# THE HIGH COURT

**FAMILY LAW**

**IN THE MATTER OF ARTICLE 11(6) OF COUNCIL REGULATION (EC) 2201/2003**

**AND**

**IN THE MATTER OF FOREIGN PROCEEDINGS**

**[2019 No.37 HLC]**

**BETWEEN:**

**R.H**

**APPLICANT**

**AND**

**A.R**

**RESPONDENT**

**Judgment of Ms. Justice Mary Rose Gearty delivered on the 12th of April 2021.**

## 1. Introduction

1.1 The international law governing child abduction has one primary objective: to prevent the trauma caused to a child by the unilateral decision of one parent or guardian to move that child to another jurisdiction, thereby potentially disrupting the child's life in many ways and usually damaging the child's relationship with another parent or guardian still resident in the child's home country.

1.2 In the main proceedings, this Court is asked to reverse an order made by the Polish courts. The Applicant's son was removed to Poland by the Respondent, the

mother of the child. The Polish courts have ordered that he should not be returned to Ireland. This Court has apparent jurisdiction to reverse that order as the child was habitually resident in Ireland at the time of his removal and, according to Article 11 of Council Regulation (EC) No. 2201/2003 [the Regulation], the Irish courts should make the final determination as to return (or non-return) and as to the custody of the child. This is an interim application by the Respondent mother for a ruling that this Court does not have jurisdiction to hear the application under Article 11 due to an earlier custody hearing in the District Court in Ireland.

1.3 The Regulation complements and fortifies the Hague Convention and applies to EU member states, providing a mechanism for the swift return of children who have been wrongfully removed from the country in which they habitually reside and making various provisions as to how the jurisdictions in different courts may be exercised in such cases.

1.4 The Respondent argues in this motion that, because the Irish District Court has already considered a guardianship case in respect of the same child, the decision on custody has essentially been made and that the High Court no longer retains jurisdiction under the Regulation. She relies on the case of *G.T. v K.A.O.* [2007] IESC 55, 2008 3 I.R. 567 in this regard. This decision, it is said, is authority for the proposition that the District Court is now seised of the case. She argues further that, to succeed in his Article 11 proceedings to review the Polish order of non-return, the Applicant must undermine the order he himself sought, which granted him custody rights but granted

care and control of the children to the Respondent. It is argued that he cannot both approbate, or seek to rely on, that order and undermine or reprobate it in subsequent proceedings. The Applicant responds that the District Court order does not operate to oust the jurisdiction of the High Court in Article 11 proceedings to review the non-return order of the Polish Court and, if appropriate, to order the return of the child.

## 2. Factual Background

2.1 The child, W, was born in 2010. In 2016, District Court guardianship proceedings were commenced in Ireland by the Applicant father for guardianship but, when first listed in January of 2017, no court order issued and no further step was taken in the proceedings at that time. In April of 2017, the Respondent went to Poland with W. On the 18th of December 2017, the Applicant instituted proceedings under the Hague Convention in Poland.

2.2 On the 10th of January 2018 the Applicant had re-entered his application for guardianship in respect of W before the Dublin District Court using the same record number as attached to his earlier application in respect of which no order had been made. On the 27th of February 2018 that court made an order granting guardianship of W to the Applicant but granting primary care and control to the Respondent. It does not appear to be in issue in this motion that the District Court decision did confer custody rights on which the Applicant could rely as the case had commenced before April of 2017, the date of removal. The significance of the District Court order here,

according to the Respondent, is that it resolves the question of custody in proceedings issued by the Applicant thereby rendering the Article 11 application redundant.

2.3 The District Court, having been seised of the case, was entitled to make various orders including vesting custody rights in the Applicant, insofar as the proceedings were first before that Court in January of 2017 and Ireland was still the habitual residence of the child at that time. But the decision of *G.T. v K.A.O.* [2007] IESC 55, [2008] 3 I.R. 567 is only authority for that much. What is more pertinent in this case is whether the decision in 2018, taken after the participation of both parties, can oust the jurisdiction of the High Court in a subsequent application to review a non-return order. *G.T. v K.A.O.* does not address this issue.

