father on 14 June 2021. The father had been interviewed on 23 June 2021. The trial judge noted that neither one expressed any safeguarding concerns about the other, even though they had been specifically asked about this as an issue for the report. The mother said at that time that she had no safeguarding concerns, that the father was a good father, and that the children were happy in his company.

9. In these proceedings the mother places particular emphasis on the father's drinking. She described two incidents of intoxication, one of which occurred on 19 December 2021 and one in April of 2020. At the time, the mother reported the instances of concern to the police and in a supplemental affidavit she showed that the police confirmed that two such instances were reported.

Views of the children in the report

10. Mr. van Aswegan, Clinical Psychologist, met the children on 3 June 2022 and produced a report dated 13 June 2022 for the court which, inter alia, set out their views. In paras. 6.5 to 6.10 the trial judge set out what she regarded as the salient evidence of the views of the children in the report:

> *"6.5 Mr. van Aswegan, Clinical Psychologist, met the children and produced a report setting out their views. The responses in respect of each child were as expected for a child within the relevant age range. In respect of Tara, the report states that she had been living in a town in England and "She noted that 'it was a bit dangerous' but was unable to expand on this observation". Tara said that in*

England she "[H]ad fun with loads of kids. Actually I went to two schools, don't actually know what class… such a long time since I was there." The teachers in her school had been kind and she had good friends.

6.6 In terms of her relationship with her father Tara enjoyed time with her father and, in her words: "Actually, we went out a lot, walked everywhere. It was kind of fun. My Dad's girlfriend has a daughter who is my best friend". She liked living in England "a little bit". She added: "I don't really like staying with my Dad sometimes. Sometimes he can be a bit mean, he shouts a lot. Sometimes he is a bit kind." And, "Dad, I'd go visit him sometimes. We call him lots, nice talking to him. Miss him a little bit. He really misses us." When asked about when she might see him, she said: "About once a week 'cos we go to school a lot. My mom said maybe on week-ends."

6.7 As regards her current situation Tara reported that she is "living on top of a hill, in the middle of nowhere". Asked about where she would like to stay, she said: "I would like to stay in Ireland with Mum of course. 'Cos I think it's better for me and [Paul] to grow up in." When asked if she had any objection to returning to live in England, she said that "I won't like it. I just don't want to go back to England. I like it here, more than in [her home town]". When asked why she did not want to go back to England she responded "I don't know, scared in [that town], a lot of dangerous stuff. I actually don't know".

6.8 When asked about his circumstances in England, Paul said that he liked living with Dad adding "it was super sunny and a park next to our house". He shared a

bedroom with his sister and had a pet cat. At school: "I was in first class, before that school I had a school [which he named]. I loved playing with my skateboard and bike and two scooters."

6.9 As regards future care and living arrangements Paul wants to remain in Ireland being cared for by his mother, adding "It's better here, in here everyone is nicer". When asked if he objected to returning to England he said: "This is my favourite, its better here 'cos not that much people are kind in England". When asked about reasons for this view he could not add anything further.

6.10 Regarding access, Paul suggested "sometimes we can just see him, on Tuesdays on my birthdays, maybe on a Saturday or speak on the phone". Asked to describe his parents, he said Mum was nice and "Dad, is pretty nice and kind. He's clumsy a little bit, he always loses his keys."

11. At para. 6.11 the High Court judge held that the issues addressed and the level of detail in the report were sufficient to enable her to ascertain the relevant views of each child. In summary, the judge found that Tara objected to her return to England while Paul expressed a preference to remain in Ireland.

Decision of the High Court

12. The trial judge identified the objectives of the Hague Convention in paras. 2.1 to 2.3 of her judgment. No issue was taken with her statement of the relevant principles on appeal. She noted that the Convention requires that an applicant prove on the balance of probabilities that the applicant has rights of custody, that the applicant was exercising those rights, and that the child was habitually resident in the relevant country at the time of removal or retention. If these matters are established (as they were in this case), then the

burden shifts to the respondent who must establish a defence and persuade the court to exercise its discretion not to return the children as a result of that defence. The trial judge noted that on the agreed facts, the father had established the wrongful removal of the children within the meaning of the Convention and thus the onus shifted to the mother to establish the defence of grave risk.

