Approved

No further redactions required

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021 IECA 132

Court of Appeal Record No 2021/61

Faherty J.

Collins J.

Pilkington J.

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

BETWEEN

CT

Applicant/Respondent

AND

PS

Respondent/Appellant

JUDGMENT of Mr Justice Maurice Collins delivered on 28 April 2021

BACKGROUND

1. This is an appeal by PS, the father of W and X, from the Judgment and Order of the High Court (Ms Justice Gearty) of 12 March 2021 directing their return to France forthwith pursuant to Article 12 of the Convention on the Civil Aspects of International Abduction *("the Hague Convention"*) and Council Regulation (EC) 2201/2003 EC ("*Brussels II bis").* The Court also directed that all pleadings, a psychological report directed by the Court, the Affidavits and exhibits and the Orders made in the proceedings be made available to the parties' legal representatives and to the French courts.

2. These Orders were made on the application of CT. CT is the mother of W and X. W and X are young boys aged, respectively, 11 and 5. CT is a French national and W and X were born in and have at all times lived in France. There is no dispute but that as of October/November 2020 they were (and continue to be) "*habitually resident*" in France. PS is a Irish citizen. CT and PS were in a relationship together for many years and cohabited as a couple in A, France between 2005 and March 2019, when their relationship came to an end. PS returned to Ireland in early 2020 and now resides in R. He has visited his children in France since then (PS continues to have business interests in France) and they have also been to Ireland with him during school holidays.

3. W and X reside with CT in the town of A, in a residence owned by her. Both CT and PS exercise parental authority in common pursuant to Articles 372 and 373 of the French Civil Code.

4. W and X are pupils in SB school in A. In mid-October 2020, with the agreement of CT, PS brought the boys to Ireland for the Halloween holidays. It was agreed that the boys would be brought back to France no later than 1 November 2020 in time to return to school following the holidays.

5. On 29 October 2020, in response to the Covid-19 pandemic, the French Government announced that pupils in primary school (*ecole primaire*) aged 6 years of age and upwards would be required to wear face masks in school. Previously, face masks were mandatory only in secondary schools (collèges/lycées). W (but not X) would therefore be required to wear a face mask on his return to school after the holidays. This caused concern to PS. In his view, W would have difficulty in wearing a face mask and if required to do so he would suffer anxiety and discomfort. It will be necessary to discuss PS's concerns, and the basis for them, in detail below. For present purposes, however, it suffices to note that PS informed CT that he would not be returning the boys to France as agreed because of the new requirement for W to wear a face mask at school. They have remained in Ireland since then.

6. On 10 July 2020, PS had petitioned the Family Court of the *Tribunal Judiciare* in A seeking joint custody (with CT) of W and X and a determination that their habitual residence should be at his place of residence in Ireland. The hearing of that petition was

initially scheduled for January 2021 but was accelerated in light of the retention of the children in Ireland and took place on 17 November 2020. PS did not attend the hearing but was represented by his lawyer. On 24 November 2020, the Family Court gave a detailed written ruling. The court found that the parents should continue to exercise parental authority jointly. As regards the application for a change of their habitual residence, the court found that none of the material filed by PS (which included medical certificates relating to the wearing of masks by the boys) provided any grounds *"for the children to be uprooted overnight and removed from their social and family environment in France to settle down in Ireland*" and ruled that the habitual residence of the children should continue to be at their mother's home. The court gave directions in relation to visiting rights (to be exercised on French territory) and, noting that PS had retained the children beyond the agreed visiting period, issued an order prohibiting the children from leaving France without the consent of both parents, that order to become effective "*on the date which the children have been returned to the home of [CT] after this ruling has been handed down."* Various ancillary orders were also made.

7. PS has appealed the decision of the Family Court. Although the decision was given in November 2020, that appeal was not lodged until 15 March 2021, subsequent to the High Court hearing and its Judgment. Counsel for CT criticises the delay in bringing the appeal. In any event, we are told that the hearing of the appeal is now fixed for early October 2021. The orders made by the Family Court of the *Tribunal Judiciare* continue to be enforceable pending the appeal.

8. On 14 December 2020 the French Central Authority forwarded CT's application for the

return of the children and these proceedings were commenced on 22 December 2020. The proceedings came on for hearing before the High Court on 3 March 2021, with the Judge giving a detailed judgment on 12 March 2021.

THE PROCEEDINGS IN THE HIGH COURT

9. As the Judge notes in paragraph 2.2 of her judgment, it was common case that there has been a wrongful retention of the children contrary to the Hague Convention. It followed that, in accordance with Article 12, an order for their return had to be made unless a "*defence*" was established by PS.

