

THE HIGH COURT

FAMILY LAW

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

AND

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION SIGNED AT THE HAGUE**

AND

IN THE MATTER OF COUNCIL REGULATION (EC) NUMBER 2201/2003

AND

IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

AND

IN THE MATTER OF A, B AND C, MINORS

**(CHILD ABDUCTION: DELAY, ACQUIESCENCE, BEST INTERESTS,
DISTINGUISHING BETWEEN SIBLINGS)**

[2022] IEHC 252

[2020 No.3 HLC]

BETWEEN:

D.M.

APPLICANT

AND

V.K.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 5th day of April, 2022

1. Introduction:

1.1 This is a case in which the Applicant father seeks an order for the return of his three children who were removed from Hungary in 2019, while he was serving a prison sentence. He has custody rights in respect of the eldest children, A and B, and it is argued that the Court

must summarily return these children pursuant to Child Abduction and Enforcement of Custody Orders Act of 1991 and Regulation 2201 of 2003, which implement the objectives of the Hague Convention on Child Abduction [The Convention] in Ireland, and that the third child, C, should also be returned as it would not be in the interests of the children to separate them. The Respondent replies to the effect that the Applicant was not exercising rights of custody as he was in prison and that his application, albeit within one year, was so late and so delayed in terms of its progress as to amount to acquiescence. She argues that the children are now so well settled in Ireland, that delays in the proceedings have led to a situation in which it would be unfair to move them and that there is a grave risk of harm to them if they are returned. The Respondent also relies on the views of the older children, concluding that they have objected to being returned and that this too should persuade the Court to exercise its discretion not to return any of the children.

1.2 The eldest children, A and B, born in 2009 and 2012 respectively, lived in Hungary continuously from 2015 until their removal to a third state and then to Ireland. The third child, C, was born in 2016. The father of C was not identified on her birth certificate. A DNA test completed in 2020 confirmed that the Applicant is her father and the law in Hungary provides that as of the date of confirmation and prospectively thereafter, but not retrospectively, the Applicant is recognised in law as a parent with rights of custody. In respect of C, therefore, the Applicant did not have rights of custody for the purposes of the Convention at the relevant time, which is the time of removal in 2019.

1.3 It was submitted that since child C cannot be the subject of a summary return as envisaged by the Hague Convention, the other children should not be separated from her. Finally, the Respondent concludes that as the Irish Constitution guarantees the rights of C,

which should be determined by the courts in Ireland, this decision takes precedence over the requirements of international and EU law and her fate should be decided first and should determine that of her brothers, who cannot be returned if she is not to be returned. The Respondent concludes that none of the three should be returned to Hungary on any one, or on a combination, of the bases outlined above.

2. Factual Background:

2.1 The Applicant is a Hungarian national and the Respondent is from a third European Union member state where the older children were born. The parties have been in a relationship since May of 2007. The child A was born in 2009 and B was born in 2012. In 2014, while the Applicant was serving a prison sentence, the Respondent removed the children to England without the Applicant's consent. The Applicant commenced legal proceedings pursuant to the Hague Convention and the Respondent voluntarily returned on the 28th of November of 2015. The parties resumed their relationship and lived together until the Applicant was imprisoned again in 2018. This family unit in Hungary comprised the parties, their children, and three other children of the Applicant's from a former relationship. C was born in mid-September, 2016. DNA testing, carried out during the course of these proceedings, confirmed that the Applicant is the biological father of C.

2.2 In 2018, the Applicant was sentenced to two years' imprisonment. While the Applicant was serving this prison sentence, the Respondent made arrangements to move to Ireland, where her mother lives. The details as to why she first went to, and then left, her native country are in dispute and it is not necessary for the purposes of this case that this dispute is resolved. The move was made without the knowledge or consent of the Applicant and this is accepted. In March of 2019, the Respondent travelled to her native country. In

June of 2019, the Respondent and the three children travelled to Ireland where they remain. Until that time, none of the three children had been to Ireland. The Applicant did not know of, or consent to, either move.

2.3 It is accepted by both the Applicant and the Respondent that the legal position in relation to the youngest child, C, differs from that of her brothers. This Court will deal with the position of each child separately and then consider the question of what orders will best vindicate the rights of all three children.

2.4 In this case, as often occurs in cases taken under the Hague Convention, Regulation 2201 of 2003 [the Regulation] and the relevant Irish legislation, there are many allegations and counter-allegations which cannot be the subject of rulings by this Court. This is not a welfare hearing in which all such matters must be considered and decided, nor is it a case in which the relevant evidence was tested so as to enable such rulings to be made. Here, the Court has a binary decision to make: return or not, in respect of all three children. The parties were expressly asked to address the recent case of *A.K. v U.S.* [2022] IECA 65, which also involved three siblings, and there was no submission to the effect that the children should be separated, indeed the dicta in that case suggest otherwise. The family unit should be considered and not just each individual child in a vacuum, so to speak.

3. Procedural Background:

3.1 After the removal of the children in March 2019, the Applicant completed a Request for Return form as provided by the Central Authority of Hungary on the 6th of July 2019. The requesting authorities included the Respondent's native country, Ireland, and England as the Applicant was unaware of the children's whereabouts. On the 29th of November 2019, the

Hungarian Central Authority contacted the Irish Central Authority seeking assistance in relation to the matter. The Special Summons was issued on the 26th of February 2020.