13. She then set out the legal test for grave risk as formulated by Finlay Geoghegan J. in *C.A. v. C.A.* [2010] 2 I.R. 162, at para. 21 as follows:

> *"[T]he evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence""*

14. In *R. v. R.* [2015] IECA 265 the same judge emphasised the trust to be placed in the courts of the home state to protect the child. The trial judge emphasised that the level of harm contemplated in Article 13 of the Convention *"is harm to a degree that also amounts to an intolerable situation"* and that the upset of moving a child from one home to another was not the level of risk contemplated by the Convention.

15. Finally, the trial judge noted that if the defence is established, the court has a discretion whether or not to return the children.

16. In relation to the first incident, in April 2020, the trial judge noted that when the mother was interviewed by the childcare officer in England on 17 June 2021, she said that she had no safeguarding concerns and that the father was a good father and that the children were happy in his company. In relation to the second incident, on 19 December 2021, notwithstanding this incident, the mother left the children in the care of the father in

or around January 2022 for a period of at least two weeks. The children were then removed from England to Ireland on 21 February 2022. The trial judge held that these facts undermined the argument that the children were at risk of physical or psychological harm sufficient to be classified as being at grave risk if they are in the care of their father.

17. The court noted that while the mother had stated she had made an application to the court in England to vary the childcare order, no such papers had been exhibited. Gearty J. said that removing her children to live in another jurisdiction was not a reasonable alternative to applying for a variation of a court order. At paras. 4.16 and 4.17 she concluded:

> *"If excessive alcohol consumption by their dad is a matter of concern, and this Court is not in a position to reach any conclusion on that issue, it is a matter for the relevant family court, not a reason to move his children to Ireland without his knowledge or consent. Their removal back to England may indeed be difficult but, as made clear by Denham J. in R.K. v J.K., this is not the level of risk contemplated by the Convention.*
>
> *…While it is understandable that [the mother] and her Irish fiancé want to establish a home in Ireland, this does not justify removing children from their home in this way. While there may have been dissatisfaction about the Applicant's drinking, this is far from the kind of evidence of grave risk that might justify a sudden and covert removal of two children from their home to a country in which they had never lived before"*

18. The trial judge rejected the submission that the English courts were unable to address the situation. She noted that there was no evidence of the mother having brought these matters to the attention of the local family court, despite the fact that there were

proceedings in being and a social worker assigned to, and familiar with, the family. On the contrary, when the English court was made aware of these proceedings in May 2022, arrangements were made for an urgent hearing.

19. The trial judge also noted that the mother was a party to the hearing before the relevant family law court in England on 11 May 2022 and that she agreed that, should the children be returned, they would spend their first few days with their father. The trial judge said:

> *"…While the [mother] maintains that she felt under pressure to agree, this is difficult to accept if she had real concerns about their safety in his care. If the [mother] is concerned about their safety, arrangements will have to be made by that court, to vary its order so that they stay with her. The English Family Court is not only competent to deal with these issues, that court is in a much better position than this court [so to do]. This court has no family, medical or social history of the family at its disposal save the childcare officer's report already mentioned. All such records are in the U.K. because that is the habitual residence of these children."*

20. The trial judge concluded that the mother had failed to show that the English courts could not manage the relevant situation or that the father would not abide by any of the orders made by the relevant English court. The trial judge concluded: *"There is no basis to apprehend that the children will not get the services they need in England."*

21. The trial judge then addressed the issue of the views of the children. The mother submitted that the children were old enough for the court to consider and act on their views. She submitted that they both objected to the return. The trial judge identified the relevant law in relation to the issue. She held that there was a three stage test. First, the court must ascertain if the children do, in fact, object. If they do, the trial judge must assess what weight to attribute to the objection, given the maturity of the children. Finally,

if each of these two limbs are established, the court must then consider if an objection is sufficient to outweigh the counterbalancing objectives of the Convention. The trial judge noted that Article 13 requires the court to take into account the views of the child but that it does not vest decision making power in the child.

