UNAPPROVED

THE COURT OF APPEAL

Record No: 2023/57

Donnelly J. **Neutral Citation Number [2023] IECA 126**

Faherty J.

Ní Raifeartaigh J.

(CHILD ABDUCTION: HABITUAL RESIDENCE, VIEWS OF THE CHILD)

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991 AND

IN THE MATTER OF THE HAGUE CONVENTION AND

IN THE MATTER OF R. M., A MINOR

M

RESPONDENT

- AND -

M

APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered the 26th day of May, 2023

Introduction

1. This is an appeal by the mother of a child, who for the purposes of these proceedings will

be called Pawel, against the judgment [2023] IEHC 183 and accompanying order of the High Court that Pawel be returned to the jurisdiction of the courts of Poland. Two issues arose in the High Court and in this appeal; whether Pawel was habitually resident in Poland and whether return ought not to be ordered, in all the circumstances of the case, because of Pawel's stated views on returning to Poland.

2. For the purposes of this judgment, I will refer to the father as "the father" or, where appropriate, "the applicant". He is the respondent to the appeal. I will refer to the mother as "the mother" or, where appropriate, "the respondent". The mother is the appellant.

Background

3. Pawel is now over 14 and a half years old. He was born in Ireland. Prior to July 2021, he had lived most of his life in Ireland, apart from a period when he was about one year old. Both his mother and his father are nationals of Poland. There is a dispute between the parties as to when and how their relationship broke up, but nothing turns on that dispute. Both parties agree the break-up was difficult. It is sufficient to say that both the mother and the father continued to live in Ireland up to July 2021.

4. Pawel's mother became involved with another man with whom she has a young child now aged about 7 years. Pawel lived with them and went to primary school in Ireland. Pawel's father became involved with another woman in or about 2015 and they have a young child born in 2021. Pawel enjoyed the company of his father in Ireland although his primary carer was his mother. Pawel is fluent in English and fluent in conversational Polish; he speaks Polish at home. His linguistic difficulties with being educated through the Polish language medium will be discussed later.

5. It is undisputed that as of July 2021, Pawel was habitually resident in Ireland. The circumstances in which Pawel came to be in Poland in 2021 are disputed, however. Indeed,

neither party's affidavits are perhaps as clear as they could have been on that issue. The grounding affidavit of the father's solicitor asserts that the child moved from Ireland to Poland with his father in July 2021. A declaration, dated 9 September 2021 and signed by both parents, as to the place of residence of the child, being the father's address in a city in Poland, is exhibited. Another declaration with respect to an application for home schooling in Poland was also exhibited. This also indicated that Pawel was registered with a named private primary school. The residential address on the declaration was that of his father. The declaration stated that Pawel would take annual classifications exams conducted by the school, in accordance with regulations at a time and place directed by the school. The applicant's solicitor's affidavit says it was agreed that home schooling was the best schooling option for Pawel for the first year to help him acclimatize in Poland. It is also averred that in June 2022 he passed the classification examination for Grade 7 at the private primary school. At no point, however, in the affidavit, or the exhibited statement of the father, is there any detailed explanation as to why or how the transfer of Pawel to Poland, and his transfer from the primary care of his mother to his father, came about. For example, there is nothing to say that this was because of a particular agreement arrived at by the parents in relation to how long this new primary care provision would last or what access periods would apply.

6. In her replying affidavit, the mother avers that she does not accept that the father and Pawel *moved and/or relocated* to Poland in July 2021. She says that her mother (referred to hereafter as "the maternal grandmother"), who resided in Poland, was ill at this time. In circumstances where the maternal grandmother required care and support, the mother says that she "agreed for the Applicant to take the child to Poland in July" in advance of her traveling to Poland with her other son in August. Following her arrival in Poland, the children resided with her at the maternal grandmother's residence. She says that the father

lived separate and apart from her, at his own address about 150 kilometres away. She said that it was in September 2021, when she went home to Ireland with her other child, that Pawel moved to live with his father. She says she intended to return to Poland and spend time with the maternal grandmother and Pawel.

7. The mother avers that the maternal grandmother died unexpectedly in October 2021 and the mother and her other child returned to Poland for two weeks. Pawel joined her and his half-sibling at the late maternal grandmother's residence during this period. The mother said she was conscious of not causing further disruption for Pawel and his schooling, therefore, upon her return to Ireland, he remained in Poland from September 2021 to February 2022.

8. The mother says however that between September 2021 and February 2022 during her daily and consistent contact with him, Pawel was expressing a wish to return to Ireland as he was missing her and his half-brother. He returned to Ireland in February 2022 accompanied by his aunt. In May 2022, the mother then returned with Pawel to Poland in circumstances where Pawel was attending the christening of the father's other child, and for the purpose of facilitating the completion by Pawel of his final Polish examinations. She goes on to say that on 3 August 2022 she travelled to Poland and then took Pawel to stay with her at her late mother's house. As deposed to by the mother, on 17 August 2022 Pawel returned to Ireland in the company of the mother and they have not returned to Poland since that date.

9. At para. 11, the mother avers that the signing of the parental consent form confirming Pawel's residence at the father's address was not then or now an acceptance that the named city in Poland (the residence of the father) was Pawel's permanent residence. She says that at the time she signed the form it was expected that she would be spending the majority of her time in Poland with the maternal grandmother. However, the unexpected death of the

maternal grandmother (in October 2021) frustrated those plans save that the mother did not want to disrupt the schooling plan for Pawel that had already been arranged. The mother also avers that at no stage did Pawel enter the mainstream secondary school system in Poland. She says that she was unaware (in October 2021) that Pawel could have continued his Polish home schooling in Ireland. She said she was caused by the applicant to believe that home schooling could only be undertaken in Poland and that Pawel had to be declared as resident in Poland for this purpose.

10. In his replying affidavit, the father takes issue with the mother's account of Pawel's relocation to Poland. He says that in the Autumn of 2020 it was agreed between him and the mother that himself, the mother and Pawel would move back to Poland (albeit in two separate family units). He says that this was intended to be a permanent move. It was agreed that Pawel would complete his education in Poland. He says that Pawel knew of this in August 2020. He claims that this was agreed because both parents wanted to move back to Poland and because Pawel had had unpleasant experiences in school (the specific experience referred to is denied by the mother). The father says that it was agreed before moving to Poland that Pawel would live with him and go to school in his area. Furthermore, it had been agreed that Pawel would be home-schooled at first "in order to adjust to life in Poland".

11. He says it was also agreed that the mother would transfer the Irish child benefit to him and pay the agreed maintenance of €170 to him for as long as the mother remained in Ireland. It was, the father says, agreed that the mother could take Pawel to her home while she was in Poland. The plan was that the mother would move permanently to Poland after the father's relocation to Poland. He avers that he moved to Poland with Pawel on 14 July 2021: the plan was that the mother would move to Poland in August 2021. He states that in August 2021, the mother travelled to Poland to care for the maternal grandmother who

was unwell. He agrees that Pawel spent two weeks with her, and thereafter returned to the father's care at the end of August 2021 following which he commenced school in September 2021.