3.2 According to a chronology provided by the Applicant, which was not agreed but is in line with the Court file in this regard and in respect of which no contrary evidence was brought to my attention, arrangements to facilitate a DNA test in respect of the child, C, began in November 2020 and concluded in September 2021. There was no agreement as to Hungarian law in respect of rights of custody and an Affidavit of Laws was obtained in respect of which the Certificate is dated the 29th of November 2021.

3.3 On the 25th of November 2020, the Court made an Order for the assessment of the two eldest children, A and B, to afford them the opportunity to express their views and to be heard in the proceedings. This took place on the 5th of December 2020 and the report of the court appointed assessor, Mr van Aswegan is dated the 13th of December 2020. In light of the delay in the proceedings, a second assessment of the children was conducted one year later, by the same assessor, the report of which is dated the 22nd of December 2021. The DNA test and the affidavit of laws process combined took an inordinate amount of time.

4. Purpose of the Hague Convention and the Regulation:

4.1 The purpose of the Hague Convention as outlined in Article 1 of the Convention is *“to secure the prompt return of the children wrongly removed or retained in any Contracting State and to ensure that rights of custody and of access under the law of one Contracting State is effectively respected in the other Contracting States.”* The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents, and to mitigate the damage sustained to the child’s relationship with the other parent by returning

the child to her home. There, the courts where the child lives and where her school and medical records are held, and where witnesses are readily available, can make decisions about her welfare with the best information available. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing a summary remedy against those who seek to take the law into their own hands.

4.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respectful nations. This international agreement addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

4.3 The Regulation came into force in 2005, and is directly applicable in Ireland, not requiring domestic implementing provisions. Article 8(1) of the Regulation provides that the courts of the country of habitual residence of the child have jurisdiction in matters of parental responsibility. Article 10 provides that jurisdiction in cases of child abduction remains with the courts of the Member State where the child was habitually resident immediately prior to removal, until one or more specific events occur. This is discussed further, below. Article 11 prescribes conditions which must be followed to obtain the return of a child that has been

wrongfully removed or retained in a Member State other than that of her habitual residence. In most respects, it mirrors the provisions of the Convention.

5. Wrongful Removal: Habitual Residence and Rights of Custody

5.1 For the removal of a child to be considered wrongful pursuant to Article 3 of the Convention or under the Regulation, it must be shown that removal was in breach of the Applicant's rights of custody under the law of the State in which the child was habitually resident immediately prior to the removal, and that, at the time of removal, the Applicant was exercising rights of custody in respect of the child.

5.2 For the purposes of Article 3, the facts in this case indicate that the habitual residence of the children immediately prior to their removal was Hungary. It is accepted that the children spent a period of time, approximately three months, in a third country prior to their arrival in Ireland. But it was not suggested that this changed their habitual residence. The evidence overwhelmingly points to the conclusion that all three children were, at the time of their removal to Ireland, habitually resident in Hungary.

5.3 On foot of this finding, the Court must consider whether the removal was in breach of the Applicant's rights of custody under the law of Hungary. Article 4 of the Convention defines custody as including "*rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence*". The Certificate of Law sets out the relevant provisions in Hungarian Law and it is not in dispute that in Hungary, when a person formally acknowledges the paternity of the child, that person obtains custody rights in respect of the child. The acquisition of parental rights is prospective from that point and, here, in respect of child C, those rights were acquired during these proceedings.

5.4 The Applicant formally acknowledged the paternity of A and B at the respective dates of registration of their birth certificates. Therefore, at the time of removal from Hungary, the Applicant enjoyed custody rights in respect of A and B. If he was exercising his custody rights, the removal of either child by the Respondent without the consent of the Applicant is a breach of Applicant's right to determine the child's place of residence.

5.5 The Applicant was not named on the birth certificate of the youngest child, C. Paternity in respect of C was established, and thus legally acknowledged, in September 2021, after a DNA test. Therefore, at the time of removal from Hungary, the Applicant did not have custody rights in respect of C, and the removal of C from the jurisdiction of Hungary was not wrongful within the meaning of Article 3 of the Convention.

5.6 Returning to A and B, the final criterion to be satisfied for the purposes of proving wrongful removal pursuant to Article 3 of the Convention is to show that the Applicant was *exercising* custody rights in respect of the two eldest children at the time of removal. The Respondent submits that due to the Applicant's incarceration at the time of removal, the Applicant was not exercising his custody rights in accordance with Article 3.

5.7 The Supreme Court addressed the question of whether an Applicant who is serving a prison sentence can be said to be exercising his custody rights in *M.S.H. v L.H.* [2000] 3 IR 390. That Court confirmed that the burden of proving that custody rights were not being exercised lies with the Respondent and "*must be clearly and unequivocally established*".

5.8 In the words of McGuinness J. in *M.S.H. v L.H.*:

"There are many circumstances in which one parent may have a low level input into the day to day physical care of a child. It could not be that that fact alone would deprive that parent of a

legally established right of custody. Still less could it be right for this court to hold because a parent is serving a term of imprisonment he or she is divested of a legally established right to custody of his or her children.”