2.4 This 6-year-old boy was taken from Ireland to Poland and the Polish courts ordered that he should not be returned to Ireland. The jurisdiction of the High Court in Ireland rests on the relevant Articles of the Regulation. In broad terms, it is due to the child's having been habitually resident in Ireland that the Convention provides that the Irish courts can revisit and, if necessary, overturn the Polish decision not to return W. If this jurisdiction is successfully invoked, under the terms of the Convention as clarified by caselaw in this regard, the High Court examines custody and welfare issues generally and not just the issue of return.

## 3. Issues: Status of the District Court Order, Approbation and Reprobation

3.1 Here, the Respondent seeks to persuade this Court that, due to the custody issue having been ostensibly determined by the District Court in 2018, albeit after the

removal of the child, the High Court no longer has jurisdiction to hear and determine the same issues. She points out that, the District Court having been advised that the child was now resident in Poland and having been asked by the Respondent to await the decision on return by the Polish courts, the District Judge nonetheless acceded to the Applicant's application to hear and determine the matter and granted custody rights to him but gave primary care and control of the child to the Respondent. The Polish decision not to return the child, meanwhile, was duly appealed. While the initial decision in Poland was made on the basis that the Applicant father had not established custody rights, the regional court in Poland, on appeal, accepted that he had such rights under national law, as set out in *G.T. v K.A.O.*, due to Irish District Court proceedings with a first return date in January of 2017, i.e. *before* the child was removed. Thus, the Applicant was entitled to bring proceedings under the Regulation. Nonetheless, the appeal court upheld the initial decision not to return the child, this time on Article 13 grounds, namely, that the Respondent had successfully proved that there was a grave risk of harm to W, should he be returned to his father.

3.2 The Respondent argues that the District Court Order made on the 27th of February 2018 is, for the purposes of Articles 10 and 11 of the Regulation, a decision made by the courts of habitual residence (at the material time) of the child, relating to the custody of the child. That Order was not appealed and cannot now be reprobated by the Applicant.

3.3 The jurisdiction of this Court is conferred by Articles 8, 10 and 11 of the Regulation, which are set out in full, along with relevant case law, so as to consider their scope and effect. The principles which suggest that one cannot approbate and reprobate the same order are then considered.

## 4. Applicable Law – the Articles in Context

4.1 The relevant portions of the Regulation are from Articles 8, 10 and 11 and read as follows:

Article 8: General jurisdiction

> *"1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.*
>
> *2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12."*

Article 10: Jurisdiction in the cases of child abduction

> *"In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:*
>
> *(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or*

*(b) the child has resided in that other Member State for a period of at least one year after the person [or body] having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his new or her new environment and at least one of the following conditions is met:*

*(i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;*

*(ii) a request for the return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);*

*(iii) a case before the court in a Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);*

*(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention."*

Article 11: Return of the child

*"1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*

*[the Convention] in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply…*

*6. If a court has issued an order on non-return pursuant to Article 13 of [the Convention] the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents… to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.*

*7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child…*

*8. Notwithstanding a judgment of non-return pursuant to Article 13 of [the Convention] any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child."*

4.2 By way of general context, the international, domestic and constitutional context in which these Articles must be read include: the child's right to a regular, personal relationship and direct contact with both parents under Article 24(3) of the Charter of Fundamental Rights of the European Union; the rights of the child under Article 42A of the Constitution, in particular that the best interests of the child shall be the paramount consideration in guardianship and custody proceedings and that the views of the child shall be considered in such proceedings; the reflection of those constitutional guarantees as set out in section 3 of the Guardianship of Infants Act of 1964 (as amended by s.45 of the Children and Family Relationships Act of 2015), which again emphasises the best interests of the child.