12. The father describes Pawel's travel to Ireland in February 2022 as solely for the purpose of visiting his family in Ireland. He says he consented to Pawel being away for a period of three weeks only. Towards the end of February, he had contacted the mother asking for a date for Pawel's return and was advised that it would be March. However, the mother did not return Pawel to Poland until 25/26 April 2022. Consequently, Pawel's education was disrupted.

13. The father denies that the purpose of Pawel's return to Poland in April 2022 was to attend his half-sister's Christening and complete his examinations. While he did both these things, the primary reason for his return was that he was at that point habitually resident in Poland.

14. According to the father, the mother was allocated social housing in Ireland after having been on a waiting list for years. He suggests that this might be why she changed her plans about moving permanently to Poland. He says that at the time of the death of the maternal grandmother, the mother never suggested Pawel would return to Ireland.

15. The circumstances of the Pawel's return to this jurisdiction are in dispute. The father avers that on 3 August 2022 Pawel went to stay with the mother at her residence in Poland. He did not take with him any of his belongings and packed only Summer clothes. He avers that he became increasingly concerned about the mother's intention to take the child to Ireland. Albeit it had been ultimately agreed by the mother that he could collect Pawel on the evening of 17 August, the mother in fact removed him from Poland earlier that day. On the evening 17 August, he received a text from the mother with a photo of herself and Pawel outside her residence in Ireland with the word "Greetings" as the caption.

16. The father says that prior to removing Pawel, the mother had requested Pawel's passport from him but he refused to give it to her.

17. The mother says that the father had no right to retain the passport as there was a District Court Order from 2013 requiring the passport to remain with her. She says that the father knew about her arrangements to fly back on 17 August and says she was transparent with him in all her communications. The father says in his statement that the mother must have "secretly made out her son's ID card and left Poland's borders on it". The mother never explained how Pawel travelled to Ireland without the passport.

The High Court Judgment

18. The judgment commences with a brief synopsis of facts. The next heading is "Objectives of the Hague Convention". The judgment emphasises that the Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child swiftly home. The trial judge accurately identifies that the Court in the present case was required to return Pawel unless one or both of the issues raised, habitual residence and the child's objection, are decided in favour of the respondent.

19. Under the heading "habitual residence" the judge accurately identifies that the relevant case law provides that this is a question of fact. She specifically refers to the salient factors to be those outlined by the Court of Appeal (Whelan J.) in *Hampshire County Council v CE and NE* [2020] IECA 100.

20. The trial judge turned to the facts as alleged by the parties. She notes that the respondent's partner and other son did not leave Ireland and says that this alone suggests that her intention was not to relocate to Poland. She identifies the period of Pawel's stays in Poland. She says that the periods, all else being equal, reflects an adequate degree of permanence. She notes

the claim by the father that there was an agreement between the parties that each were to move permanently to Poland and she says that the declarations made by the parents is confirmation that Pawel lived in the city with his father.

21. In relation to the agreed position that Pawel would be home schooled, the trial judge says this is an indication that the move to Poland would be a more permanent relocation for Pawel than his mother. She notes that the mother moved her son to Poland, it was not time specific and there is no averment that the relocation was event specific. In relation to the mother's claim of having been misled about the necessity for residence in Poland for the purposes of home schooling, the trial judge said that whether that was so or not, the decision that Pawel would avail of the school programme indicates a decision he would locate to Poland. She refers to the death of the maternal grandmother and notes that the mother's explanation for Pawel not moving back to Ireland in October 2021, namely that she did not want to interrupt Pawel's schooling (even though his school term had only just begun). In the view of the trial judge, this was confirmation of the view that he was habitually resident in Poland at that time.

22. The trial judge also refers to other factors which required to be considered to ascertain where Pawel was ordinarily resident in August 2022. She notes his connections with both countries and his regular visits to both. She notes that although it was claimed Pawel had Irish citizenship no application had been made for an Irish passport and that he held a Polish passport. She notes his fluency in both English and Polish but refers to his difficulty with studying various subjects in Polish. The trial judge notes that there were signs of integration in both Ireland and Poland. She notes that he had few friends in Poland which the father said was due to being home schooled. She states that as a matter of common sense and in accordance with the relevant law, a young child's place of habitual residence will depend to a large extent on his parents but with an older child he can have his own centre of interest which differs from one or both parents.

23. The trial judge notes that the father confirms that he had only packed his summer clothes for his trip to Ireland (on appeal, it was emphasised that what had been averred to by the father was that he had only packed Pawel's Summer clothes for his trip to his mother's residence in Poland) and that most of his belongings remain in Poland. In relation to his passport, the trial judge notes that contemporaneous texts between the parties showed that the father had the passport which, she said, provides mild support for the view that Pawel had located to Poland. She says that the thrust of the exchanges between the parties provides further support for the fact that there was no agreement that Pawel was to return to Ireland either in August 2022 or subsequently, and that the mother was aware that the plan was for Pawel to remain in school in Poland. She held that, on balance, Pawel had changed his habitual residence from Ireland to Poland in September 2021. Had this been a temporary change, he would have moved back to Ireland when his maternal grandmother died. Further support for this view could be found in the assessment of the child's views. The trial judges notes that the independent assessor records the child saying he lived in Ireland until he moved to Poland in 2021.

24. In dealing with the views of the child, the trial judge again notes that the law is well settled, and she correctly describes the law. She refers to the report of the independent clinical psychologist appointed as a court assessor. She then held as follows:

> "4.2 An independent Clinical Psychologist was appointed as the Court Assessor. He met Pawel last month and prepared a report setting out their views. The Court is always concerned to take the views of a child into account and does consider that the maturity of the child, as set out by the assessor, coupled with the child's age, make it incumbent on me to consider this objection carefully. On the 3-stage test applicable, firstly, it is the Court's view that Pawel has an objection to returning, albeit one that is mildly expressed. He does not want to have to make new friends again and would prefer to remain in Ireland. While this is not a direct

objection to living in Poland, his comment that he is finding studying in Polish more difficult 8 is so related to living in the country that his overall view amounts to an objection within the meaning of the Regulation, in my view.

4.3 The word "objection" imports strong feelings as opposed to a statement of preference, to use the words of Whelan J. in J.V. v. Q.I. [2020] IECA 302 (para. 69). Pawel's views, as recounted to the assessor amount to an objection, rather than a preference, as a matter of plain meaning. It is not simply that he would prefer to remain here, his responses indicate an objection to returning and are based on specific difficulties in language and the anticipated loss of friends. He comments also on family dynamics in Poland being more difficult in some respects."

25. Having concluded that Pawel was not coached in his views, the trial judge then held as follows:

"4.5 Pawel is now 15 (sic) and I take his views seriously as he is mature enough that the Court should afford them significant weight. The Court is required by law to balance these views with the important objectives of the Regulation which governs this case. While the Court must take account of Pawel's views, this does not vest decision-making power in him; this would place an unfair burden on him.