5.9 This same reasoning is applicable here. It was not seriously disputed that the Applicant had contact with his children, albeit restricted by his incarceration. The Respondent bears the burden of showing a failure to exercise custody rights and she has not done so here. The Respondent relies on the case of *M.J.T. v C.C.* [2014] IEHC 196, in which Finlay Geoghegan J. found that the Applicant was not exercising rights of custody. But that Applicant had failed to contact his daughter in any way over a period of years, despite being at liberty. The facts in *M.J.T.* are entirely different to those outlined in this case; this case is comparable to the *M.S.H. v L.H.* case and the latter is the appropriate precedent to follow. Despite submitting that it is incredible that the Applicant would have a phone in a prison and that he could not have been earning money, it is nonetheless not asserted or submitted that he cut ties with his children and the Respondent herself acknowledges that he spoke to the children every week on the phone, albeit for a short call. There is no suggestion that he abandoned them and it is not contended that he made no contact with them while incarcerated.

5.10 Therefore, this Court concludes that child A and child B were wrongfully removed from Hungary, their jurisdiction of habitual residence at the time of removal, in breach of the Applicant's custody rights in circumstances where the Applicant was exercising these rights. However, as the Applicant did not possess custody rights in respect of child C at the time of removal, it cannot be said that child C was wrongfully removed from Hungary, within the meaning of Article 3 of the Convention.

6. Grave Risk

6.1 Where grave risk is raised as a defence, a court must consider whether the allegations, if true, justify a decision not to return the child. It must be noted that here, as in most such cases, the allegations are denied. It must also be emphasised that this Court has not had the opportunity to hear the parties and to assess their evidence after it had been tested by cross-examination, so this exercise is not one in which the issues of fact can be decided definitively.

6.2 In this context, the Applicant based one of the arguments on the contents of an open letter, then sent to the Court, in which negotiations as to the settlement of the case were set out. The possibility of reaching parental agreement in a case of this nature is, and must usually be, the ideal outcome for the children involved. The encouragement of negotiation, mediation or any form of dispute resolution is an important objective of most courts and it is certainly a primary objective in this Court, particularly in this list which involves decisions which bear on where children will reside. Bearing all these matters in mind, this Court does not place much weight on the contents of the letter in question, written (as it was) in the hope that the matter might achieve an amicable solution. While the letter was expressed to be an open letter, it is nonetheless so important that parties engage in such talks that I am loathe to place much weight on statements or positions adopted in that, very different, context and apply them to the interpretation of evidence in the case itself. Whatever about the issue of what might be mooted as part of a negotiation, it is clear from the affidavits that three children of the Applicant's previous relationship reside with him. This fact alone provides, in my view, some indication as to his intentions and ability as a father and is to his credit.

6.3 Turning to the alleged risk, this is based on what may be anticipated if historical reports are accurate, and is a risk of violence to the Respondent and not to the children. While

the issue of whether or not a child is a witness to violence is an issue of great concern, it is not, in itself and without evidence of more serious risk such as previous psychological injury, sufficient to prevent a summary return to the left-behind parent. This is not only to vindicate the Applicant's rights but to ensure that the children have a relationship with their father.

6.4 In *R v R*, [2015] IECA 265, the Court of Appeal commented on the concept of grave risk as follows:

"The onus is on the Mother, in relation to this defence, to establish that there is a grave risk that the return of the boys to Germany would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It is well-established on the authorities that the test is a high one: A.S. v P.S. (Child Abduction) [1998] 2 I.R. 244, per Fennelly J. at para. 57. Where, as in this instance, one of the risks being referred to is a risk of physical or psychological harm of the boys, it is also clear that the courts in this jurisdiction will normally place trust in the courts of the country of habitual residence to be able to protect the children, and indeed, the mother, from any such harm. This is particularly so where the state of habitual residence is a member of the European Union and Article 11 of Regulation 2201/2003 applies to the return."

Concluding, at para 55, that:

"Even if the allegations of the Mother in relation to the historical situation are proven to be correct (and the Court is not indicating that it accepts or rejects them), the Court has concluded that the trial judge was correct in determining that the return of the children with the Mother, in circumstances where the Father agreed to vacate the prior home were such that the return could not be considered as constituting a grave risk to the boys of physical or psychological harm. The Mother has been and is their primary carer, and she, with the assistance of the

German authorities and courts, if necessary, is in a position to protect them on return in such factual circumstances.”

6.5 The Respondent confirms that the Applicant was not physically violent to the children. The Respondent alleges that the Applicant had been violent to her in front of the children. The Applicant denies the allegations. While there were no domestic violence proceedings in Hungary, the assessor’s evidence in this respect is relevant in that he formed the view that child A had witnessed domestic violence. To her credit, the assessor also commented that it was absolutely not his view that the children were influenced by the mother relaying a false history to them. However, his report had a different focus and was not directed at an enquiry into these allegations, so this is not definitive evidence of such events. For the purposes of this argument, it is sufficient to consider whether, if true, the social services in Hungary are capable of responding appropriately to such events.

6.6 The Applicant has agreed that the Respondent and children can return to live in their previous residence and he undertakes to vacate the premises upon their return. On the evidence before this Court, and thanks in part to this undertaking, there is insufficient proof that due to alleged previous incidents involving the mother, the children will be exposed to a grave risk of harm, should they be returned to Hungary, that could not be addressed by the relevant authorities and child protection services in Hungary.