10. The defence to return advanced by PS was that of "*grave risk*" within the meaning of Article 13(b) of the Hague Convention. A number of issues appear to have been raised by PS in this context, including allegations regarding the conduct of CT and all of these were addressed by the Judge in her Judgment. However, the central issue in the High Court – and the only issue in this appeal – relates to the requirement that W will have to wear a face mask at school in the event that he is returned to France (as already noted X will *not* have a wear a face mask because he is not yet 6).

11. PS stated on affidavit that W had refused to wear a face mask when visiting a relative of CT (in fact, the visit was to both CT's mother and grandmother, who are resident in the same nursing home) who was ill in a nursing home. (I observe that PS was not present during this visit and therefore cannot give any direct evidence of what occurred). He (PS) had confirmed with his GP, Dr F, that W and X were claustrophobic and *"as such would find the wearing of a mask uncomfortable and upsetting*." W was "*also extremely anxious which makes him very uncomfortable about wearing a mask*." He said that there were no exemptions from the requirement that masks be worn from age 6 onwards. That was, he noted, unlike the position in Ireland where face masks are

not recommended for children under 13 years of age and where children could be exempted for health reasons. He would not be a party to forcing W or X to wear masks *"because of the difficulties and the trauma it causes them*". In his view, to return the children to a situation of mandatory face mask wearing and attendance at school "*would be unduly injurious to the welfare of the children especially [W]".* He was "*not convinced of the efficacy of face masks generally*" and believed that "*for the most part .. they are a waste of time and are more likely to cause illness than to protect from Covid-19 infection."*

12. PS exhibited two letters from Dr F dated 4 November 2020. They are in identical terms, save that one refers to W and the other to X. The letter relating to W is in the following terms:

> *"To Whom it Concerns*
>
> *This patient of mine suffers from claustrophobia when wearing a facemask and as such may be exempted from wearing a mask.*
>
> *[Signed]"*

It is worth recalling at this point that X is only 5 years old and therefore is currently outside the scope of the French mask mandate.

13. PS also referred to a complaint said to be have been brought "*by 2 concerned lawyers*

in Nice" on behalf of a group called Reaction19 which appears to involve or prefigure some form of legal challenge to the Government decree mandating the wearing of face masks in schools and in particular in elementary (primary) schools. I shall refer to this document (which is exhibited in its original French and in (partial) English translation) as *"the Reaction19 Complaint*." The general tenor of this document (the authorship of which is unclear) is that face masks are ineffective in terms of preventing COVID-19 transmission, as well as causing short-term and long-term damage to children. The document claims that the WHO had advised of the dangers of wearing face masks.

14. CT also swore an affidavit. She states that that W never refused to wear a face mask. He was "*not in agreement at first*" but he had understood the need to do so. She referred to the fact that children in secondary school in Ireland were required to wear face masks while at school. In her view, PS's objections were not really age-related but were related to the principle of wearing face masks. In any event, it was, she said, a matter for the child's place of residence to decide policy on such issues. While she acknowledged that W might experience some apprehension about having to wear a face mask at school, she believed that this was due to his exposure to father's objections. She said that the children had been listening to PS advocate against mask wearing since October 2020 and suggested that, with appropriate explanations, W would be fine with wearing a face mask.

15. CT did not accept that the letters from Dr F amounted to anything more than PS's own views. This was the first time that Dr F had seen the children (assuming that they had in fact been seen by him) and he knew nothing about them other than what he was told

by PS and whatever the children may have been told by PS to say to the doctor. She says unequivocally that children were not claustrophobic and *"have never had any such difficulties*". This had simply been invented by PS. She did not believe that either of her sons have any issues with wearing a mask. No-one liked wearing a mask as it was uncomfortable but that did not mean that it should not be done.

16. While making it clear that she did not accept that W (or X) could not wear a face mask, CT states that in France persons can be exempted from wearing a mask if they are suffering under a disability certified by a doctor. The position is, she said, similar to that in Ireland.

17. There is a great deal of other material in the affidavits, with allegation and counter-allegation being made about the conduct of PS and CT vis-à-vis one another and as parents. Complaints and counter-complaints have, it seems, been made by them to the French authorities. It is not necessary or appropriate to refer to this material here. While a variety of issues appear to have been canvassed in the High Court – and are quite properly addressed by the Judge in her Judgment – the issue presented to this Court on appeal is narrow and specific. In essence, PS's sole argument is that W should not be returned to France at this time because, if he is returned, he will be compelled to wear a face mask in school. That, PS says, would expose W to physical or psychological harm and therefore, he argues, Article 13(b) is triggered. In his written material, and again in his oral submissions, PS was at pains to emphasise that he was not seeking to retain W in Ireland permanently but only wanted to delay his return to France so as to avoid W being compelled to wear a face mask at school.