4.6 Pawel's stated objections to return and negative comments about living with the Applicant are relatively mild and not sufficient to outweigh the counter-balancing factors. In particular, the Court notes the objectives of the Regulation which include discouraging the removal of children to another jurisdiction without both parents' consent. This is an important objective of the Regulation and is in the long-term interests of Pawel and of all children.

4.7 The important objective of ensuring mutual respect of laws in contracting states is also upheld by ordering the return of Pawel."

The Appeal and Cross-Appeal

26. The mother appeals on the basis that the trial judge erred in finding that Pawel had his habitual residence in Poland in August 2022. Her grounds are that:

a) The trial judge erred in finding that there had been a conscious relocation of Pawel in September 2021.

b) She placed too much significance on the schooling arrangement for Pawel while in Poland.

c) She failed to give sufficient consideration to the explanations put forward by the mother for why he was in Poland.

d) Too much weight was placed on the return of the child to Poland between May and August 2002 as this period was explicable as consistent with his being present for other events in the ordinary course.

e) Too little weight was given to the return to Ireland between February and 7 May 2022 which were consistent with a desire on the part of the child to return to Ireland.

f) Too much significance was placed on the passport issue; this was misplaced and against the weight of evidence.

27. In relation to the weight attached to Pawel's objections to being returned to Poland, the mother appeals on the basis that:

a) The trial judge did not afford proper or sufficient weight to the views of Pawel concerning the prospect of a return to Poland, having regard to his age and level of maturity and capacity for independent thought and so erred in law.

b) Too little consideration was given to the mannerly, well thought out and clearly expressed views of a teenage boy.

c) The judge did not differentiate between a mild objection being one which is mild, and at the other end, a fully formed and steadfast objection which is articulated mildly, and so erred in law.

d) The trial judge failed to properly balance the child's acknowledged objections and negative comments about living with the applicant with the aims of the Convention.

e) The trial judge failed to have regard to the fact that as an older, mature child Pawel had and maintained an established centre of interests in Ireland which differ from his parents, and so erred in law.

28. The father contests the appeal and has also cross-appealed primarily on the basis that Pawel's views did not amount to an objection to being returned to Poland. These views were, according to the father, no more than a preference being expressed by Pawel.

The Hague Convention on Child Abduction and The Brussels II *ter* Regulation 2019

29. The law on international child abduction applicable in Ireland is derived from the Hague Convention on Child Abduction as implement by the Child Abduction and Enforcement of Custody Orders Act, 1991 and the EU Regulations which cover child abduction cases where both the countries involved are Member States of the European Union. Up to 1 August 2022, the provisions of the Regulation known as Brussels II *bis* covered applications made, inter alia, under the Hague Convention. Since that date, the provisions of Council Regulation (EU) 2019/1111 of 25 June 2019 (hereinafter "Brussels II *ter"* or "the Regulation"), govern applications made after that date.

30. Both Brussels II *bis* and Brussels II *ter* provide that these applications are to be dealt with expeditiously. Both lay down a timetable for the decision (referred to as judgment in Brussels II *bis*) to be given within 6 weeks after the court of first instance is seised (Brussels II *bis* states after the application is lodged) save where exceptional circumstances make this impossible.

31. This is a very ambitious timetable given a) the potential for delays in the respondent accessing legal aid, b) the necessity to translate documents and, c) in a case where the child's views must be heard, to appoint and obtain a report from an independent assessor. When the necessity to have an adversarial hearing is factored in, together with time for a judge to write a judgment, the reality may be that many cases will not be able to reach this target. Nonetheless, it is a legal requirement which all parties, including the State in the provision of the resources allowing for such a timetable to be reached, must strive to comply with in every case. It is highly commendable in this case that the trial judge was able to deliver a judgment within two weeks of the hearing of the case.

32. Brussels II *ter,* for the first time, imposed time limits (as distinct from a duty to act expeditiously) on the decisions of appellate courts. Article 24. 3 provides:

> "Except where exceptional circumstances make this impossible, a court of higher instance shall give its decision no later than six weeks after all the required procedural steps have been taken and the court is in a position to examine the appeal, whether by hearing or otherwise".

33. It is not entirely clear from the wording of the provision if the six weeks starts to run from the date that the court *hears* the appeal or if the time limit starts at the moment the procedural steps have been taken and the court is in a position *to set the matter* down for hearing. In other words, does being *in a position to examine the appeal* imply that the clock only beings to run from the date the appeal is actually heard? Or does it mean that once the court could, theoretically, be in a position to hear the appeal if a date for such hearing were *there and then available,* that the time would then begin to run? It is not necessary to make any final decision on this and indeed it is perhaps inadvisable so to do given that it was not the subject of either argument or agreement before us,

although the provisions of this new Regulation were helpfully brought to the Court's attention by counsel for the father. Whatever the position, it is apparent that the time limit for an appellate court must be measured against the fact that there is a clear obligation on the courts to provide for expeditious court proceedings and that a 6-week time limit is imposed on the court of first instance from the date the court is seised of the application. Undoubtedly, these are matters of the utmost urgency and there is an obligation on all courts dealing with these cases to treat them accordingly.

Standard of Appellate Review

34. No issue was taken with the principle that the standard of appellate review applicable to this was the intermediate standard of review identified by the Court of Appeal (Murray J.) in *AK v US* [2022] IECA 65, where the issue is "*whether the combination of a set of primary facts that are either agreed or deduced from affidavit or documentary evidence result in the conclusion that the child is or is not habitually resident in a particular place'.* This leaves the Appellate Court free to interfere with findings of fact or inferences or erroneous application of principle. Murray J. stated:

> *'It is thus not necessary for the appellant to establish that a judge has erred in law or in principle, the appellate court is not concerned to establish that the decision of the trial judge was not one that was reasonably open to him or her, nor will the appellate court be necessarily constrained to affirm a finding which is supported by credible evidence (although obviously where a judge has so erred or there is no credible evidence to support the finding the appellate court will interfere). Instead, the appellate court affords limited deference to the decision of the trial court by beginning its analysis from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and interfering with those conclusions only where it is satisfied that the judge has clearly erred in the findings*

made or inferences drawn in a material respect."

The Habitual Residence Ground

35. Neither the applicant nor the respondent took issue with the identification by the trial judge of the applicable law in the area. She had referred to the CJEU decision of *Mercredi v Chaffe* (Case C-497/10 PPU) and the Court of Appeal decision of *Hampshire County Council v CE and NE* (a recognition and enforcement of judgments case under Brussels II *bis*). Both of these cases were referred to by both parties in the course of the appeal; indeed, there was overlap in the paragraphs relied on by each side in the case law. Although the meaning of habitual residence is a matter of law, it is not defined in either the EU Regulation or the Hague Convention. Murray J., in A.K. v U. S. said that "[i]n interpreting the phrase, primacy must be given to the ordinary meaning of the two words comprised within it. Put most simply, a person is habitually resident where they live, where their stable home for the time being is located, where their social and family life is and where they are integrated into an identified environment (….). These are concepts that are universally understood and widely applied by ordinary people in their everyday lives. They should not in the bast majority of cases give rise to any difficulty of identification or analysis." The CJEU (and the courts in this jurisdiction) have developed a multi-factorial or hybrid approach to establishing a child's habitual residence. This is fully explained in the judgment of Whelan J. in the *Hampshire County Council* case and in particular in the 21 principles she identifies from the case-law.