22. In considering the child's evidence, the court must assess whether it amounts to an expression of a mere preference or amounts to an objection to a return. As was pointed out by Whelan J. in *J.V. v. Q.I.* [2020] IECA 302, the word *"objection"* imports strong feelings as opposed to a statement of preference on the part of the child. Finally, she noted that *"it is clear from numerous cases that the weight to be attached to views of a child increases as the child gets older."*

23. Gearty J. considered in detail the report of Mr. van Aswegan. She concluded that the views of Tara amounted to objections while those of Paul amounted to the expression of a preference. In relation to Tara, she held that her age and degree of maturity must be taken into account in assessing whether her objection should mitigate against returning her to England, as is otherwise mandated by the Convention. She concluded that Tara was of the age and level of maturity that, even if her objection was a stronger and well-reasoned one, it might not affect the decision of the court. She held that the objection was *"not sufficiently cogent or weighty as to counterbalance all the other factors which mandate a return."* Gearty J. noted that Tara could not say why she refers to her home in England as dangerous and that she has no objection to offer in respect of living with her father. At para. 6.16 she concludes:

> *"...The relatively mild objection voiced by [Tara] in this case and without cogent basis other than an understandable desire to remain with her mother, is not sufficient to outweigh these other factors."*

24. Gearty J. also accepted the observations of the assessor regarding Tara's maturity. In his opinion she was likely to try to please persons whom she cares about; in this case her mother is likely to be someone she wishes to please. Thus, even if Tara's objection had been stronger and better reasoned, her age and maturity was such that it might not have affected the decision of the Court.

25. In relation to Paul, the judge noted that his view was that people in Ireland are *"kinder"* but that he clearly loves his father and does not appear to have any strong objection to living in England but has a preference for Ireland which is his *"favourite"*. She found that that was not sufficient to amount to an objection within the meaning of the jurisdiction.

26. The trial judge concluded as follows:

> *"7.1 The children were wrongfully abducted from England, despite childcare proceedings, which are ongoing in the relevant family courts. There having been insufficient evidence to establish a grave risk to the children or to conclude that they will be in an intolerable situation should they be returned, the Court is not required to consider the exercise of its discretion in this regard.*
>
> *7.2 The views of the children lean towards remaining in Ireland. Those of Tara are sufficiently clearly stated as to amount to an objection, as opposed to a preference, and I have considered that in making this decision, but it is not cogent enough to persuade me that her objection should counterbalance the factors in favour of return.*
>
> *7.3 Given her young age and the factual matrix of this case, an objection would be required to be substantial and more clearly explained before it could be considered weighty enough to override what is otherwise the clear duty of the Court. Paul has a*

preference for remaining in Ireland but no objection to a return is made out in his case."

The trial judge ordered the return of the children to the state of their habitual residence, England, within ten days of the perfection of the order (which occurred on 15 July 2022). She also ordered the father to pay to the mother the sum of £1,500 in advance of the return date. This was to defray the costs associated with the mother complying with the order and of her accommodation in England.

The appeal

27. The mother had the benefit of legal aid in the High Court. She filed a Notice of Appeal without the benefit of legal advice. It contains ten grounds of appeal as follows:

"1. [The] minors are at grave risk of foster care in England due to [the father] having no support network and being a drunk and drug dependant.

2. The minors are made [to] fend for themselves while in his care which is why I [the mother] removed them from the jurisdiction.

3. No welfare check has been carried out on [the father] whereas it has on myself, and the Children Services were happy with no further action.

4. The children have told a Court Independent Assessor that they do not want to return to England as their dad is only kind sometimes. They are also scared in his environment:

4.1. Crime rate in his area of living is 423 crimes in May due to sexual assaults and drugs.

4.2 After the assessment, [Paul] made allegations to myself against [the father] which explains why he does not want to talk to [the father] in my opinion.