7. The Defence that a Child is Well Settled

7.1 If an application is not made within a year of removal, a court can consider whether or not the child has become so well settled that it should exercise its discretion not to remove the child. This application was made within one year. The Respondent herself concedes that

settlement is not “*technically available*” but argues it nonetheless. If a defence is not available under the Convention, it is not available.

8. Summary Return pursuant to Article 12 of the Convention and Habitual Residence

8.1 Article 12 of the Convention requires a summary return in circumstances “*where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention*”. Article 12 is not absolute as the defences provided for under Article 13 give the Court a discretion in respect of the order to return. Further, and in addition to Convention rights, the Regulation provides a mechanism, under Article 11, whereby the courts in the country of origin retain a jurisdiction to revisit an order not to return a child.

8.2 It has been established that the children were habitually resident in Hungary at the time of removal. However, the Court has been asked to consider whether, looking at the wording of the Regulation, the children have acquired a new habitual residence.

8.3 Article 10 of the Regulation states:

“In cases 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, institution or other 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 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 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 the 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."*

8.4 As appears from this provision, the Hungarian courts retain jurisdiction unless a new habitual residence is acquired *and* the left-behind parent acquiesces in the child's removal *or* if the child has been here for over a year and no application for return has been made *or* a request made has been withdrawn *or* either a custody decision handed down *or* an Article 11 custody enquiry closed. None of the latter three conditions has been met in this case in respect of A or B. Absent acquiescence, any habitual residence acquired in Ireland on the basis of

Article 10(b), on the wording of the Regulation, does not oust the jurisdiction of the Hungarian courts in respect of A and B.

8.5 In respect of the question of acquiescence, to paraphrase Lord Browne-Wilkinson in the House of Lords judgment in *Re H (Abduction: Acquiescence)* [1998] AC 72, whose summary of the law on acquiescence was adopted by Denham J. in *R.K. v J.K. (Child Abduction: Acquiescence)* [2000] 2 IR 416 and approved in numerous other Irish Superior Court decisions, the question of whether the wronged parent, the Applicant, has acquiesced in a child's removal depends on his state of mind; it is not a question of examining the abducting parent's perception of his conduct but whether he acquiesced in fact. The burden of proof lies on the abducting parent i.e. the Respondent. In considering this question of fact, a court will be inclined to attach more weight to contemporaneous words and actions than to assertions in evidence of the Applicant's intention. Where words or actions clearly show that the abducting parent was led to believe that the Applicant would not assert his right to summary return, justice requires that he be held to have acquiesced.

8.6 The Supreme Court in *P.L. v E.C.* [2009] 1 IR 1, held that the '[t]he Hague Convention contains no provision permitting refusal of return on the ground of delay simpliciter'. In *F.L. v C.L. (Child Abduction)* [2007] 2 IR 630, on which the Respondent relies to persuade this Court that the Applicant acquiesced, the delay between the wrongful retention and the commencement of proceedings was only 10 months, however the facts were very different. There, Finlay Geoghegan J. commented as follows:

"...The object of an immediate return requires both that the wronged parent make a prompt request for the return of the child and that the national authorities and courts adopt expeditious procedures. Whilst article 12 applies to proceedings commenced within one year this does not

mean that a parent is permitted to delay commencing proceedings until shortly before the expiry of the year. As is clear from the above decisions, a parent may be found to have acquiesced within the meaning of article 13 through inactivity.”

8.7 The applicant in that case, however, had visited the children in Ireland and he and the Respondent had other contact including requests for access and an application for a barring order, before there was any indication to the Respondent that the Applicant would request the return of his children to Northern Ireland. That situation, one of ongoing contact without mentioning abduction proceedings, can be distinguished from the facts of the instant case in which the Applicant was in prison, there was no contact between the parties and he appears to have given no indication that he consented to or acquiesced in the removal of his children. In circumstances where the Respondent bears the burden of proving acquiescence, she has not done so in this case.

8.8 The Respondent submitted that because the Applicant’s proceedings were formally commenced in this jurisdiction very shortly before the end of the one-year period, which is the basis for a summary order of return, that this in itself amounts to acquiescence and accordingly, the circumstances of the children since coming to Ireland may be taken into account. This alone does not constitute proof of acquiescence. However, the Respondent relies further on the delays within the proceedings.

8.9 The Respondent, who bears the burden of proving acquiescence, points to two factors in particular: she notes what is referred to as a failure to submit papers to the Central Authority and the fact that the replying affidavit (sworn in October) was served in November, seven months after the Respondent’s substantive draft reply was received. The Applicant knew of the children’s removal from Hungary in March 2019, and his Request for Return

acknowledges that he believed they were in Ireland by that summer. The Applicant signed his Request for Return on the 6th of July 2019, some three months after he learned of the removal. It does not bear a date stamp in respect of receipt and there is no evidence that it was sent to the Hungarian Central Authority at that time. The first evidence of the Central Authority having received the request is a letter dated the 29th of November 2019. As the Respondent puts it, the Applicant's evidence does not disclose any other steps until the commencement of the proceedings on the 26th of February 2020, over 11 months after the removal. However, there is and was no indication to the Respondent that the Applicant acquiesced during this time. Further, the child A told the Court-appointed assessor, in his first meeting with him in 2020, that his father kept searching for them. He did not elaborate on that comment, but it mitigates against an impression that the family expected to remain, without objection, in Ireland. I do bear in mind that it was a comment made in the context of a question about the initial move to Ireland and is unlikely to shed much light on the Applicant's views throughout the following year.