4.3 Detailed provisions as to what a court must consider in determining what is in the best interests of the child are set out in section 31(2) of the 1964 Act, as amended.

4.4 The Regulation came into force in 2005, and, as a Regulation, is directly applicable in Ireland, not requiring domestic implementing provisions. To summarise the provisions of the Regulation, bearing this constitutional and legislative context in mind, Article 8(1) provides that the courts of the country of habitual residence (Ireland) of the child have jurisdiction in matters of parental responsibility but it is explicitly said to be subject to Article 10, which dictates that jurisdiction moves to Poland in certain circumstances and that, otherwise, Ireland retains jurisdiction until one or more of these specific events occur.

4.5 Scrutiny of all the potential variations contained in Article 10 suggest that its provisions only apply in a post-removal situation and relate to the Article 11 process whereby non-return orders are considered, finally, by the country of habitual residence.

4.6 The various circumstances which would allow jurisdiction to pass to Poland include when the child is habitually resident there and if there is (a) acquiescence or (b) a year has passed since the removal and the child has settled *and* any one of the four other conditions which are: no request for return, request lodged but abandoned, case closed under Article 11(7), or a custody decision has been made in the Irish courts which does not mandate return. This last cannot be read in isolation; all other provisions of Article 10 can only arise post-removal and post-request for return or at least when sufficient time has passed to confirm that the Article 11 process will not be invoked. The custody decision referred to must be one which does not require the return of the child and this can only be understood to mean that the return of the child has been considered in Article 11 proceedings.

4.7 Jurisdiction does not pass to Poland until the child has acquired a habitual residence in Poland *and*, under the relevant provisions, is there for at least a year and is settled *and* under Article 10(b)(iv), when the Irish courts, as the place of habitual residence before wrongful removal, and as part of their residual function under Article 11, have made a decision on custody which does not require the return of the child. At that time, when the Irish courts have decided custody issues but have not

ordered the return of the child, then and only then, does jurisdiction of the courts in the place of habitual residence (Ireland) move to the courts in the other Member State (Poland). From the clear wording of Article 10, this cannot occur until the child has acquired a habitual residence in Poland, is there for at least a year and is settled. It seems to this Court that Article 10(b)(iv) is intended to apply after a non-return order but in any event cannot apply to an order obtained before the child had been a full year in Poland. Here, the child left Ireland in April 2017, the District Court order issued in February of 2018, and the non-return order post-dates the District Court decision on which the Respondent seeks to rely as the basis for the change of jurisdiction under 10(b)(iv). Additionally, there is no evidence before this Court and no argument was addressed to the issue of when the child became habitually resident or settled in Poland. The Court must also find as a fact that the child had been in Poland for at least a year and had settled there before jurisdiction can pass to Poland in respect of what may be termed welfare decisions. It does not appear pragmatic or within the contemplation of this process that a district court decision issuing within a week of removal, for instance, might operate as the definitive decision on custody rights for the purpose of a later Article 11 application.

4.8 Article 10 can only be understood when read in its context and, in particular, in conjunction with Article 11. The wording of Article 10(b)(iii) and (iv) refer to proceedings being "*closed pursuant to Article 11(7)*" and to a decision on custody "*which does not require return*." The provisions are immediately followed by Article 11, the

process whereby a non-return order is made. In this context, Article 10(b)(iv) must refer to a decision on custody in the context of Article 11 i.e. a custody decision made after the non-return order and in the light of that order. In such a case it would not be logical to embark on a further hearing. While the scope of the Article 11 procedure includes custody issues, the fact that another court of competent jurisdiction may have embarked on a hearing, or made orders, in relation to custody issues does not appear to remove the jurisdiction of the High Court to review and overturn the decision of another member state not to return a child who was removed from his habitual residence. That jurisdiction remains, primarily, a summary one to order a return or not, even if larger in scope than the usual Regulation application in respect of an abducted child, as it involves considering the issue of welfare and not just of return.