5. *[The father] has made threats to my partner that if we were to return to the U.K., he was going to kill him.*
6. *He has in the past been cautioned by [local] police with regards to his abuse towards me.*
7. *He has also had the children removed from his care and returned to me by [the local] police in the past for drunk and abusive [behaviour] to the children.*
8. *He has controlled me mentally using the children as weapons.*
9. *I have no accommodation to return to in England and the £1,500 which has been asked for [the father] to pay for me is not near[ly] enough to accommodate myself and my family to return and find housing, flights and set up in the U.K.*
10. *I am also pregnant with my partner who is from [Ireland].”*

The respondent’s Notice

28. The father pleads that the trial judge was correct in holding that the mother had failed to establish the defence of grave risk, in determining that Paul’s views amounted to a preference rather than an objection and that little weight should be attributed to the objections of Tara having regard to her age and degree of maturity. He objects to the introduction of new and unsworn allegations which were not before the High Court as raised in grounds 1-6 and 8-10 of the notice of appeal. He disputes the allegation in ground 7 insofar as it is alleged that he was drunk and abusive to the children.

Submissions of the appellant

29. In her short written submissions, the appellant repeated the allegations in her notice of appeal and expanded them by reference to new statements which were not evidenced in the High Court. She did not address the decision of the trial judge or advance any reasons to say why she erred in her decision.

30. In oral submissions she emphasised the desire of the children to remain with her in the house where she says they have settled in Ireland and integrated well into the local community. She said the children ought not to be sent to a place where they "do not want to be". She said that they were scared in England and happy in Ireland.

31. She reiterated the assertions in her written submissions that the father was frequently drunk or falling down the stairs while the children were in his care, and added that she had video evidence of him verbally abusing Tara and that he smoked cannabis.

32. She said that he had refused to return the children to her on a number of occasions and that "the only way I can get them back is to take them."

33. Her submissions did not directly address the judgment of the High Court or argue that the trial judge erred in her application of the law to the facts in this case. In essence her appeal is grounded on the fact that she does not accept the manner in which the trial judge exercised her discretion in this case.

Submissions of the respondent

34. The respondent objected to the introduction of new facts which are not in evidence and which were not before the High Court. The respondent was not served with the submissions of the appellant and accordingly his submissions could not be addressed to her arguments. Instead they concentrated on the two issues (grave risk and views of the children) which were raised in the High Court.

35. The father argued that the defence is a rare exception to the requirement under the Convention to return children who have been wrongfully abducted, citing *AP v PS (Child Abduction*) [1998] 2 I.R. 244. He submitted that the threshold is a high one and that it is required to be based on clear and compelling evidence, citing the passage quoted from *C.A. v. C.A.* above. He submitted that the mother had failed to make out the defence: that her allegations were vague and unparticularised and amounted to no more than bald assertions.

The trial judge, it was said, was correct to conclude that the mother's allegations were undermined by her past conduct which was not consistent with genuine safeguarding concerns. Further, he submitted, the trial judge was correct to hold that the issues of the welfare of the children were best dealt this in the local English courts, in accordance with *C v. C* and *P.L. v E.C.* [2009] 1 I.R. 1. The father submits that matters of general welfare are to be decided by the courts of the state of habitual residence and not the court of the requested state. All the issues raised by the mother amounted to general welfare issues rather than evidence of grave risk and therefore ought to be dealt with in the English courts before which proceedings were pending and due to be heard five days after the return of the children (if so ordered).

36. In relation to the views of the children, the father submitted that the case law establishes that in considering whether the child's objections to return are made out, the strength of the child's objections, the reasons for those objections and whether those reasons are cogent, understandable and well thought out are relevant factors, as is the duration of the child's residence in the State and the social environment in which the child currently exists. He relied upon the judgement in *J.V. v. Q.I.* for the proposition that a mere preference is insufficient and that the word "objects" connotes a level of feeling which goes beyond the usual ascertainment of the child's wishes in a routine custody dispute.

37. The father submitted that the trial judge correctly applied the legal test, that Paul's wishes amounted to a preference but not an objection and that Tara's objections had to be considered in the light of her age and maturity. He relied upon the decision of the Supreme Court in *M.S. v. A.R.* [2019] IESC 10 in relation to the correct approach to (a) the assessment of the views of the child, (b) the weight to be attributed to the objections, where they are made out, and (c) the exercise of the Court of its discretion, referring to paras. 60, 61 and 64-65. The father submitted that the High Court correctly balanced the objection of

Tara against the fact that the children had been wrongfully removed from the state of their habitual residence, that at the time there was an English custody order governing the custody of the children, that the removal of the children was in breach of the order and contrary to the Hague Convention, that the application for the return of the children was heard within a few months of their removal to the State and as such the policy considerations underpinning the Convention outweighed the mild objections of Tara, a child age seven. He submitted that the trial judge's exercise of her discretion was within the bounds of well-established legal authority and as such ought not to be overturned on appeal.