18. Returning to the procedural narrative, on 13 January 2021, Ms Justice Gearty made a number of orders, including orders allowing CT remote access to the children and she also fixed the hearing of the substantive return application for 3 March 2021. She continued to case manage the proceedings. On 10 February 2021 the Judge made an order pursuant to Article 11(2) of Brussels II *bis* that W be interviewed by Michael van Aswegen, a clinical psychologist and that Mr van Aswegen should report to the High Court on the interview. The order identified issues to be discussed with W and a number of matters to be addressed in such report, including whether W objected to being returned to France (PS had, in his first affidavit, stated his belief that W would so object, as well as his belief that W "*is of sufficient age where his views on this matter should be respected*").

19. In that same order of 10 February 2021 the Judge noted an application made by counsel for PS to have expert evidence heard at the hearing on 3 March 2021 and she directed that a statement of evidence was to be provided by the proposed expert witness – a Professor Dolores Cahill from UCD – within 7 days. That direction was not complied with (because, as PS explained to this Court, Professor Cahill was not in a position to commit the time needed to prepare such a statement) and, instead, the High Court was asked to allow Professor Cahill to be called to give evidence in the absence of any statement. The Judge refused to permit such a course. Her reasons for doing so are set out in paragraph 6.3 of her Judgment. While there was no appeal from or direct challenge to this ruling, the exclusion of Professor Cahill from giving evidence was criticised by PS and was the subject of some discussion in oral argument.

20. In my view, the Judge's decision not to permit Professor Cahill to be called was one which she was clearly entitled to make. Proceedings under the Hague Convention are summary proceedings that, in general, are heard on affidavit: Order 133, Rule 5(2). While the High Court has a discretion to permit or direct oral evidence to be given, that discretion arises only *"in exceptional circumstances."* Furthermore, the High Court is entitled to regulate the calling of expert witnesses before it. That is so regardless of whether Order 39, Rules 57 and 58 apply to proceedings under the Hague Convention or not. The High Court has ample power to manage proceedings before it. Here, it would have been entirely inappropriate to permit Professor Cahill to be called. As the Judge observes, without a statement of her intended evidence, the Court could not assess the relevance of that evidence or her expertise to give it. The fact that, as the Judge noted, Professor Cahill had never seen W or X was another factor weighing against her being permitted to give evidence. Finally, permitting Professor Cahill to be called in the absence of a witness statement would have been profoundly unfair to CT, as she and her legal team could not properly prepare for cross-examination or assess whether it was necessary to engage an expert to counter the evidence of Professor Cahill. That in turn would have given rise to a risk that the proceedings would have to be adjourned, giving rise to delay.

21. Following the Judge's order of 10 February, Mr van Aswegen interviewed X. Due to Covid-19 restrictions, that interview took place over Zoom. His report is dated 25 February 2021. It notes that W was attending school (remotely) in R, where PS now resides. As to whether W objected to being returned to France, the report stated that

"*[W] expressed a clear wish to return to France."* W described his experience of school in France positively and reported having a good friendship network. He had maintained contact with his friends in France via an online game. He missed his mother and wished to return to France to go back to living with her. He also expressed a desire to maintain regular contact with his father. Mr Van Aswegen was of the view that W's level of maturity was such that was *"in a position to form his own views as to who should take the role of primary carer and where this care should be taking place."* Mr Van Aswegen noted the fact that W had been referred to a clinical psychologist in France previously as a result of behavioural issues and advised that, irrespective of the Court's decision as to his primary place of residence, W's parents should seek his re-referral for therapeutic intervention. So far as appears from the report, Mr Van Aswegen did not discuss with W whether or not he had any difficulty or anxiety about the prospect of having to wear a face mask at school in the event of being returned to France. In fairness to him, that was not an issue specifically identified in the Court's Order of 10 February 2021. With the benefit of hindsight, it perhaps ought to have been. What can be said, however, is that W expressed a clear wish to return to France, which he knew would involve returning to school in A. It is also evident from the messages passing between PS and CT that W was aware of the requirement to wear a mask in school and knew of his father's objections.[1] Far from expressing any anxiety at the prospect of returning to school in his interview with Mr van Aswegen, W expressed a positive desire to do so.