4.9 The decision of Finlay Geoghegan J. in *E.E. v O'Donnell* [2013] IEHC 418 clarifies the purpose of the various articles of the Regulation and the way in which they operate to allow the courts to provide a swift remedy in child abduction cases and to reconcile decisions in different jurisdictions:

> *"24. The nature of a decision taken by a Court on an application for the return of a child who has been allegedly wrongfully removed or retained pursuant to the Hague Convention is important to a full understanding of the purpose and scheme of Articles 10 and 11 of the Regulation and the jurisdictions ascribed to the respective courts and procedures to be followed after a decision of non-return. The application for the return of a child pursuant to the Hague Convention is a summary application and once it is*

*established that a child was wrongfully removed from or retained out of his State of habitual residence, the court (unless exceptionally Article 20 applies) is bound to make, in a summary way, an order for return unless a defence pursuant to Article 13 of the Hague Convention is made out. Even where such a defence is made out and the Court decides not to make an order for the return of the child, such decision is only a decision as to whether or not to make a summary order return. It is not a decision on custody. Article 19 of the Hague Convention expressly provides that a decision under the Convention concerning the return of the child "shall not be taken to be a determination on the merits of any custody issue". Hence, a decision on a return application does not preclude a subsequent hearing and determination on the merits of any continuing custody dispute between the parents or other relevant persons before a court having jurisdiction to hear and determine such disputes at the relevant time. One of the purposes of the Hague Convention is to procure the prompt return of children to the jurisdiction of the courts of their habitual residence so that it is those courts which determine custody disputes in the best interests of the child. Articles 10 and 11(6) to (8) of the Regulation are directed to a custody hearing on the merits which may occur <u>after</u> the making of an order for non-return pursuant to Article 13 of the Hague Convention...*

*25. The purpose and scheme of Articles 10 and 11(6) to (8) of the Regulation appears threefold:*

*(i) to prevent a court which makes an order refusing to return a child pursuant to Article 13 of the Hague Convention from immediately assuming jurisdiction in relation to custody or access disputes concerning the child; and*

*(ii) to give the parties an opportunity of having determined a custody dispute on the merits before the courts in the Member State of the habitual residence of the child prior to the wrongful removal or retention; and*

*(iii) to create certainty insofar as possible for a child following the determination of the custody dispute by the courts of the Member State of origin, by providing for the making of a return order pursuant to Article 11(8) which, if certified in accordance with Article 42, is automatically enforceable in the Member State where the child is now residing or if the decision does not entail the return of the child, the transfer of jurisdiction in relation to the child to the courts of that Member State pursuant to Article 10(b)."*
[emphasis added]

Finlay Geoghegan J. went on, at paragraph 27, to state:

"27. *Articles 11(6) to (8) of the Regulation are not prescriptive as to which court in Ireland the documents received pursuant to Article 11(6) should be transmitted, either directly or by the Central Authority, or as to which court should determine any continuing custody dispute ... However, it is of significance that Article 11(7) only imposes an obligation on the Central Authority or a court to notify the parties and invite submissions where a court has not already "been seised by one of the parties". In more familiar terminology, this means that the Central Authority is only obliged to*

*notify the parties and invite submissions <u>where there are no relevant pending proceedings before a court in the country of origin</u>. Articles 11(7), 40(1)(b) and 42 appear to envisage that if there are pending proceedings relating to custody or access of the child in relation to which a non-return order has been made, that the documents received by the Central Authority pursuant to Article 11(6) following the making of the non-return order should be transmitted to the court with seisin of those proceedings and be considered in those proceedings*." [emphasis added]

4.10 Here, as in *E.E.*, a summary order to return has been refused. The courts retaining jurisdiction are the Irish courts as this is where the child was habitually resident before being removed. There are no pending proceedings here. If the case in the District Court had been adjourned awaiting the result in the Regulation proceedings, the Central Authority, following the procedure laid down in the Rules of the Superior Courts as clarified in *E.E.*, may well have transferred papers to the District Court (via the High Court, if necessary under the relevant rules of court).