8.10 As a matter of fact, given the initial date on his request for return in July 2020, and this comment from his son, there is sufficient evidence of a consistent attitude of objection on his part. It is the Applicant's state of mind which is relevant, absent evidence that the Respondent was led to believe that there was acquiescence which is not in issue here. The Respondent avers that the Applicant does not appear to have contacted or tried to contact her although he did have a contact number for her, but this does not assist in deciding on his state of mind in circumstances where, while he was in prison, his partner removed his children from the country for a second time and went to a country peripherally connected with the family,

through her mother. He made no request to her for the return of the children until she received the pleadings at the end of February 2020.

8.11 Since the commencement of the proceedings, the Applicant has not acted with the speed that might be expected, but neither has the Respondent. The Respondent served an unsworn copy of her replying affidavit in April 2020. The Applicant's affidavit in reply was not sworn until October of 2020. Arrangements were then made for the assessment of the children and a DNA test to establish C's paternity. This last step was required by the Respondent's averment that she did not accept that the Applicant was C's father. In particular, she averred that she had left England in November 2015 and thought at that time that she may be pregnant. Given that C was born 9 months and two weeks later, and with no suggestion of her being overdue, this averment does not carry great weight with the Court. In other words, she was born almost exactly 9 months after the parties in the case reconciled and resumed their relationship. The child was treated in all respects as the Applicant's child. The process of obtaining a DNA result took almost a year. Despite the pandemic, then still ongoing, this was more than unfortunate and was not a delay caused by the Applicant.

8.12 The Court was asked to obtain an affidavit of laws as a consequence of the DNA results which led to another, albeit shorter, delay. As a result, the children have now been in Ireland for three years, one before and two after the first application to this Court. The facts do not suggest active or passive acceptance of the changed circumstances. Instead, they suggest that the Applicant did not move with great dispatch, but not to the extent that it is inconsistent to allow him to rely on the Convention and to find that he is bound to accept this unilateral move to Ireland. The Respondent has not established acquiescence on the part of the Applicant.

9. Views of the child

9.1 Even if the Applicant has, otherwise, made his case for summary return, if either child objects to being returned and is of sufficient maturity that the Court should consider his views, the Court retains a discretion as to whether or not to return the child. Each of the two boys has been assessed twice by the court-appointed assessor, Mr. van Aswegen.

9.2 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if the children do in fact object and, if so, what the weight of the objection is given the maturity of the children. Finally, if established, the Court will consider if an objection is sufficient to outweigh the counter-balancing objectives of the Convention.

9.3 Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is very important to consider the views of the child and whether or not they may influence the Court to take the exceptional step of refusing to return a child.

9.4 Here, child C cannot be the subject of a summary return order whereas her two brothers, A and B, by strict operation of the Convention rules, should be, unless the Court is persuaded that their objections ought to prevent their return. All three fall into the category of cases where the return is no longer what is envisaged by the Convention or the enabling legislation: it is too late to constitute the kind of emergency remedy required in such cases.

9.5 In an argument related to that of acquiescence, which defence has already been dismissed on the facts of the case, the Respondent points to in *Re D (A Child)(Abduction: Rights of Custody)* [2006] 3 WLR 989 to submit that these children have now been here so long that,

even if a return is otherwise indicated, the Court should refuse such an order in the best interests of the child. The law does not appear to permit the exercise of that kind of general discretion but the time period and all surrounding facts have a bearing on the interests and views of the children. *Neulinger* is referred to by the Respondent in this context also. This was a decision of the Grand Chamber of the European Court of Human Rights, *Neulinger and Shuruk v Switzerland* [2010] ECHR 1053. Paragraphs 145 and 146 are relied upon:

“...in order to assess whether Article 8 has been complied with, it is also necessary to take into account the developments that have occurred since the Federal Court’s judgment ordering the child’s return...If it is enforced a certain time after the child’s abduction, that may undermine, in particular, the pertinence of the Hague Convention in such a situation, it being essentially an instrument of a procedural nature and not a human rights treaty protecting individuals on an objective basis.

.....it is necessary to take into account the child’s best interests and wellbeing and in particular the seriousness of the difficulties which he or she is likely to encounter in the country of destination and the solidity of social, cultural, and family ties, both with the host country and the country of destination. The seriousness of any difficulties which may be encountered in the destination country by the family members who would be accompanying the deportee must also be taken into account”.

9.6 The facts of *Neulinger*, which led to these remarks, were stark indeed. A child who had been abducted in 2005 was not discovered in Switzerland until 2006. His father had become a member of what was described by the Grand Chamber as a group known for its zealous proselytising. The kind of conduct involved in the case can be gleaned from reports set out in the judgment in which that applicant was requested not to take his son to a public

highway to preach and collect donations, not to take him to the synagogue for the entire day, and restricting his access to his son to two visits a week. He had blamed the respondent mother for medical conditions suffered by their son, including glandular fever. An early custody hearing in Israel determined that the couple could not live together, their relationship was so acrimonious and finally, there was evidence that the toxic atmosphere described was created by the applicant. In that case, the respondent had suffered from depression as a result of the applicant's conduct and the Grand Chamber had psychiatric evidence before it of potentially grave risk of her suffering from a psychological illness should she be required to return. The applicant had been in two relationships since the child was removed, in respect of which one had taken court proceedings to enforce maintenance obligations. The child did not share a language with his father, having left Israel as a baby, and now only spoke French.