[1] See para 8.2 of the Judgment.

22. In accordance with what this Court understands to be established practice, the Order of 10 February 2021 directed that Mr van Aswegen's report was to be furnished to the Court and that a copy be furnished to the solicitors for each party who were to be at liberty to discuss its contents with the respective clients. Copies of such reports are not provided to the parties themselves, for reasons of confidentiality and child welfare. The contents of Mr van Aswegen's report were communicated to PS (and CT) in that manner. No challenge was made to the report and no application was made on behalf of either party to have Mr van Aswegen called to give oral evidence or made available for cross-examination. Neither party sought to cross-examine the other on their affidavits either. Accordingly, the application proceeded on the basis of the affidavit material and the written report only.

THE HIGH COURT JUDGMENT

23. The Judge gave her Judgment on 12 March 2021. As already noted, in paragraph 2.2 of that Judgment, she stated that the Court was satisfied that France had always been the habitual residence of both children, that both parents enjoyed and had been exercising their custody rights in respect of the children at the relevant time, that CT had not consented or acquiesced in their retention by PS and that the procedural and timing requirements of the Hague Convention had been complied with. The Judge noted that none of those matters had been put in issue by PS and that it was therefore common case that there had been a wrongful retention of the children contrary to the Convention. The burden thus shifted to PS to establish a defence.

24. The Judge then addressed the Article 13(b) "*grave risk"* defence. The burden of establishing such defence rested on PS and he had to "*adduce clear evidence that there is probably a grave risk of harm to the children, or an intolerable situation for the children, if returned, in order to succeed*" (para 3.2). She referred briefly to authority on what constitutes "*grave risk"* (there does not appear to have been any real controversy as to the legal test) and proceeded to consider the evidence. She concluded on the basis of the evidence that W had worn a face mask when visiting his grandmother, that he did so without any apparent ill-effects and that, if W did not want to wear a mask generally, that was the height of his objection. There was, in the Judge's view, no suggestion of any medical condition nor had any anxiety or discomfort been noted by CT who was with him during the visit (para 4.6). In making these findings,

the Judge relied on the affidavit evidence of CT. Given that CT was in a position to give direct evidence about the visit to her mother and grandmother, whereas PS was not, the Judge was clearly entitled to make these findings and no grounds for challenging those findings were identified to any real extent on appeal, though PS continued to assert his version of events.

25. The Judge next considered the "*medical reports"* provided by Dr F. The Judge made it clear that she was not treating that evidence lightly and had carefully considered it. She noted, however, that it was directly contradicted by CT in her affidavit and that the suggestion that W (or X) was suffering from any form of medical condition was not supported by PS's messages to CT (which are reviewed in some detail in the Judgement) (para 5.1). The Judge stated that she was unwilling to rely on the medical report relating to W and attached little weight to it. She set out in considerable detail the considerations which had led her to take that view and these warrant citation in full:

> *"1) the Respondent is the patient of this doctor;*
>
> *2) the doctor is unlikely to have treated W before and it was not suggested that he had;*
>
> *3) the timing of the report coincides with messages indicating a firm view that the children would not be returned to France due to the mask-wearing policy;*

4) the timing of the report also comes at the conclusion of a series of messages indicating strong opposition to mask-wearing but not on health grounds related to either child;

5) it is highly likely that the Respondent was present when the children attended;

6) the views of the Respondent, strongly held and expressed on many occasions to the Applicant, may have dictated the tenor of the doctor's report at least to some extent; and

7) while the report on X is not relevant in respect of the question of his return, it is relevant to note that although there is no reference anywhere to X being distressed by mask-wearing, he is nonetheless made the subject of an identical diagnosis of claustrophobia." (para 5.3)

The Judge's treatment of the medical report relating to W is criticised by PS and it will be necessary to address those criticisms in due course.

26. The Judge then addressed the Reaction19 Complaint. She noted that the document had been compiled by a person or persons who were not named and that there was no assurance as to the identities, credibility or expertise of those who contributed to it. It was not sufficient for PS to demonstrate that face masks were ineffective, as that could not constitute grave risk (para 6.2). She also noted that the Complaint included statements to the effect that requiring a child under the age of 15 to wear a face mask amounted to various criminal offences such as endangerment and deception. Such an

assertion, in the Judge's view, showed a poor understanding of both law and logic and any source that produced such advice had to be treated with scepticism (para 6.2 *bis*). Having dealt with the application to call Professor Cahill, she then expressed her conclusions on the face masks issue as follows:

> *"6.4 The Court received no reliable evidence on the risks of mask wearing and merely notes that the vast preponderance of public statements by recognised medical experts support the effectiveness of the measure in protecting public health, while acknowledging that masks may be more difficult for some people to wear than others and that they should be treated appropriately i.e. worn as advised, washed often or discarded. The risk to the particular child is what is relevant in this case. The parental exchanges, set out in detail above, make it clear that neither boy has breathing issues, nor was there any hint of a medical condition arising as they went about their day to day activities, which might make wearing a face mask difficult."*

27. The Judge then addressed the other issues that had been raised by PS in objection to the children's return, including various complaints concerning CT's care of the children. Having done so, she concluded that the allegations had not been made out as a matter of fact and, even if they had, the events alleged by PS would not constitute evidence of grave risk to either child such as would require the Court to refuse their return (para 9.2). These matters were not agitated before this Court and there was no challenge to these findings made by the Judge. As already explained, the only issue advanced by PS on appeal was that if W if was returned to France while the mask mandate remained operative for schools he would suffer harm as a result of being forced to wear a face

mask. PS accepted that all other issues were matters to be addressed by the appropriate French authorities, and in particular the French courts. In these circumstances, it is neither necessary nor appropriate to discuss this aspect of the Judgment in any greater detail.

28. Consequent on her Judgement, the Judge made the orders the subject of this appeal. She put a stay on those orders to the first directions hearing in this Court and on that occasion the appeal was immediately allocated a hearing date of 13 April 2021.

THE ISSUES AND ARGUMENTS ON APPEAL

29. PS did not have legal representation for his appeal.

30. His Notice of Appeal seeks as the sole relief a stay on the High Court's order *"until the mask mandate in French schools from the age of 6 is lifted."* In his grounds of appeal, reference is made to "*HSE evidence"* which, it is suggested, his legal advisors had failed to advance to the High Court. The effect of that evidence (so it is said by PS) is that the HSE could provide no proof as to (i) the effectiveness of face masks as a means of containing Covid-19; (ii) the safety of face masks; (iii) the effectiveness of social distancing as a means of limiting and containing Covid-19 or (iv) the effectiveness of vaccines as a means of limiting or containing Covid-19 or providing the recipient with personal immunity against it and (v) the safety of such vaccines.

31. This "*HSE evidence*" comprises a series of Freedom of Information Act requests made to the HSE by a third party seeking the provision of records held by the HSE relating to the matters referred to in the previous paragraph. One of these requests sought *"records ... which describe the proven scientific safety of masks or face-masks as a means of limiting or containing the spread of SARS-Cov2 (Covid-19) or similar viral pathogens, with particular reference to the duration the mask is worn."* On each request, there is an annotation – added, presumably, by the requester – to the effect that the HSE response was that it did not hold any such records and such records do not exist. In fact, it is evident from the actual responses that, while the HSE indicated that

it did not hold the records sought (apparently on the basis that the level of detail requested was not available from the HSE's Health Protection Surveillance Centre (HSPC)), it had determined that such records were held by the Health Protection Regulatory Authority (HPRA) – an independent statutory agency established pursuant to the Irish Medicines Board Act 1995 (as amended) – and had transferred the requests to that body.

32. As noted, these FOI requests were made by a third party. The Court was told by PS that he (PS) had accessed this material on an internet site. The Court is unaware whether the requester appealed the decisions (as the HSE had advised him he was entitled to do) or what records (if any) may subsequently have been provided by the HPRA in response to the requests.

33. This "*evidence*" was not presented to the High Court but the Court received it *de bene esse*.

34. In addition to Article 13 of the Hague Convention, the Notice of Appeal invokes Articles 41, 42 and 44 of Bunreacht na hÉireann and the Criminal Law Act 1976 (it appears from references elsewhere in the documentation filed by PS that it is section 12 of that Act on which he seeks to rely).

35. PS filed a letter, dated the same date as his Notice of Appeal, in which he refers further to the "*HSE evidence*" and makes points about the relative success of Ireland and France in combatting Covid-19. The letter makes various assertions regarding the safety and/or

efficacy of Covid-19 testing and vaccination, some in lurid terms, and criticises the Judge's approach to the evidence.