Discussion

38. In the High Court, the mother opposed the return of the two children to England and Wales on the basis of two arguments: grave risk within the meaning of Article 13 of the Hague Convention and the views of the children, which, it was said amounted to an objection to a return on the part of the children, which views were required to be considered in accordance with Article 13 of the Convention. Insofar as the Notice of Appeal raises issues which were not before the High Court, they cannot form grounds of appeal. Furthermore, insofar as the mother seeks to introduce new evidence, (in her notice of appeal and her written or oral submissions) which was not before the High Court, this also is not permissible, as she has not sought or been granted leave to adduce new evidence. Thus, this court cannot consider the following matters/issues raised in the Notice of Appeal:

> *"(1) Whether the minors are at grave risk of been placed in foster care in England.*
>
> *(2) Whether the minors are made to fend for themselves while in his care.*
>
> *(3) Unspecified allegations allegedly made by either Tara or Paul against their father.*

(4) Threats allegedly made by the father to the mother's partner.

(5) Whether the father has in the past been cautioned by local police with regard to abuse towards the mother.

(6) Whether the children have ever been removed from the care of the father and returned to the mother by the local police by reason of his allegedly drunken or abusive behaviour to the children.

(7) Whether the father used the children as 'weapons' to control the mother.

(8) Whether the personal circumstances of the mother, both medical and financial, mean that she will not be in a position to return to England if the children are returned to their father."

39. The court must decide this appeal on the basis of the evidence adduced and arguments advanced in the High Court and the decision of the High Court. This means that the court must address the defence of grave risk advanced by the mother in the High Court and, secondly, whether the High Court erred in her assessment of and the weight attributed to the views of the children in relation to the proposed order of return.

Grave risk

40. Both Ireland and the United Kingdom are signatories to The Hague Convention on Child Abduction. The Hague Convention has been implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991. Article 13 of the Convention provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person…[who] opposes its return establishes that—

(a) the person… was not actually exercising the custody rights at the time of removal or retention , or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

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

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

41. In *C.A. v. C.A.* [2010] 2 IR 162 at para. 21, Finlay Geoghegan J. held:

"[T]hat the evidential burden of establishing that there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him or her in an intolerable situation is on the person opposing the order for return, in this case the mother, and is of a high threshold. The type of evidence which must be adduced has been referred to in a number of decisions as "clear and compelling evidence"

42. The mother must establish that there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The threshold is a high threshold. It must be established on the basis of clear and compelling evidence. As the court is not in a position to resolve disputed

issues of fact, the court must approach the assessment of the alleged risk on the basis that the facts asserted are true.

43. In this case I am satisfied that the High Court was correct in concluding that the mother has failed to discharge the evidential burden which rests on her. It is a high threshold. The evidence she adduced concerning the possible risk to the children in this case fell very far short of the clear and compelling evidence which is required in order to satisfy this threshold.

44. Furthermore, it is clear that the issues concerning this family and the care of the children are currently before the local family courts in England. There is no evidence whatsoever to suggest that that court is not in a position to properly safeguard the welfare and rights of the children. In addition, the mother has been afforded the opportunity to participate in proceedings both before the wrongful abduction of the children and since, on 26 April 2022 and again on 11 May 2022. There is nothing to suggest that she is not in a position to raise any concerns she sees fit to either the social workers assigned to the family or the Family Court dealing with the proceedings pending before it. In fact, the evidence is that she chose not to raise any concerns with either the social workers or the Family Court when she was afforded an opportunity so to do.

The child objects – Article 13

45. A summary return of children pursuant to Article 13 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".* Recently, in *J.V. v. Q.I.* [2020] IECA 302, Whelan J. addressed this issue. At para. 68 and 69 she held:

> *"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."