36. The meaning of habitual residence that has been applied by the CJEU and in the courts of this jurisdiction has, as counsel for the father correctly stated, its origin in *A: Reference for a preliminary ruling Case C523/07* [2010] 2 WLR 527. The CJEU held that the concept of habitual residence for the purpose of Brussels II *bis* should normally

be given an autonomous and uniform interpretation throughout the European Union. It held that "habitual residence" of a child, within the meaning of Article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case. The Court summarised the factors that must be considered in determining habitual residence at para. 44:

> *"… the concept of "habitual residence" under article 8(1) of the Regulation must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."*

37. It is unnecessary to repeat the 21 principles identified by Whelan J. in *Hampshire County Council* save to say that she confirms that it is the habitual residence of the child (and not the parents) that is at issue and she includes that the court should consider the reasons for the parents' move to and the stay in the jurisdiction in question and that in evaluating whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up and assess the degree of connection which the child had with the State in which she resided before the move.

38. It is this latter part that causes a particular concern to the mother in her appeal to this court. Counsel for the mother submits that in her judgment the trial judge appeared to equate the time spent in Ireland with the time spent in Poland, pointing to the opening

paragraph of her judgment where it was said that Pawel "has lived in Poland and in Ireland". He also points to the report from the independent expert who records Pawel as stating on two occasions he *lived in Ireland* but only that he *moved to Poland*.

39. In my view, neither of these points are borne out on a consideration of the judgment. In the opening paragraphs, the trial judge was giving a brief summary of the facts to "set the scene" as it were. It is clear from the judgment when discussing the habitual residence, that the trial judge was well aware and had regard to the fact that Pawel had lived most of his life in Ireland. At paragraph 3.2 she says "The parties in this case, having married and settled in Ireland, separated some years ago. In 2021, the Applicant relocated to Poland, with his partner and their baby." It is obvious when she is dealing with the issue of habitual residence that she was well aware of the facts of the case. The reference to '*lived in Ireland'* and then to '*moved to Poland'* as reported by the independent expert simply records an apparent plain statement of fact; one lives in one country and one moves to another place. It is noted that the child is recorded as then saying he "lived with his mother" for a short time (in Poland) before he moved to Ireland. Pawel is simply stating in plain language what his living arrangements were at that time. The trial judge was also using plain and ordinary language when she described Pawel's living/movement patterns.

40. Of more substance, perhaps, is the mother's concern about the finding by the trial judge that the fact that his passport was "kept in Poland" provides mild support for the view that Pawel had relocated to Poland. In fact, the passport had travelled with him to Poland when he went with his father in July 2021; he had travelled there with his father and not the mother as stated in the judgment. At its highest however, I consider the issue of the passport as neutral to the question of habitual residence. The passport was unsurprisingly with the father because he was the one who travelled to Poland with

Pawel. The mother wanted the passport to be returned and relied upon a District Court order made in 2013 to demand it from the father. The facts had clearly changed since then and the father had the passport when he was the one who travelled with Pawel to Poland in July 2021. It must be said that the mother has never clarified what documentation was used to facilitate Pawel's travel back to Ireland with the mother in August 2022. Of importance here is that the finding as to the passport was not the main basis for the trial judge's determination on habitual residence. As it was really a neutral fact, it cannot be determinative of this issue.

41. Counsel for the mother accepts that the case law does not go so far as to say that the Court must find that Pawel's stay in Poland must have been intended to be permanent to amount to a habitual residence. Instead, it is argued that a weighing of the factors is at issue. Counsel submits that the judgment was too "Polish centric" and that little or nothing was said about the situation in Ireland before the move. While counsel accepts that in principle a habitual residence could in certain circumstances change almost overnight (see principle (xvii) identified by Whelan J. in *Hampshire County Council*), he submits this was not such a case on its facts. He refers to the fact that there was no real explanation why the mother would have ceded primary care of Pawel to her estranged partner and that this ought to have been given some prominence by the trial judge. Counsel also submits that registering Pawel for school was a responsible thing to do in the circumstances and therefore no inference as to habitual residence should be drawn from this registration.

42. Counsel submits that each of the matters set out in the *Hampshire County Council* judgment ought to have been referenced by the trial judge and dealt with accordingly. He referred in detail to those issues. He noted that no real consideration was given to the fact that Pawel was at least entitled to become an Irish citizen, that his friends were

here, that he found Polish difficult at a technical level, and that both sides of his family were present in Ireland until 2021.

43. Counsel for the father rejects the contention that the trial judge made any error in identifying the habitual residence of Pawel as Poland. It was a question of fact which, on the case law, she had correctly decided. This was not a stay of a temporary nature with no change of habitual residence. Counsel placed emphasis on the decision regarding schooling and the declarations in relation to it. A child can only have one habitual residence (see Case C-289/20 *IB v FA*) and the trial judge correctly identified it as Poland.

Discussion and Decision

44. The trial judge referred to the key factors set out by Whelan J. in *Hampshire County Council* in seeking to identify the habitual residence of a child, referring to the linguistic, social and familial circumstances in each case and the nationality of the child, along with the stability of the child's environment. In the course of her judgment, she covered these factors, noting that some may favour Ireland for example Pawel's linguistic struggle with schooling in Poland and the evidence that he had few friends in Poland.

45. The trial judge explicitly said that the social integration can determine a child's true centre of interests. She said that there were clear signs of integration in both places. She noted Pawel's strong family ties in both places being close to both his mother's new family and his father's new family. She noted the letters from the paternal grandfather and father's partner. While she gave little weight to them on the basis that they likely reflected the views of the father and were thus not independent, she found that they provided some support for the proposition that the applicant's view that Pawel was to move permanently to Poland was genuinely held.

46. The mother's complaints that the judgment was "Polish-centric" in its approach to habitual residence are not borne out. The trial judge was quite properly attempting to ascertain the links with the "new" jurisdiction of Poland. The judge was aware of and adverted to the fact that Pawel's life prior to 2021 was in Ireland. In many ways this was an unusual case in so far as the relevant parties, i.e. both parents and the child, all had a common nationality (Polish) and an agreed habitual residence in Ireland up to 2021. The real issue was what was the effect of Pawel's move to Poland in July 2021 (and in particular, the school registration in September 2021), his subsequent residence there until February 2022, and his return to Poland in May 2022 to Poland, on his previous habitual residence. It is not surprising in those circumstances that the focus of the judgment was on those issues.