4.11 The findings in *E.E.*, as to the purpose of the relevant articles and the process which is involved in returning the case to the relevant court, all strongly support the conclusions that the welfare aspect of the case (or the issue of identifying the best interests of the child, to use the language mandated by the Constitution) is an issue that must be decided by the Irish courts after a decision not to return the child.

4.12 This view is reinforced by the CJEU (Fourth Chamber) decision in the case of *P v Q* (C-455/15). There, courts in Sweden and Lithuania made incompatible orders on

the same day. A child had been removed from Sweden and a non-return order was made in Lithuania on the basis of an Article 13 defence. The Swedish Court considered that it had jurisdiction based on Article 8 of the Regulation, as the child had habitually resided there until the date of abduction. The Lithuanian Court assumed jurisdiction on the basis of Article 15 (that it was better placed to decide the issue). The Swedish Court granted custody to one parent and Lithuanian Court granted custody to the other. The non-return order in the Hague Convention proceedings was made in Lithuania on a later date. Considering the operation of Regulation Article 11(8) the CJEU held:

> *"48. … Regulation No 2201/2003 contains in Article 11 specific provisions relating to the return of a child who has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention.*
>
> *49. Moreover, that article provides in paragraph 8 for an autonomous procedure under which the possible problem of conflicting judgments in the matter may be resolved (see, to that effect, the judgments in Rinau C-195/08 PPU, EU:C:2008:406, paragraph 63 and Povse, C-211/10 PPU, EU:C:2010:400 paragraph 56)*
>
> *50. So, even if a difficulty concerning the wrongful retention of a child were to arise in the case in the main proceedings, that difficulty would have to be resolved not by a refusal of recognition on the basis of Article 23(a) of Regulation No 2201/2003 of a judgment such as that of the Šilutės rajono apylinkės teismas (District Court, Šilutė)*

*of 18 February, 2015 but, if necessary by recourse to the procedure laid down in Article 11 of that regulation.*"

4.13 The references, in paragraph 49, to the procedure under Article 11 as one that is *autonomous* and, in paragraph 50, to the fact that difficulties should be resolved, if necessary, by recourse to this procedure, suggest that the Article 11 procedure applies notwithstanding previous orders made by the courts of the state of habitual residence and in order to provide a final review by the most appropriate court for the purpose.

4.14 The reasoning of Finlay Geoghegan J. in *E.E. v O'Donnell*, above, confirms this view and makes it clear that one of the main objectives of the Article 11 procedure is to provide certainty after an order of non-return. The proceedings under the Regulation, seeking the return of a child, are summary in nature and do not require any examination of custody issues. It is only after a non-return order that the relevant application can be made for a review of that decision, including a consideration of the best interests of the child, by the courts in the place of habitual residence. The fact that there were District Court proceedings which had led to various orders being made does not mean that the jurisdiction of the Irish courts to review the non-return order under Article 11 has been ousted. The Respondent's argument, that the District Court proceedings decided custody issues for the purposes of Article 11, therefore, is not persuasive. Article 11 was not relevant at that time, no question of the non-return of the child arose and no custody decision was made in that specific context.

4.15 In *A.O'K. v M.K.* (Child Abduction) *[2011] IEHC 82, [2011] 2 I.R. 498*, Finlay Geoghegan J. considered the same articles in a similar context. There, district and circuit court orders granting custody to the applicant mother had been made before the children were wrongfully retained by the father (respondent) while on holiday in Poland. The applicant issued a notice of motion in the High Court for an order under Article 11(7) for the return of the children, following an order of non-return having been made in Poland and upheld there by an appeal court. The Irish High Court examined the Article 11 procedures and noted that there was a primary obligation on the Central Authority to issue the application pursuant to O.133, r. 11(1) of the Superior Court Rules and put the parties on notice where it has received the documents from another Central Authority.