36. Many of these same points are made in PS's "*submissions*". These are not legal submissions in any meaningful sense but, rather, a series of factual or quasi-factual assertions. They include a great deal of irrelevant and/or sensationalist material. The submissions criticise the Judge for discounting the evidence of his GP. Dr F, it is said, had found both boys to be claustrophobic and said that they would find wearing a face mask uncomfortable and stressful. According to the HSE Guidelines, this is a serious medical condition and, as a result, the boys must not wear masks. The evidence provided to the High Court is said to establish a valid basis for delaying the return of the children to France. It is also suggested that Covid-19 infection is not a serious medical condition (and, in fact, that Covid-19 may not exist). Refence is made to an article in the Journal.ie stating that Covid-19 was no longer considered to be a high consequence infectious disease (HCID) in the UK as and from March 2020. It is said that the Judge was in error in stating that face masks are worn in most countries as a measure to suppress Covid-19. Many countries were not in lockdown and did not require face masks to be worn, reference being made in this context to Sweden, certain US States, China, India, Brazil and Japan. As regards Ireland, it is said that only NPHET (the National Public Health Emergency Team) supports the wearing of face masks.

37. Appended to this "*submission*" are the HSE FOI documents to which I have already referred, as well as an article about the role of bacterial pneumonia as a cause of death

in pandemic influenza co-authored by Dr Anthony Fauci.[2] Various other documents are also appended, including releases from Children's Health Defense (a controversial US non-profit associated with anti-vaccine activism), as well as material apparently emanating from an Australian group that calls itself the "*Guardians of Sovereignty*" which expresses opposition to *"mandatory vaccine testing."* With the exception of the FOI documents, no reference was made to these documents at the hearing of the appeal and I make no further refence to them in this judgment.

38. In her written submissions, CT supported the reasoning and conclusions of the Judge. The submissions note that no constitutional arguments were advanced in the High Court and objection is taken to such arguments being made for the first time on appeal. The submissions observe that no arguments concerning vaccination were made in the High Court and any such arguments were irrelevant in any event, as children are not being vaccinated in France. On the issue of "*grave risk*", it is said that "*no evidence of any substance"* had been offered by PS showing "*that either child is in jeopardy by reason of the possibility that he might have to wear a face mask."* Dr F's report is *"an entirely unconvincing document*" which the Judge had been right to reject.

39. At the hearing of the appeal, PS produced and sought to rely on an internet news article referring to a decision of the Weimar Family Court, given on 8 April 2021, where the Court apparently made an order prohibiting two schools in Weimar from requiring

[2] Morens et al, "Predominant Role of Bacterial Pneumonia as a Cause of Death in Pandemic Influenza: Implications for Pandemic Influenza Preparedness", *Journal of Infectious Diseases* 2008: 198.

students to wear face masks, imposing minimum distancing requirements on them or requiring them to participate in Covid-19 rapid testing. CT objected to this document on a number of grounds but the Court again considered it appropriate to receive it *de bene esse*. PS submitted that the decision of the Weimar Family Court is further evidence that the requirement to wear a face mask at school gives rise to a "*grave risk*" of harm to W in the event that he is returned now. Further evidence was, PS said, provided by the HSE material that I have referred to above, the medical reports from Dr F and the Reaction19 Complaint. PS argued that the cumulative effect of this evidence was to establish the necessary basis to delay the return of W and X to France pursuant to Article 13(b). In answer to a question from the Court, PS accepted that Dr F had effectively relied on what he (PS) had told him regarding the children's anxiety about wearing face masks and had "*translated*" that into medical language. He also confirmed that the medical reports relied on in these proceedings were the same reports as had been considered by the Family Court in A.

40. For CT, Mr de Blacam SC emphasised that the only issue in the appeal was whether there was the necessary evidence to establish that the requirement to wear a face mask at school gave rise to a "*grave risk*" of harm to W within the meaning of Article 13(b). The Court was not concerned with the effectiveness of face masks. Nor was it concerned in any way with issues relating to vaccination. The Judge was, he said, entirely correct to discount the reports from Dr F. They had been procured by PS and it was not clear if the GP had even seen the children before issuing the reports and it was also unclear whether the GP was aware that PS intended to use the reports in court proceedings relating to the children. There was no evidence whatever that W (or X)

suffered from claustrophobia or that they could not wear a face mask. The evidence of CT was unequivocally to the contrary. Mr de Blacam suggested that the terms of the medical reports had been dictated by PS and he submitted that PS had effectively conceded that such was the case. Mr de Blacam also placed reliance in this context on a report from a French psychologist who had seen W on several occasions in 2020. That report (dated 16 February 2021) did not suggest that W suffered from any psychological condition such as claustrophobia, though it did note that W feared being cut off from his life in A as a result of his parents' separation. The report also noted PS's "*turmoil*" at being deprived of his children.