46. In *M.S. v. A.R.* [2019] IESC 10 the Supreme Court summarised the principles to be applied by a court in considering an application to return a child to the state of its habitual residence where defences under Article 13 of the Convention are raised by the abducting parent to resist the order for return. At paragraphs 58-65 Finlay Geoghegan J. speaking for the court held:

"58. Drawing on the above authorities, and others, at the risk of oversimplification, I would summarise the principles according to which an application for the return of children wrongfully removed should be determined in this jurisdiction. The underlying policies of the Convention are that it is, in general, in the best interests of children that custody disputes be decided by the courts of their habitual residence and that the abduction of children across borders is harmful to them and should be deterred. Those underlying policies are given effect to by both the general policy and

objects of the Convention to secure the prompt return of children wrongfully removed and respect for judicial decisions in relation to custody and access within the Contracting States. Those objects in turn are given effect to by the general rule pursuant to Article 12 of the Convention, in respect of the mandatory return of a child wrongfully removed. However, included in the policy of the Convention is that there are a limited number of circumstances in which a requested court is permitted not to return a child wrongfully removed. Those limited circumstances are set out in Articles 13 and 20 of the Convention. Article 20 is not relevant to this appeal.

59. One of the circumstances identified in Article 13 of the Convention is 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'. A child's objections are separate and distinct from the circumstances identified in paras. (a) and (b) of Article 13, the latter of which relates to grave risk and intolerable situation.

60. Where, as here, the application for return is from a Member State of the EU, the Court is obliged, pursuant to Article 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 views subject to age and maturity.

61. The court should then consider the issue of child's objections 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 a 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 bases for the child's objections.

62. Where a court is satisfied of the first two questions, it should then clearly turn to a consideration of the exercise of the discretion given to it by Article 13 of the Convention. That discretion must be exercised with due regard for the general policies and objectives of the Convention. As stated, these include general policies which favour the prompt return of children for the purpose of the courts of their habitual residence deciding custody disputes, but also include a policy that where a child objects, a court may refuse to return the child.

63. There are no presumptions pertaining to the exercise of discretion under Article 13 of the Convention where a child's objections are made out and he or she is of an age and degree of maturity where it is appropriate to take account of the views. The child's views or objections are not determinative or even presumptively so. The court must exercise its discretion on all the evidence before it, having regard to the particular facts and circumstances of the application and the child in question. The discretion must be exercised in the best interests of the child in the context of the application. The court is not permitted to conduct a full welfare assessment for the purposes of deciding whether an order for return or an order to refuse return is in the best interests of the child. That is made clear by Articles 16 and 19 of the Convention. It is a more limited appraisal of the actual circumstances of the child at the date the court is asked to exercise its discretion, based on all the evidence.

64. The Court should carefully consider the nature of the objections and the reasons therefor, and of course, the age and degree of maturity of the child, when deciding upon the weight to be attached thereto. In general, greater weight may be given to the views of an older child. However, it must be emphasised that care must be taken with such general statements as each individual application must be assessed having regard to the individual facts and circumstances of the child, the parents and other family circumstances.

65. Overall, a court, in exercising its discretion where child's objections are made out under Article 13 of the Convention, must be careful to weigh in the balance the general policy considerations of the Convention which favour return and the individual circumstances of the child who objects to return, in order to determine

what is, in the limited sense used, in the best interests of that child at that moment. The weight to be given to the general policies of the Convention which favour return and to the objections to return which were made and to other relevant circumstances of the child may vary with time. As has been said, the further one is from a prompt return, the less weighty the general Convention policies will be. In exercising its discretion, a court must take care that it has regard to the fact that the jurisdiction to refuse return is an exception to the general policy and provisions of the Convention. The discretion must be exercised with care, and in the best interests of the child, but not so as to undermine the general policy objectives of the Convention, including deterrence of abduction."