47. A trial judge is not required to slavishly tick off a list of factors that have been identified as matters of relevance. It is important that the relevant issues are addressed. For example, in the case of *AK v US*, Murray J. at para 43 identifies the principles, from amongst the 21 set out in *Hampshire County Council*, which "*are particularly relevant in this case*". Perhaps one way of ensuring that a judge will examine all issues that a party considers relevant is for the parties to identify in submissions the precise factors outlined in *Hampshire County Council* they claim are relevant and to indicate why. I have noted that in the written submissions filed by the mother in the High Court, the decision in *Hampshire County Council* was not referenced, although it may have been in oral submissions. The salient question is whether a trial judge is alerted by the parties, in their respective submissions, to the relevant principles and factors by which it can then be adjudged whether a particular habitual residence has been established. Where there is a conflict of fact, that should also be identified in submissions.

48. What is primarily at issue in this appeal, however, is not that the trial judge failed to have regard to the key factors relevant to establishing habitual residence; rather, the mother's complaint is that the trial judge did not give enough weight to the issues she raised as supporting her proposition that Ireland remained Pawel's habitual residence.

49. Having reviewed the judgment, I am satisfied however that there was no error in the trial judge's inference from the primary facts and her assessment that the habitual residence of Pawel at the time of the removal was Poland. The trial judge was alive to the important facts of the case regarding the ties to Ireland and the ties to Poland and to the importance of an individualised case specific identification of those facts. In particular the facts of the case demonstrate that Pawel travelled to Poland as a 13-year-old boy with his father and his father's family at a time when that family were relocating to Poland from Ireland. The trial judge accepted, albeit she mistakenly identified the mother as having taken Pawel to Poland in July 2021, that the mother had not intended to move to Poland permanently but only for the duration of her mother's illness.

50. The trial judge found that a significant factor was the decision that was made to have Pawel registered with a school in Poland. He was registered for home schooling in September 2021 at the father's address. This was before the maternal grandmother died. It is not clear why such registration would take place if it was meant to be anything other than a commitment to have Pawel commence his education in Poland and for that purpose live with his father. Home schooling in Poland was taking place and it is difficult to see why Pawel would need to be so home schooled unless it was for the purpose of preparing him for schooling in Poland. I am not satisfied that the mother has sufficiently explained why, when she returned home in *September* i.e. before the maternal grandmother died, she did not bring Pawel back to Ireland with her. In my view it is relevant that the decision to leave Pawel in Poland was taken in

September, which was early in the school year, and this would run counter to the mother's argument that she did not want to disrupt Pawel's schooling. The trial judge's view that the agreement to have him home schooled is indicative that Pawel's move would be more permanent than his mother's move was one which was entirely open to her on the facts apparent from the documentation before her. It cannot be said that there is any error in the inference she drew. This was significant in the context of the overall assessment.

51. Similarly, the fact that Pawel travelled back to Poland in May 2022 for the purpose of, inter alia, completing his examinations was also significant. It was a commitment to the school system in Poland and consistent with habitual residence in Poland.

52. In terms of his integration, as stated above, the trial judge was well aware of his situation. She correctly identified that he was integrated in both places. His father and his young half-sister were living in Poland with their extended family. He had lived with them for a year. While he may not, perhaps due to his home schooling and limited period in Poland, have made friends equivalent in number and depth to those in Ireland, having grown up in the latter country, there was a significant degree of integration in Poland which was a factor that the trial judge had to take into account in terms of the habitual residence. The trial judge was alive to the fact that Pawel had more difficulty with technical Polish but that he was fluent in both languages. For the purpose of identifying his habitual residence, that specific linguistic imbalance was not and is not decisive in circumstances where his parents and extended family are Polish and he has a basic proficiency in the language. Furthermore, the fact that he had friends in Ireland could not of itself be a determinative factor as to whether his habitual residence had changed; such residence can change overnight in some circumstances with the result

that a child may not have had time to make any new contacts in his new place of residence.

53. Overall, I am satisfied that the trial judge gave consideration to all the main factors in her judgment and while there were a couple of misstatements of fact, there were no material errors made. She correctly identified the main factors relevant to a consideration of habitual residence. There is no error in the inference she drew as regards the habitual residence of Pawel.

54. This ground of appeal is dismissed.

A Case of Child Abduction

55. Having upheld the trial judge's finding that Pawel was habitually resident in Poland at the time his mother took him to Ireland, it is appropriate to address, in a separate section, the claim by the mother, in written submissions dealing with the child objection's appeal ground, that this was "not a case of an abduction in anything but the most technical sense of the word." Counsel for the father rightly takes issue with that characterisation of what occurred here.

56. The mother in this case took her child from Poland where he had resided (primarily with his father) for approximately eleven of the previous thirteen months. She did so where she knew the father was objecting; she accepts that the father was refusing to return Pawel's passport to her. Instead, she relies upon an older Order of the District Court which had said that the "passport of infant to be returned to mother". Time and circumstances had moved on since that order and she had clearly given that passport to the father so that he could travel with Pawel to Poland in July 2021. She never explains precisely what document was used, or how she came to have such a document, to enable Pawel to cross international borders.

57. This was a clear-cut case of child abduction and there can be no claim of "right" by the mother in these circumstances. Indeed, the mother was well aware of the existence of the Convention on Child Abduction, given that she had successfully resisted the father's application for Pawel's return to Ireland when the mother took him to Poland when he was an infant. Any explanation that she may have had for considering that Pawel had not acquired an habitual residence in Poland does not excuse a deliberate choice by her to take him from Poland without the permission of his father and without first seeking to resolve that issue in a court. Where the court has found there was habitual residence, this was nothing other than a very straight forward example of a mother engaging in removing her child from one jurisdiction in contravention of the child abduction Convention.

58. Counsel for the father correctly identified deterrence of child abduction as a policy of the Convention to which the Court must have regard when considering whether to exercise its discretion to refuse return based upon a child's objection. As the Supreme Court (Finlay Geoghegan J.) stated in *MS v AR* [2019] IESC 10 at para 56:

> "In exercising its discretion, a court must take care that is has regard to the fact that the jurisdiction to refuse to 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."

This was an issue that was at the forefront of the mind of the trial judge in ordering the return of Pawel to Poland.

The Views of the Child

59. Article 13 of the Convention allows the court to refuse to order return "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." The trial judge articulated in a commendably succinct manner, the three-stage approach that the Supreme Court *(MS v AR*) has laid down as the correct approach to addressing a claim that the child objects to return and therefore ought not to be returned. I will paraphrase that approach as posing the following questions:

a) *Has the child objected to return?*
b) *Is the child of such age and maturity that it is appropriate for the court to take account of those objections?*
c) *If the first two questions are answered in the positive, ought the court exercise its discretion in favour of retention or return?*

60. The second question is not at issue in this case. If Pawel has an objection to returning to Poland, he is of such an age and maturity that it is clearly appropriate for the court to take account of those objections.

Did Pawel object to return?

61. The first question arises from the cross appeal against the trial judge's finding that Pawel was objecting to his return. The father submits that Pawel was expressing no more than a preference to stay in Ireland and that the trial judge was wrong to say that the views, as recorded by the independent expert, amounted to an objection. Counsel relies upon the decision of the Court of Appeal in *JV v QI* [2020] IECA 302 where Whelan J. held that the language of Article 13 required an objection and that "In general, the expression by a child of a mere preference to remain with one parent is insufficient to meet the threshold. As had 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."