41. In respect of the Reaction19 Complaint, Mr de Blacam observed that, as regards the wearing of face masks, the primary focus of the document was on the (in)effectiveness of masks rather than any danger of wearing them, though he accepted that there were some statements to the effect that wearing masks was dangerous. No basis for such statements was provided, however, and in his submission no weight should be given to the document. On the decision of the Weimar Family Court, Mr de Blacam noted that it related to Germany rather than to France. Therefore it was not relevant. In any event, the Court did not have the full decision and did not have available to it the evidence heard by the Weimar Family Court. In the circumstances, no weight should be given to the decision.

42. Both sides referred to the van Aswegen report in the course of their submissions. PS told the Court that W had told him that Mr van Aswegen had, in the manner of a Jedi Knight, exercised mind control over W and had made W say what he (Mr van Aswegen)

wished to hear. That self-evidently preposterous suggestion does not warrant further discussion. PS said repeatedly that the report failed to address why W and X had stayed on in Ireland. In doing so, PS appeared to overlook the fundamental fact that they had no choice but to do so, in circumstances where PS had failed to bring them back to France.

43. While acknowledging that report does not explicitly address the issue of wearing face masks, Mr de Blacam relied on the fact that W had clearly expressed a desire to return to France and to his school. That was, he suggested, entirely inconsistent with any suggestion that W was apprehensive at the prospect of being required to wear a face mask while in school.

44. As explained above, a copy of the van Aswegen report was provided to the solicitors for each of the parties in the High Court. The solicitors who acted for PS no longer represent him. As a result, PS no longer has access to the report. While PS himself raised no issue about this, and while he was obviously aware of the contents of the report, the Court was concerned to avoid any possible unfairness to him in these circumstances. Therefore, in advance of PS making his replying submissions, the Court rose for a period to allow PS an opportunity to refresh his memory of the report (which is relatively brief). This was done by arranging for Ms Brophy, the solicitor for CT, to read the report to PS in the presence of the Registrar. The Court is grateful to Ms Brophy for her assistance. The Court is satisfied that PS was in a position to make whatever submissions he wished concerning the van Aswegen report and was not disadvantaged in this regard by reason of being a litigant in person in the appeal.

THE LEGAL FRAMEWORK

45. The proceedings here are for the return of W and X to France. There is no dispute that they have been wrongfully detained in Ireland. That is so notwithstanding PS's insistence that he is seeking only to delay their return. The children are habitually resident in France, with their mother CT. The children ought to have been returned to the care and custody of CT on or before 1 November 2020. That is what was agreed between CT and PS as the persons exercising parental authority in relation to the children. It is evident that CT did not consent to the children remaining in Ireland beyond 1 November 2020. Finally, the application for return has been made in a timely manner. Accordingly, all of the matters that are required to be established for the making of an order for the return of the children are clearly established here.

46. It follows that, subject only to the application of any other provision of the Convention, the Court is bound to make such order pursuant to Article 12 of the Hague Convention *(".. the authority concerned shall order the return of the child forthwith…")*. This obligation gives effect to the objects set out in Article 1 of the Convention which include that of securing "*the prompt return of children wrongfully removed to or retained in any Contracting State".* The Convention has the force of law in the State: section 6 of the Child Abduction and Enforcement of Custody Orders Act 1991 (as amended). The provisions of Brussels II bis are also binding.

47. The only "*defence*" expressly invoked by PS is the "*grave risk*" defence provided for in Article 13(b), though Article 20 may also be relevant in light of PS's invocation of

the Constitution as a basis for resisting an immediate order for the return of the children. While PS had indicated that W would object to being returned to France, in which case a different aspect of Article 13 would have required consideration, there is no evidence of any such objection and the available evidence – and in particular the van Aswegen report – is clearly to the contrary: W wishes to return to his mother in A.

48. I also note that the only *"grave risk*" defence made in relation to W. No legal basis whatever has been advanced to justify the retention of X in Ireland.

Article 13(b) and "Grave risk"

49. Article 13(b) provides:

> *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-*
>
> *...*
>
> *b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."*

50. Where – as here – the issue of return arises as between EU Member States, Article 13(b) must be read subject to Article 11(4) of Brussels II bis which states that a "*court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it*

is established that adequate arrangements have been made to secure the protection of the child after his or her return."

51. Even where such a "*grave risk*" is established (and it is clear that the burden of establishing such rests on the person opposing return), that does not have the effect of *precluding* the making of a return order. Rather, in such circumstances, the relevant authority must exercise its *discretion* as to whether or not to order return and, if so, on what terms.