9.7 The most significant delays in this case coming to hearing were the initial response from the Central Authority in Hungary (a delay of about 8 months), the DNA test, required by the Respondent, and the Affidavit of Laws, which last two items together took over a year to produce. The Respondent argues that the children have no family or other support in Hungary and that they do not speak the language but until they were moved to Ireland, Hungarian was the language spoken by all three, as noted in the initial request in July 2019.

9.8 On the facts, the salient features of the case appear to be as follows:

- (a) The two boys are in school, they are happy, and they do not want to return to Hungary.
- (b) While initially not fluent in English, both now speak it well, B speaks it fluently.
- (c) They describe friends and social activities in Ireland and A mentions the third country where they stayed before the latest move to Ireland in more positive terms than he describes Hungary. B can barely remember earlier homes in these countries.

- (d) The Respondent has facilitated weekly contact between the Applicant and the two boys, she also provides interpretation as the older child's Hungarian is rather weak.
- (e) A comment in the report suggests that A has heard a narrative, and has an understanding shared within the family about why his sister has a particular injury.
- (f) While A recalls violence on the part of the Applicant, neither boy describes him in particularly negative terms.
- (g) The assessor confirmed in evidence that the children appear to have been exposed to domestic violence, which he described as chronic domestic violence and he recommended that they be referred to social services. This view was one that he formed after speaking to the boys but not to either parent.
- (h) A wants to continue contact with the Applicant, B is relatively positive about him.

9.9 The assessor's evidence about their relationship with their dad is worth referring to. The summary is from my note and, while not verbatim, it conveys the tenor of the evidence:

[In the] second report it struck me that the boys did indeed value contact with their father – even where there were barriers in respect of language, it seems that the barrier was more a barrier of language not contact with dad. If there is disintegration in a relationship, there is usually some level of anxiety and avoidance relating to them feeling that the parent could be angry with them; I did not see that here. They are more inclined, particularly A, to engage with him. B, which one would expect for his age, might expect friends to be more engaging than a call with his father.

9.10 Asked to comment on the position of the children if not returned, the assessor responded:

I think we find more and more, where parents live in different countries, we need to find a way of managing the relationship between child and absent parent. It is important, if one is keeping ongoing contact with video, that parents must make it attractive for the children – he may play an online game with child, read a story, capture the attention weekly. One way that contact needs to be kept alive is physical visitation and that should happen over a weekend.

9.11 The assessor concluded that this kind of level of contact is sub-optimal and that A made it very clear that the amount of contact he wishes for is limited, B did not want visits but had a positive view of him and also said that his mum liked it when he talked to his dad. The assessor concluded that supervised access was a good way to build confidence and that, where parents are separated, one cannot achieve optimal scenarios for either parent or the child; the relationship is inevitably *fragmented*. He also commented on the closeness of these children to their mum in the context of

what this family experienced, a series of significant life events, one is the jailing of their father. Second is move to [a third country], she brought them to England then Ireland, each is significant for adults and children alike.

9.12 Asked about whether or not their responses to him constituted objections to returning, the assessor said that in his view, they were indeed. I agree with this conclusion, given the responses of the children to questions about how they would feel about returning to Hungary. The question that must now be addressed is whether these objections are sufficiently weighty as to persuade a Court not to order the summary return of children who should, on every other available defence, be returned forthwith.

9.13 It is clear that both A and B have objected to returning to live in Hungary. In terms of their age and maturity, I am satisfied that it is appropriate to take their objections into account and I do so. Their objections appear to have been independently formed and are based, in part, on their unwillingness to be separated from their mother and in part on their enjoyment of life in Ireland, including friends, activities and current family life with their sister and the Respondent's partner, who has resided with them since they came to Ireland, according to A.

9.14 The final limb of this test is to decide what weight to place on the objections and whether or not the objections outweigh all the other factors in favour of return.

9.15 Using the test set out by Finlay Geoghegan J. in *C.A. v C.A. (otherwise CMcC)* [2010] 2 IR 162, the objection of A is relatively strongly voiced in terms of his preference for Ireland albeit it is partly based on wanting to be with his mum. B has also objected but is much younger and the weight of this objection is less, particularly given the lack of context or comparison made; this child could not recall residing in Hungary. The objections coincide with the stability of the family here in Ireland, but they are at odds with general Convention considerations, in particular, the objections are at odds with the principle that abducted children be swiftly returned, with the deterrence of abduction and with respect for the judicial processes of other member states of the European Union and signatory states of the Convention. It is a matter of great concern that this Respondent has, not once but twice, removed her children from the care of their father.

9.16 Having carefully considered the views of the children as set out in the reports, they do not outweigh the aims of the international agreements, which mandate a return. The objection of the older child carries more weight in that he recalls his life in Hungary and is older and better able to form and articulate a logical view. While definite in their statement that they do

not wish to return, there is no strong objection to their dad, to being with him or to the prospect of living in Hungary such that their return with their mum should not be ordered in line with the imperative policy considerations underlying the Convention.