62. At what stage may a stated preference go beyond a "mere preference" and become an

objection? A helpful articulation of how to resolve this issue is to be found in the High Court decision of Ní Raifeartaigh J. in *ZR v DH* [2019] IEHC 775. She stated at para.17:

> *"Does what the boy stated about his wishes amount to a "preference" or an "objection"? Sometimes the difference between the two can be a fine one, but fundamentally it should not be an exercise in semantics; it seems to me that the difference between a preference and an objection is not so much about the type of words the child uses to the assessor but rather about the strength of the child's views. At one end of the spectrum, a child might have a fairly mild view that he or she does not wish to return, which would amount only to a preference, while at the other end of the spectrum, the child might have a very strong view that he or she does not wish to return, which could properly be described as an objection. The Court's focus should be on ascertaining the true will and desire of the child (and the strength or firmness of that desire) and should not become unduly fixated on the actual words used, because this could become an exercise in semantics which might focus too much on the words the child used. A child does not speak with the Hague Convention terminology in mind but rather is using language appropriate to his age, intellectual ability, articulacy and so on."*

63. It is a truism that each case turns on its own facts. The facts of *JV v QI* concerned the removal by a mother of her children, aged ten and seven years, from Belgium where they had spent most of their lives to Ireland. The mother had moved to Ireland, the previous year to pursue a new relationship. The removal was made in breach of a very clear court order to the contrary. Apart from the child objection point, the mother made a number of claims in the course of resisting the application for return, such as consent and grave risk which were rejected in the High Court and in the Supreme Court. The views of the

children in that case were put before the High Court in the form of an independent expert's report. The older boy (age 10 years) noted that he "said he would like to remain in Ireland but relating this to swimming in rivers". The expert was of the view that in light of his age, his responses would most likely be shaped directly or indirectly the parent in closest proximity. The boy was under the impression his father had consented to the move. The second child expressed the view that he was not happy in Ireland and he missed his father. He did give a reason for staying in Ireland; that he would learn another language. The expert concluded in respect of the younger child, that his expressed objections were unlikely to have been independently formed. Both the expert and the High Court judge found the stated objections to be "unconvincing".

64. The dicta of Whelan J. that these were expressions of no more than mere preferences must be seen in the context of the facts of the case. So too must her finding that whether one characterises the views expressed by the children as preferences or otherwise, it is clear having regard to the jurisprudence that the views expressed fell short of an objection to returning to Belgium.

65. The views of Pawel, then aged over 14 years, were expressed in an entirely different context. While it is slightly unfortunate that the assessor seems to occasionally paraphrase the views rather than quote them directly, which is best practice, the report is not deficient as a record of Pawel's views. Indeed, on many occasions, especially on important issues, the expert quotes Pawel directly. The answers to the opening question about the circumstances in which he was living prior to coming to Ireland in August 2022, while not quoted directly, are revealing. Pawel is said to have made a comparison of his experience of school in Poland with that of schooling in Ireland. He said that he struggled with reading and writing in school in Poland and found it generally difficult to engage with the Polish language in the educational context. When asked about the circumstances in which

he came to Ireland there is a direct quote as follows: "I flew back with Mum. I told my Dad I wanted to go back. "Are you sure" he said and I said ya, I've no friends. I'd say he was disappointed."

66. In terms of his circumstances in Ireland, he is recorded as saying he is positive about living here within his mother's family. He is positive about school and his friends. The report paraphrases him saying "that he missed his father adding that, if he had remained in Poland, he would have missed his mother."

67. When asked about his wishes regarding his future care and living arrangements, he said that he had lived in Ireland for most of his life and therefore wished to remain in Ireland with his mother, brother and two dogs. He was asked thereafter whether he has any objection to returning to live in the jurisdiction of Poland, his response is recorded as follows: "All my friends are here. I already left once, and some of my friends I know all my life…and I made new friends. I would have to leave my team. I would be sad to leave." Under his reasons for objecting he says that he has experiences having to leave Ireland and the friendships he had established once before and that he found the initial loss and the need for adjustment as a difficult experience. Having to leave his friendship group previously had made him sad.

68. When Pawel was asked if there was other information he may wish the court to take into account in deciding that he be returned to the jurisdiction of Poland, Pawel added that he would have more arguments with his father and with his step-mother and that he had no interest in the area of his father's employment who he said tried to coerce him into "doing that stuff". He re-iterated his wish to remain in Ireland.

69. It was the expert's view when addressing Pawel's objection, that Pawel was expressing a strong wish to remain in Ireland and be cared for by his mother. In relation to whether this was an objection to returning to the country or to the other parent, the expert says that

he expressed a wish to remain with his mother and said that Pawel emphasised the importance of his friendship grouping and not wishing to have this ruptured. He also expressed his view that he has spent most of his life in Ireland and finds Polish a difficult medium in which to be educated. The expert said there was no overt evidence of influence by either parent.

70. The trial judge was keenly aware that "objection" imports strong feelings going beyond a preference. She held that Pawel's views, as recounted, amounted to an objection rather than a preference as a matter of plain meaning. She said it was not simply a preference to stay but an indication of his objection to returning based upon his specific language difficulties and loss of friends together with family dynamics being more difficult in Poland. Counsel for the father submits that they did not have the necessary strength of feeling to amount to an objection. He emphasised that his only reference in response to a direct question about an objection was to say he would be sad to leave. It was submitted that there must be more than sadness to amount to an objection.

71. In my view there was no error by the trial judge in her assessment of the wishes that Pawel expressed which led her to draw an inference, and reach a conclusion, that he was expressing an objection to returning to Poland. The answers Pawel gave, when considered in the context of his age and maturity and the circumstances of the case, demonstrate that these views were far removed from the expressing of a preference, such as views expressed by the older child in the case of *JV v QI*. This was a boy of over 14 years expressing his views in a mannerly but nonetheless clear way. He was not required to recite the word objection, but it is clear that he first gave information as to his preferred place to live and when asked directly if he had an objection to return was able to reply with great clarity giving reasons for that objection. He made reference to his friends and to his sadness at having to leave them. It would border on an insult to a 14-year-old to say

that when he answered a direct question about whether he had an objection to returning to Poland with such a direct response that this was not the expression of an objection but was only the statement of a mere preference. In any event, if there was any doubt, he explained it further when he was asked specifically about the reasons for the objection where he repeated his concerns about loss of friendships and made reference to his previous experience. The trial judge correctly identified his expression of his wishes as an objection.

72. The father's cross-appeal on the point of whether the child had made an objection to returning to Poland is therefore rejected.

Did the High Court exercise its discretion correctly?