4.16 The jurisdiction to be exercised by this Court is that granted by Article 11 and expressed in recital 17 to the Regulation as being one which can replace the non-return order and can be enforced without special recognition or enforcement procedures in Poland. This is not an order that the District Court could have made, by definition, in 2018, as no order of non-return had been made.

4.17 At paragraph 48 in her judgment in *A.O'K.*, Ms. Justice Finlay Geoghegan discussed the interim nature of most orders in custody cases, noting that they could rarely be said to be final orders given the nature of such cases. She went on to hold that the particular custody dispute in that case should be resolved by the High Court, due to the complexity and novelty of the legal issues arising and the necessity to

consider Article 11 and other requirements of the international law in respect of child abduction, in respect of which exclusive jurisdiction was vested in the High Court.

4.18 This finding also confirms that the relief sought in the current motion should be refused. The intention behind the Article 11 provisions is that the courts of the child's habitual residence at the time of removal or retention have the final say on the question of return at which time they also consider the question of custody and the best interests of the child. A court deciding an Article 11 review of a non-return order must give the child an opportunity to be heard (if he is of a certain age and maturity), must give the parties an opportunity to be heard and must take into account the reasons for and evidence underlying the non-return order. This could not have been done in the District Court in this case; the non-return order had not yet been made. If that is so, there is no provision under the relevant articles which deprives this Court of jurisdiction to make orders under Article 11 in this case.

4.19 That conclusion is further supported by the case of *Povse v Alpago* (case C-211-10), in which the most pertinent paragraph (regarding a custody decision in the second country, or country of enforcement, handed down after a non-return order was reversed by the country of origin) reads:

> *"78 To hold that a judgment delivered subsequently by a court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to circumventing the system set up by Section 4 of Chapter III of the regulation. Such*

*an exception to the jurisdiction of the courts in the Member State of origin would deprive of practical effect Article 11(8) of the regulation, which ultimately grants the right to decide to the court with jurisdiction and which takes precedence, under Article 60 of the regulation, over the 1980 Hague Convention, and would recognise the jurisdiction, on matters of substance, of the courts in the Member State of enforcement.*"

4.20 This logic applies to the current situation in which a decision on custody was made in the country of origin before the non-return order. Such a decision cannot circumvent the system set up in Article 11 and cannot deprive this system of its practical effect, namely, to reserve to the courts in the country of origin the jurisdiction to review a non-return order and to make the final decision on custody matters in the form of a certified judgment which, if it issues, will be binding on the Polish courts.

## 5. <u>Does this Applicant seek to Approbate and Reprobate the same order?</u>

5.1 The Respondent submits that the Applicant cannot both approbate and reprobate the decision of the District Court. This is sometimes paraphrased by saying that he cannot blow both hot and cold. No authorities were cited in that regard but there are a number of authorities as to the specific meaning of this phrase in law and some are cases in which child abduction was the context of the discussion.

5.2 In the 1930's, the House of Lords in *Evans v Bartlam*, [1937] 2 All ER 646, described the phrase as meaning that a litigant may not accept a judgment as binding, and thereafter seek to set it aside. There, the question was whether asking for a stay of

execution on an order involved the acceptance of that judgment as binding. The various concurring judgments agreed that the key to understanding the issue was looking at the consistency of conduct of the litigant. Asking for a stay of execution in respect of an order was not inconsistent with mounting a challenge to that order.

5.3 The same phrase was considered by the Irish Supreme Court in *Corrigan v the Land Commission* [1977] IR 317. There, a litigant had challenged the credentials of land commissioners after a decision issued. He knew, before the decision issued, that the same two commissioners who had made the initial decision would decide the appeal, which perceived bias was the basis for his challenge. Henchy J. pointed out that Dr. Corrigan had waited to see which way the decision would go before challenging the process. He dismissed the case, using the vivid sporting analogy that a litigant could not cry foul having already played the advantage.