9.17 Considerable reliance was placed in oral submissions on the decision of *M.U. v N.R.* [2017] IEHC 828, in which Ní Raifeartaigh J. refused to return two children. I was urged by Counsel for the Respondent to compare the two cases. The facts of this case confirm my view in respect of return. There, the Court found as a fact that the applicant was not exercising his rights of custody but that the respondent, who had resided in a refuge for a time and who had argued that the children were well settled, had not proved grave risk or that the objections of the children (considerably stronger than those expressed here) were sufficient to justify refusing to return the children. These two children did not want any contact with their father, in contrast to the Applicant's children in this case.

9.18 Insofar as this case resembles the facts in *C.A.*, the factors which weigh against these children's views are significant indeed. Children of this age cannot be expected to consider the importance of their relationship with the abandoned parent, despite the fact that disruption to that relationship is likely to have a significant effect on their futures. It does not appear to be appropriate to refuse to return the children on the basis of their objections.

10. *Neulinger*: The Best Interests of the Children

10.1 It was submitted that the case should be considered in the light of the *Neulinger* case, the facts of which are set out above. The assessor was asked how the children would fare in Hungary now, after their moves to various different countries over the years and he responded: *I think it would be negative step to go back to that environment.* He referred to

disrupting their lives, them having to re-establish themselves and the potential to establish or sustain relationships with non-resident parent even a substantial distance away. He added that there was no mention, by either child, of the Hungarian paternal family system. He found this unusual. He had *no sense that there was any connection to paternal family*. From A particularly, whose agility in the Hungarian language is not strong, if he is returned, the assessor noted that he will have to re-establish his language skills and might suffer isolation from peer groups in this context.

10.2 His understanding, post-interview, was that the children are experiencing stability and contentment which they may not have had for some time and that their English had improved and was much more agile in interview two than in interview one. His comments on the need for further integration of the children in Ireland must be seen in this context.

10.3 On the other hand, this Respondent has, through counsel, accepted that if the boys are returned to Hungary, she will go with them. The Applicant has undertaken to provide accommodation. The facts of this case can be contrasted with those in *Neulinger* in that there is no medical evidence of risk to the boys or to their mum, nor is there a history such as that in *Neulinger*, of this Applicant behaving unreasonably in relation to his children. He has maintained contact with them and clearly wants, at a minimum, to have access to them.

10.4 This is not a welfare hearing, it is an application for the summary return of two children who have been wrongfully removed. The child in *Neulinger* had been residing away from Israel since he was 2 years old, in 2005 and the decision was handed down in 2010. On the facts of this case, while a return may not be their preference and may cause certain difficulties, returning the children is not comparable to the proposed return in the *Neulinger* case in terms of finding that the best interests of the children must now outweigh the

important considerations which underpin the Convention and all the related EU and domestic provisions.

10.5 The animating principles of the Convention include that decisions about child welfare be made in the country in which the children reside and that unilateral decisions to take children to another country should be discouraged. It is worth noting again that this is the second such abduction in the Respondent's history. The several moves undertaken by this family have all been at the behest of the Respondent, without reference to or consultation with the Applicant, by all accounts. Applying the *Neulinger* rationale to these facts, the decision to return is nonetheless the correct one in the view of this Court. While a detailed welfare hearing may well result in a conclusion that the best interests of the children involve them remaining in Ireland, this is not a welfare hearing. The many moves, which appear to have led the assessor to a view that this period of relative stability should be prolonged, arose due to the unilateral decisions of the Respondent and the length of their stay in Ireland is partly as a result of her decision to dispute the Applicant's paternity. In these circumstances, there is no factor and or combination of factors in the case so weighty as to counterbalance the weight that must attach to the objectives of the Convention.

11. Distinction between the Siblings

11.1 The Applicant argues that, given that the Convention mandates a return of the two boys, his daughter must also be returned so as to remain with them. The Respondent argues that the Convention cannot take precedence over domestic law and that, under Irish law which governs the position of the child C, the Court must vindicate her constitutional rights and decide this case in her best interests. Given the length of time she has spent in Ireland and the absence of any strong argument that she should be returned (other than the fact of her

father residing in Hungary), in C's case the law suggests a straightforward refusal to return. The considerations applicable to this child are wholly different to those applicable to A and B. There is no lawful requirement for a summary return of the child under the Convention.

11.2 It seems to this Court, in particular when one follows the holistic approach taken by the Court of Appeal in *A.K. v U.S.* [2022] IECA 65, that the decision must be one which weighs up the evidence in respect of each child and the competing rights and duties under domestic and international law in deciding if an order to return the two boys is the correct one in this case.

11.3 Before returning to the facts, there are some basic principles of law which apply in this context and which must be articulated. One is the primacy of EU law over domestic law. The primary consideration of the Court is to give effect to Regulation 2201 of 2003. This takes precedence, according to Article 29.4.3° of our Constitution, over domestic provisions. While the converse was suggested in oral argument, this cannot be correct. It may, however, be unnecessary to do violence to any national provision, to paraphrase Professor Kelly's eloquent summary in his seminal work on the Irish Constitution. Under the Convention, the Regulation and the domestic legislation, the paramount objective is to identify and act in the best interests of each child. While the emphasis of the Convention and the Regulation is on the right of the child to have a real relationship with both parents and the deterrence of child abduction, the *Neulinger* case re-states the need for the interests of the children to be kept at the centre of even this kind of urgent request.

11.4 As a matter of fact, this Court has found that the removal by the respondent of the two older children was wrongful with the meaning of Article 3 of the Convention and Art. 11(2) of Council Regulation (E.C.) No. 2201/2003. The request to return was made within a year.