73. I turn now to the second issue of whether the trial judge correctly exercised her discretion to return Pawel to Poland notwithstanding that he had made an objection which was appropriate for the court to consider given his age and maturity. An initial disagreement between the parties on this appeal was whether the trial judge's characterisation of the objection expressed by Pawel as being *relatively mild* was correct. The father submits that in comparison to the type of objection in the case of *HSE v CB (a minor)* [2010] IEHC 322 which was in the *strongest possible terms*, the judge was entirely correct that this was mild. In that case, the views by a fifteen-and-a-half-year-old had been stated that she did not feel she had a future in the Netherlands. She did not want to go back as she could not speak Dutch anymore and she did not want to see her father anymore. She said it would make her sad and angry if she had to stay in the residential unit she had been staying in previously. She would run away if she had to stay there.

74. Counsel for the mother submits that it is difficult to understand how the clear and unambiguous objections voiced by Pawel can be characterised as relatively mild. The

mother's view is that this characterisation suggests that his views were neither equivocal nor indifferent.

75. In the present case, the trial judge used the phrase "mildly expressed" as well as saying that the objection was "relatively mild". My understanding of her focus at that point was on the *content* of what was said by Pawel rather than the particular way or manner that he communicated his views. It is true to say that objections can be expressed in a different manner by different children. Some children will be restrained in their expression while others may be more inclined to express opinions loudly or forcefully perhaps even by way of including some dramatic statements of intent. That may just be part of the personality of the child although occasionally the manner of expression may indicate the depth of the strength of feeling. That is something that a trial judge must be aware of when considering a child's manner of expressing an objection. There is nothing in the expert's report to suggest any particular manner in which the views were expressed. The trial judge was referring to the content.

76. Was the trial judge correct to characterise *the content* of the objection as relatively mild? It was certainly not an extreme objection or even a strong objection. This is because Pawel was not expressing an objection on the basis that a return to Poland itself was anathema to him. It was also not an extreme or strong objection to returning to his father *per se*. It was an objection based upon a firm articulation that he wished to remain in Ireland for clear, rational reasons. In comparison with the objections expressed by some other children in some other cases, it was a *relatively mild* one. The views expressed however were strong enough to go beyond a mere preference and to amount to an objection. The trial judge made no error in the inference she drew from the words expressed that Pawel was objecting to returning to Poland.

77. It is important to note that the trial judge correctly identified that even a relatively mild

objection must be given significant weight when expressed by an older child. That will be addressed further below.

78. Even if the objection can be categorised as relatively mild, was there any error by the trial judge in the exercise of her discretion to order return of the child? The exercise of discretion must be operated in accordance with the legal principles that have emerged from the case law. These principles are derived from the policies underpinning the Convention. On one view these policies might seem to be in tension, but it has been recognised that the discretion vested in a court to refuse to return on the basis of the objection of the child is also a policy of the Convention. As the Supreme Court (Finlay Geoghegan J.) identified in *MR v AR*:

> *"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."*

79. Thus, a court, in the exercise of its discretion following a child's objection, must be careful not to equate Convention policy only with the principle of prompt return. Instead, the court must be both alive to and sensitive to, the policy which gives it a discretion to refuse to return when a child objects. Of course, as the trial judge stated, the child's views are not determinative. The decision as to whether the child is returned is that of the court; the decision does not vest in the child. There are no presumptions acting against return merely because the child has made objections (see *MR v AR* at para 63).

80. In *MR v AR,* Finlay Geoghegan J. indicated that there were some general considerations

that must be taken into account, but she emphasised that each case was to be assessed *"having regard to the individual facts and circumstances of the child, the parents and other family circumstances"*. Great care therefore must be taken with general statements of policy.

81. At para 65 of *MR v AR*, Finlay Geoghegan J. went on to give general guidance as to how a court ought to exercise its discretion while noting that each case is decided on its facts. In this paragraph, the Supreme Court identified the reason *why* there was a balancing between those policies requiring return and the individual circumstances of the child who objects to return. The balancing is to determine "*what is, in the limited sense used, in the best interests of the child at that moment*." The Supreme Court said that the weight to be given to the general Convention policies favouring return and to the objection of the child may vary with time. The further one is from a prompt return, the less weighty the general Convention policies will be. Counsel for the father correctly identified promptness in court procedures as an important factor in the Convention policy and said that this case was not one to be determined on a delay basis such as the case of *DM v VK* [2022] IECA 207.

82. Counsel for the father also placed great weight on the final phrase of the final sentence of para 65 of the judgment of Finlay Geoghegan J.: *"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 and the discretion must be exercised with care, and in the best interest of the child, but not so as to undermine the general policy objections of the Convention, including deterrence of abduction"*. That is an important factor and one to which the trial judge had particular regard. It is appropriate to note that the reference to return as an *exception to the general policy* ought not to be seen as importing any test of exceptionality into the exercise of the discretion (see para 48

of the judgment of Finlay Geoghegan J. in *MR v AR*.)

83. In paragraph 94 of *MR v AR*, Finlay Geoghegan J. stated that *"the exercise by the Court ultimately of its discretion must be considered on all the evidence before the Court"*. Counsel for the mother submits relying on what is said in *MR v AR* at paragraphs 60 -65 that the judgment here does not make visible the weighing of factors. Counsel points to the case of *Youth Care Agency v CB*, where Birmingham J. in the High Court identified the *"powerful arguments and factors present that militate against …"* the objections of the child being returned. The child in the *Youth Care Agency* case was over fifteen years old but the facts were particularly striking. The child had been abducted by a person who was regarded as inadequate by the Dutch court, there were grave concerns about the child's circumstances (in the company of a twenty-one-year-old man with whom she shared a bed), for the past two years the child had no contact with the education system, and she had been encountered by Gardaí in the course of a major operation involving the Misuse of Drugs Acts. The order of return was upheld by the Supreme Court.

84. Counsel for the mother submitted that, while the exercise of a court's discretion must involve balancing the Convention principles (swift return, mutual respect/comity of courts, and deterrence against abductions) these factors ought to have been weighed clearly against factors relevant to the individual circumstances of the child and his best interests. According to the mother, there was no visible weighing of matters here.

85. Counsel for the father has made the argument that the judge, earlier in her judgment, had outlined the matters which were at issue and that the trial judge had been alive to them and had taken them into account. I agree that in many cases where the judge has referred to facts earlier in a judgment there is usually no necessity for them to be repeated. A perusal of a judgment as a whole can often demonstrate that facts have been taken into account. It is, however, more usual and appropriate for a judge who is embarking on a separate

aspect of the case, to incorporate facts found and considered by making some reference back to those facts or to the paragraphs or sections where they appear earlier in the judgment.

86. In the present case, the trial judge deals with the facts in seven short paragraphs (4.1 to 4.7). At 4.1 she deals quite correctly with the law and at 4.4 she rejects that the suggestion that Pawel has been coached. The two paragraphs that deal with his objection are set out above at para 18. Although the trial judge refers to the objectives of the Regulation, nothing arises from this. In these matters the Convention and Regulations objectives go hand in hand. The trial judge, having concluded in para 4.3 that Pawel was not coached, then addressed the issue of the discretion within two relatively short paragraphs which have been set out at para 19 above. She concluded this part of the judgment dealing with Pawel's objections, by stating at para 4.7 that: "The important objective of ensuring mutual respect of laws in contracting states is also upheld by ordering the return of Pawel".