5.4 The same concept was discussed by Lord Justice Atkin in *United Australia v. Barclays Bank* [1940] 4 All ER 20, at page 30 where he held, to paraphrase his description, that if a litigant has two inconsistent rights, once she chooses one of those options with full knowledge that she thereby relinquishes the other, the first choice is no longer open to her because of the inconsistency between the two choices.

5.5 Finally, in *re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 the Court of Appeal in England and Wales considered the defence of acquiescence in Hague Convention cases. The defence was noted to be in the same family as the doctrines of approbation and reprobation (a Scottish term), of estoppel, and the right of election;

all are variations on a similar theme. That case involved a father who had not instituted summary proceedings for the return of his children for 8 months, his legal advice having been first delayed and then incorrect. The Court of Appeal held that the primary consideration was consistency of conduct. If his conduct was wholly inconsistent with seeking a summary return of the children, this amounted to acquiescence no matter what his intentions or indeed his legal advice. Ambiguous conduct was not sufficient, the actions had to be clearly inconsistent with seeking a return under the Convention (at page 834). Here, it was held, he had not done anything inconsistent with an application to return the children.

5.6 *AZ (A Minor) (Abduction: Acquiescence)* [1993] 1 FLR 682 was a case in which the pragmatic reaction of parents to cases of child abduction was considered in the context of an acquiescence argument. Sir Donald Nicholls V-C noted that to agree to interim custody arrangements may not be inconsistent with an intention that the child would be summarily returned. He commented at page 691 that a parent would not lose rights under the Convention by accepting that a child should stay where he is, even for an indefinite period, in the kind of emergency situation usually precipitated by the wrongful removal of a child. The same kind of comment might be made here: there is no question but that the child, W should not have been unilaterally removed by the Respondent in circumstances where the guardianship proceedings in Ireland had been initiated and where she knew that the Applicant was making some attempt to regularise his position regarding his son. His continuing to seek orders granting him

rights of custody in those proceedings did not result in his abandoning his rights under the Regulation, nor should they have the result that his son loses his right to personal contact with his father without consideration of that specific issue by an appropriate court.

5.7 Applying these various comments to the case at hand one can see that the principle of acquiescence, or approbation and reprobation, does not arise here. The Applicant was not choosing between two inconsistent rights in this case. Nor was he electing to assert his rights in the District Court and thereby unequivocally abandoning his right to challenge the removal of his child in Regulation proceedings. It may assist to consider the question if framed in this way: has the Applicant conducted himself in a way that is inconsistent with his seeking a summary return of W? Or more vividly: did the Applicant elect to play the advantage in the hope of scoring, but having failed to do so, does he now cry foul? It appears that this Applicant did not abandon his rights under the Regulation, he did not take any advantage other than to seek custody rights which would later ground his application for the return of his son, as the Polish Regional Court acknowledged on appeal. He is not seeking to impugn the District Court order (analogous to the facts in Corrigan, for instance) but is inviting this Court to exercise a separate jurisdiction under the Regulation, and to correct a decision of the Polish Court.

5.8 The fact that the Applicant did not appeal the order of the District Court insofar as it granted primary care to the Respondent did not preclude him from continuing

with his application for the return of the child in Poland and does not prevent him making submissions under Article 11 to this Court.

5.9 In addition to the consideration of these principles, and carrying considerable weight in a case involving a child, one must recall that this is not a situation in which only the rights of the parties are to be considered and identified by the Court; the rights of the child are paramount and, no matter what the conduct of either party, this child is entitled to have a definitive consideration of his best interests by the most appropriate court for that purpose. This is one of the objectives of the internationally recognised principles of law in respect of child abduction. Insofar as the summary return order is the most usual remedy in such proceedings, this is to prevent the serious effects of child abduction – not just on society, but also on the child.