The defences of acquiescence and grave risk have both been raised but have not been made out on the evidence to the required standard, on the balance of probabilities. The removal of the third child was not wrongful and the law does not require the summary return of the child, C. This is the background against which the position of the children will be considered.

11.5 Here, the interests of each child must include a consideration of what is best for all three as a unit. It is artificial to speak of making one decision and arguing that this is mandated by law and that the decision in respect of all three must follow that one. Instead, all the arguments, having been teased out (as has been done here to the best of the Court's ability) must then be viewed in the round and a decision taken which best reflects the interests of all three. This is not to say that different decisions may not be made in respect of the children but to acknowledge that the parties agreed that this was a case in which the children should not be separated.

11.6 Looking first at the individual experiences of each child: In the first report, A spoke positively of his experience of school in a third country and gave an account of having many friends. He then spoke in similar terms of his experience of school in Ireland. The first report noted that A "*has a rudimentary understanding of English*" and, while the second report records that A stated that his least favourite subject is English, the assessor's evidence was that his spoken English had improved. A enjoys various sports but currently does not play any sports due to being unable to attend training on account of "*parental work schedules*".

11.7 The assessor specifically recommended that A and B *would benefit from further integration into community life via attendance at extramural activities*. Nonetheless, both boys expressed a clear preference: they want to remain in Ireland. The comment about integration has already been discussed as being in a context in which the boys have settled well in Ireland.

11.8 In *A.K. v U.S.*, Murray J. addressed the position to be taken in circumstances where one sibling is deemed to be habitually resident in the “host” State.

“The degree of integration of the family as a whole becomes particularly striking when the conclusion that C was habitually resident in Ireland is put into this mix. It was, as it is put in the Respondent’s Notice to this court, a critical element of the factual matrix pertinent to the issue of the habitual residence of A and B that the circumstances of the family had changed to the extent that C, their sister and the youngest child in an admittedly close sibling relationship, had acquired a habitual residence here. This is not, it must be stressed, to say that siblings cannot have different habitual residences: clearly they can. But where three siblings separated in age from each other by only a few years and enjoying a close relationship come to a jurisdiction at the same time, remain in that jurisdiction for the same period and for the same reasons, live together for that period, and solidify the same broader familial relationships in that jurisdiction at the same time, the conclusion that one has acquired in that period habitual residence here while the others have not requires some clear and definite point of distinction between them.”

11.9 In *A.K. v U.S.* the issue of habitual residence arose because the children had been living in Ireland with the consent of both parents for over a year. Here, the father never consented to the removal of the children and had, within months of discovering it, taken steps to institute these proceedings. His request was received by this Court within one year and he has not withdrawn it. *A.K. v U.S.* is not, therefore, directly relevant to this case. It is very helpful, however, in that the guidance from the Court of Appeal is to consider the circumstances of the family as a whole, as opposed to considering each child individually. And here, as in *A.K. v U.S.*, one child is entitled to remain here and cannot be made the subject of a summary return

to Hungary. While the Court can, either under Article 8 or due to its inherent jurisdiction, decide to order that C travel to Hungary with her brothers, there does not appear to be any reason to do so other than to keep the three siblings together.

11.10 I have considered Arts. 11(6) to 11(8) of the Regulation, but I note that these provisions whereby for the courts in Hungary can effectively review a non-return order and make an enforceable order for return does not take away from the requirement that I consider the policies of the Convention.

11.11 Looking at the family as a unit and bearing in mind both the approach of the Court of Appeal in *A.K. v U.S.* and the decision in *C.A.*, it seems that there is no provision of the Convention which assists me in refusing to order the return of the children but, as an effective and proportionate step in vindicating the rights of all three children, this is an appropriate case in which to grant a conditional stay on the basis of the children's interest in remaining together as a family unit and in the number of moves between jurisdictions being minimised, notwithstanding that the Convention requires the prompt return of A and B.

11.12 I am further reinforced in this decision by the delay in these proceedings overall. While it ought not prevent a return order, it is another factor in the overall matrix of the case which mitigates against a further move which may destabilise this family further. The blame for much of this instability lies at the door of the Respondent but it is in the best interests of her children that further consequences of two abductions not be visited on them.

11.13 In making this decision to grant a stay, I consider the position of the third child, C, to be significant. There can be no order to summarily return this child. It does not appear to this Court that one can amplify the weight of A and B's objections, so to speak, using the position

of a sibling. This is different to the situation pertaining in *A.K. v U.S.* where the question of habitual residence, a mixed question of law and fact, could be resolved in favour of one country in which all three siblings resided and where the clear residence of the youngest child could affect the factual position in respect of the other two. Here, the objections are not voiced in respect of the family unit albeit that the report makes it clear that the family, as a unit, is a close one which functions well and happily. The most pragmatic way to apply the law to the facts of this case appears to be to make the orders which are required by the clear policy objectives of the Convention and the Regulation, and to impose a stay on those orders to enable a relocation application to be made.

12. Conclusions:

12.1 The Court is required, by the terms of the applicable law, to order the return of children A and B to Hungary, but the Court will impose a stay on that order to permit an application to be made to the courts in Hungary for the relocation of the children to Ireland. No return order can be made in respect of child C.

12.2 The Court will hear the parties on the appropriate terms of the stay on the order.