87. In dealing with the views of Pawel, the trial judge appears to balance those views, described by her again as relatively mild, against the counter-balancing factors of the Convention/Regulation. Those paragraphs do not give a clear indication that the trial judge engaged with the purpose of that balancing act; to determine what is, in the limited Convention sense, in the best interests of the child at that moment. That exercise must be considered on *all* the evidence before the Court. Therefore, the task of the judge in the exercise of her discretion is not to weigh the child's views against the Convention principles or objectives that favour prompt return but to assess the individual circumstances of the objecting child in light of those principles and objectives which require return. This exercise must be carried out in light of *all of the evidence*. When one considers the exercise in that light it becomes clear why the child's views are not determinative. Those views are but one part of the assessment of the child's individual

circumstances which must be considered against the background of the Convention's policies and objectives. Thus, the fifteen-year-old child in the *Youthcare* case who strongly objected to return was none the less returned because of the assessment of the overall circumstances of the case.

88. The particular objective of the Convention/Regulation which is to deter child abduction rightly weighs heavily in the balance of the discretion here as does the policy of prompt return. The child's objection also has to be considered. All those things are of undoubted importance in the balancing exercise, but they are not the only matters. In one sense, it can be said that they form the outer ends of the balance beam, but a judge is required to move inwards from those set parameters and consider all of the relevant circumstances that need to be considered. Sometimes the relevant factors may be those factors which form part of the child's objections but, on many occasions, the relevant factors may include issues to which the child has not adverted. Either way it is important for a court to articulate the relevant circumstances that are being considered in the exercise of the discretion. Unfortunately, it is not apparent from the judgment whether all those circumstances were weighed in the balance.

89. In the present case there are factors which, if not militating in favour of a return to Poland, would at least not be detrimental to such return. Pawel speaks the language, he is a national of Poland, he has lived with his father's family in Poland previously and has attended school there for almost a year even if he was being home-schooled. He has extended family in Poland and has a degree of social integration there. He does not have an objection *per se* to being with his father (and his father's family including his own (half) sister), although he has a clear preference for living with his mother and (half) brother.

90. On the other side of the equation is the fact that Pawel was fourteen years and five months at the time he gave his objections. The upper age limit for return of a child under the

Hague Convention is 16 years and the closer one gets to that, the weightier the objection becomes. Maturity as well as age must also be taken into account, however. The report raises no doubts as to Pawel's maturity and, on the contrary, his level of maturity is underscored by the way in which he expresses his views. Furthermore, the contents of those views correctly demonstrate that he is of sufficient maturity to have them taken into account. His views must be given significant weight on account of both his age and maturity even if they are considered relatively mild objections.

91. The clarity with which Pawel expressed the objections and the rationale for his objections must be considered. They are perfectly understandable objections which go to central aspects of his life. He is a schoolboy who has spent almost the entirety of his life in Ireland being schooled in a school environment. He has experienced schooling in Poland and has said that he has difficulties in being schooled there in Polish. His everyday Polish is not sufficiently attuned to the technical language required for the Polish educational system. For a schoolchild that is significant. He is comfortable with being educated through English. What is also significant is that he made no friends in Poland, but he has friends in Ireland. He was in Poland for a significant number of months, but he does not appear to have developed any friendships there. In one sense that is not surprising because he was being home-schooled, but he does not appear to have developed friendships outside school through for example, sporting or neighbourhood events.

92. Allied to this is the fact that Pawel has already experienced the significant upheaval that a move from one country (and family) to another entails. He has articulated this in his objections to being returned to Poland. He describes that he found that to be a "difficult experience" and that being previously required to leave his friendship grouping as "making him sad". He also has expressed his desire to live in Ireland with his mother, his (half) brother and the two dogs.

93. These are all matters of significance in the context of Pawel's best interests (in the limited sense that the court considers best interests in a Hague Convention and Regulation case). It is important to recall that the courts of this jurisdiction are not being called upon to make a full welfare assessment of Pawel's best interests but to consider whether Pawel ought to be returned on a summary basis to Poland to await the full decision of the Polish courts on his residence or relocation. As this is a Brussels II *ter* Regulation case, the Polish courts will retain seisin of these decisions as they are the courts of the place of his habitual residence at the time of his removal.

94. Those are the factors that require to be considered. How ought the Court to exercise its discretion in this case having identified them? I consider the deterrence factor an important one, but it ought not to override *per se* the objections of a 14-and-a-half-year-old boy which are clearly and rationally expressed and which speak, in the particular circumstances of the case, to where in his best interests (in a limited sense) lie until a court can decide his case on a full welfare consideration. I have taken on board his integration in Poland and with his father's family. The weight however, that must be given to his objections to returning to Poland are such that it would not do justice to the Convention policy of providing for a discretion as to return where a child objects to ignore those objections, when considered against the backdrop of the entire circumstances that pertain here. Pawel is a mature fourteen-year-old who has lived most of his life in Ireland with his mother (and in later years with his (half) brother). He has already had the experience of one upheaval in moving from Ireland and his objections have a cogency and clarity that when considered in light of all the circumstances, persuade me that this Court ought not to order his summary return under the Convention. Any return to Poland ought to only be made after there has been a full consideration of the case by the Polish courts.

95. At the end of the hearing, we were informed that the father had made such an application

in the Polish courts. Unless agreement is reached between the parties, those proceedings ought to be brought on as quickly as possible. As the Court has refused to return the child to Poland on the basis of Article 13(2) of the Hague Convention, this Court shall issue a certificate using the form set out in Annex 1 of the Brussels II *ter* Regulations. In circumstances where the child was habitually resident in Poland immediately before the wrongful removal, the certificate shall be transmitted to the court in Poland which is seized of matters relating to the custody of the child.

96. The ground of appeal of the mother that the trial judge wrongly exercised her discretion in not refusing to return Pawel to Poland based upon his objections will, in the circumstances of this case, be allowed.

Conclusion

97. For the reasons set out in this judgment I have concluded that:

a) The trial judge correctly held that Pawel was habitually resident in Poland at the time of his removal by his mother.

b) The trial judge was correct in holding that Pawel objected to his return to Poland.

c) The appeal is to be allowed on the basis that Pawel's return to Poland ought to be refused in the exercise of the Court's discretion to refuse such return in light of Pawel's objection to return on a consideration of all the evidence even when balanced against the policies and objectives of the Convention/Regulation which favour prompt return and the deterrence of child abduction.

98. As is usual in Hague cases where each party is represented by the Legal Aid Board, I propose to make no order as to costs. If either party wishes to contend for a different order as to costs, then they must notify the Registrar within 7 days of this judgment and a brief hearing for costs will be arranged.

99. Ní Raifeartaigh and Faherty JJ. have read this judgment in draft and have authorised me to indicate their agreement with the judgment and the proposed order.