5.10 Beyond the summary return order, so far refused in this case, the international response to child abduction includes the precept that the courts of habitual residence are the appropriate fora in which to consider the best interests of the child. After summary orders are refused, that international system, as set out in the Hague Convention and fortified and complemented by the Regulation, requires that the order of non-return be treated in a specific way. Returning to the best interests of the child: this is not only a central tenet of international law but is required by our Constitution. Such an approach cannot be reconciled with the view that an applicant might surrender the right to have the child's position considered, post non-return

order and as envisaged in international law, by his having also sought custody of the child here before his application in Poland concluded.

## 6. Conclusion

6.1 The fact that the District Court considered the custody of W and granted primary care to his mother does not deprive this Court of a jurisdiction which is conferred by international instrument, is directly effective and was initiated by the transfer of papers to the Central Authority in Ireland from its equivalent office in Poland.

6.2 Nor, indeed, did that decision of the District Court in Ireland deprive the appeal court in Poland of its jurisdiction. That court proceeded to hear the application to return the child and refused it. While it did refer to the decision of the District Court as a factor, it is clear from the terms of the judgment that the court considered the various arguments made about the conditions and living arrangements in Poland, the length of time W had spent there and his attachment to his new home and the various statements as to the shortcomings of the Applicant (some of which appear to be accepted) and these factors were listed at length and in some detail before the single reference to the District Court decision. It is clear that the latter was only one factor in the Polish court's final decision not to return the child and that the Polish Court did not consider itself bound to follow the Irish District Court. The decision of this Court may be that the non-return order must be reversed but, due to other reasons, that he

should remain in Poland or that the return should be stayed, but that is a matter to be decided after a full Article 11 hearing and is not for this motion.

6.3 The relevant law supports the Applicant's position that this Court is entitled to consider the non-return order under Article 11 and no provision under Article 10 is engaged on the facts of this case. The whole process of review under Article 11 could be undermined or circumvented if Article 10(b)(iv) referred to a decision which was made before the non-return order issued.

6.4 No authority was cited to support the argument that the Applicant sought to undermine the very order he championed, and it does not appear to this Court that he did so. The key question in child abduction cases is whether the Applicant has acted in a way that is unambiguously inconsistent with his seeking a summary return of the child. The Applicant's having sought custody rights, whether in applying for such an order in the first place or citing the subsequent decision in a case in Poland, is not inconsistent with his application for the summary return of his child.

6.5 The main objective of this Court in Regulation proceedings is to safeguard the rights of the child. While the conduct of the parties in other cases may affect their rights and may result in them abandoning certain rights, for instance, or choosing to relinquish them, this is a case in which the most important party, the child, is not represented before the Court. On the facts of the case, the Court has held that the Applicant did not relinquish his Regulation rights. This Court would be slow to find, in any child abduction case, that the conduct of a party, other than in the specific

factual circumstances set out in Articles 10 (b), has ousted the jurisdiction of the Court to review the decision of another court under Article 11.

## 7. Practical Consequences

7.1 This case will now be listed for hearing in early course. That hearing will include a consideration of the welfare of the child and will determine the question of custody.

7.2 The parties are strongly advised to work at a mediated solution rather than one which is imposed on them by this Court. Mediation is not just in their interests and in the interests of efficiency: it is in the best interests of W that his parents can find a way to resolve the issues of access and custody. Such an agreement should allow both parents to retain a personal relationship with the child. Mediation can be effective no matter what the relationship between the parents and can take place with minimal contact between the parties, if that is necessary. Mediation can take place even as court proceedings continue. W is still only 10 years old (at time of writing) and the parties have many years of parenting ahead of them. The decision they make in this regard may be transformative for them, no matter where they live, in terms of the parental relationship they enjoy with their son. To agree, with professional help, on the details of custody and access is the most effective way to create a better family dynamic and a sound basis for their son's future wellbeing and good mental health.