47. This is the approach which must inform an analysis, in the first place, of whether either Tara or Paul object to their return to England within the meaning of Article 13 of the Convention. The evidence as to the attitude of the children is set out in the report of Mr. van Aswegan and has been quoted liberally by the trial judge. Bearing in mind that the word *"objects"* in Article 13 imports a strength of feeling which goes beyond the usual ascertainment of the wishes of a child, I am satisfied that the trial judge was correct to classify the views of Paul as falling short of an objection to a return within the meaning of Article 13. That being so, the provisions of Article 13 of the Convention are simply not engaged in the case of Paul.

48. The trial judge assessed the totality of the evidence concerning the views of Tara. She was satisfied that Tara's views amounted to an objection within the meaning of Article 13. Where a child's objections are clearly articulated, Article 13 requires the court to *"take into account"* those objections. It is clear that the objections are not conclusive or determinative.

49. If a court is satisfied that a child does object to their return to their state of habitual residence, then the court must weigh those objections in light of the objectives and policies of the Convention as explained in *M.S. v A.R.*. These include the prompt return of children to the state of their habitual residence, that the courts of the state of their habitual residence are best placed to determine issues in relation the welfare of the children, that issues of the welfare of the children are not (save to a limited extent which does not arise in this case) matters for the courts of the requested state and that abduction of children is to be discouraged.

50. Further, the High Court judge must exercise his or her discretion in deciding whether, in all the circumstances, to refuse to order the return of a child who has been wrongfully abducted contrary to Article 12 of the Convention. As such, this court should show deference to the decision of the High Court, though, as is well-established, it may intervene if it is of the view that the justice of the case requires it. It is not necessary, in this judgment, to address these well-known and oft repeated principles further.

51. The trial judge had regard to Tara's objections. She considered that they were neither cogent nor reasoned and emphasised that when asked to expand upon her objections the child could not do so. The judge accepted the evidence of the assessor that, given her age and maturity, Tara was likely to express views which would please her mother, who wishes her to remain in Ireland. The judge therefore concluded that she should not attribute great weight to Tara's objections.

52. In my judgment the trial judge had regard to all matters to which she ought to have had regard and did not take account of any irrelevant matters. She fairly weighed the strength of the totality of the evidence and reached a conclusion that was both reasoned and fully supported by the evidence. Her approach was unimpeachable and I agree with her conclusions.

53. Further, having properly assessed the weight to be attributed to Tara's objections, she proceeded to balance it against the factors which favoured the return of the children to England. Again, she properly weighed the policy of the Convention in favour of the prompt return of children to the state of their habitual residence. She correctly held that issues concerning the welfare of the children are matters for the local English courts and that those courts are both able and are best placed to deal with any such issues and that a hearing was fixed to take place five days after the return of the children to England, if that occurs. Again, in my view, her approach was correct in principle and I agree with her exercise of her discretion.

Conclusion

54. The High Court correctly held that the children had been abducted from England within the meaning of Article 12 of the Convention. Therefore, the court ought to order the prompt return of the children unless the mother persuaded the court that it was appropriate to exercise its discretion under Article 13 to refuse to order the return of the children. For this to arise the mother must satisfy the court as to the presence of at least one of the matters in Article 13.

55. The High Court correctly concluded that the evidence adduced in support of the allegation that the return of the children would expose them to grave risk of physical or psychological harm or otherwise place them in an intolerable situation fell below the threshold required and that the mother had not established that an order for return would result in the apprehended exposure of the children to grave risk.

56. The High Court correctly assessed and distinguished the evidence as to the views of the two children about returning to live in England. The trial judge correctly concluded on the evidence that the views of Paul did not amount to an objection within the meaning of the article. She held that the views of Tara amounted to a mild objection. This conclusion

was supported by the evidence and was not a conclusion which ought to be overturned on appeal.

57. The trial judge correctly weighed the mild objection of Tara to an order for return, having regard to her age and maturity, against the relevant factors which favoured an order for her return and concluded that it was not appropriate to refuse to order the return of Tara and Paul. She correctly held that issues of custody, access and the welfare of the children are matters to be decided in the existing proceedings in the local English Court which has seisin of the case. In so concluding, she exercised her discretion in accordance with the relevant principles correctly applied to the established facts.

58. For these reasons I would dismiss the appeal and affirm the order of the High Court.