52. There are a great many authorities, Irish and international, on Article 13(b). While expressed in slightly different terms from time to time, the authorities speak with one voice in emphasising the narrow scope of the "*grave risk*" exception and the heavy burden involved in establishing such a risk.

53. In *AS v PS (Child Abduction)* [1998] 2 IR 244, Denham J (for the Supreme Court) characterised it as "*a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence"* which *"should be strictly construed."* [3] Later in her judgment, she referred with clear approval to *Re HB (Abduction: Children's Objections)* [1997] 1 FLR 392 where, she noted, Hale J had held that, "*since the object of the Hague Convention was not to determine where the children's best interests lay, but to ensure that the children were returned to the country of their habitual residence for their future to be*

[3] At page 259.

decided by the appropriate authorities there, it followed that art. 13(b) carried a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if the children were returned".[4]

54. In *Minister for Justice (EM) v JM* [2003] 3 IR 178, Denham J (again speaking for the Supreme Court) stated that the *"concept of 'grave risk' established under Article 13 is narrow*." Citing the decision of the Canadian Supreme Court in *Thompson v Thompson* [1994] 3 SCR 551, she added that *"[w]hat is described in article 13(b) is an intolerable situation, a serious risk."* [5]

55. In *CA v CA (otherwise C McC)* [2009] IEHC 460, [2010] 2 IR 162, Finlay-Geoghegan J in the High Court referred to these decisions, noting that it was common case that the potential Article 13(b) defence was a "*rare exception"* to the requirement to return which "*should be strictly applied in the narrow context in which it arises."* She also noted that it was common case that the evidential burden of establishing that there is a grave risk rests on the person opposing the order for the return and "*is of a high threshold"* requiring, as had been referred to a number of decisions, *"clear and compelling evidence."*

56. This Court has also emphasised that the "*grave risk"* defence involves a high threshold and that the burden on the party opposing an order for return on that basis is *"a stringent*

[4] At page 261.

[5] Pages 189-190.

one": *CMW v SJF* [2019] IECA 227 per Whelan J.[6] Furthermore, Whelan J explained, the "*plain language"* of Article 13(b) indicates that it must be "*narrowly construed*".[7]

57. There are also a number of helpful authorities from England and Wales. Giving the principal speech in *In re D* [2006] UKHL 51, [2007] 1 AC 619, Lady Hale (as by then she was) observed that it was "*obvious*" that the limitations on the duty to return contained in Article 13 *"must be restrictively applied if the object of the Convention is not to be defeated",* citing paragraph 34 of Professor Perez-Vera's Explanatory Report.[8] In her view, the authorities of the requested state were not to conduct their own investigation and evaluation of what will be best for the child. There was a particular risk that an expansive application of article 13(b), which focuses on the situation of the child, could lead to this result. Nevertheless, "*there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of article 13 does not mean that it should never be applied at all."*[9] She went on to observe that "*'Intolerable' is a strong word, but when applied to a child must mean "a*

[6] Paragraph 55.

[7] At paragraph 56.

[8] In which Professor Perez-Vera expressed the view that the three exceptions in Article 13 "*are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter* " and warned that "*a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."*

[9] At paragraph 51.

situation which this particular child in these particular circumstances should not be expected to tolerate."[10] That observation was cited with approval by Finlay Geoghegan J in the High Court here in *IP v TP (Child Abduction)* [2012] IEHC 31, [2012] 1 IR 666.

58. *In re D* was cited by the UK Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 AC 144, where the judgment of the Court was given by Lady Hale and Lord Wilson. They expressed their agreement with the view of the High Court of Australia in *DP v Commonwealth Central Authority* [2001] 206 CLR 401 that there is no need for Article 13(b) to be narrowly construed. "*By its very terms, it is of restricted application*", the words were "*quite plain*" and needed no further elaboration or gloss.[11] Insofar as that approach may appear to differ from the approach taken in the Irish authorities, any such difference is, in my view, one of linguistic nuance only and not one of substance. The judgment goes on to identify a number of significant characteristics of the Article 13(b) defence. First, the burden of proof clearly lies with the person or body opposing return (on the balance of probabilities). Second, the risk to the child must be "*grave*". It is not enough that the risk be "*real*", it must reach such a level of seriousness as to be characterised as "*grave*". While that threshold applied to the risk rather than the harm "*there is in ordinary language a link between the two."* Third, the words "*physical or psychological harm*" gained colour from the words that follow in Article 13(b). As had been said in *In re D*, "'*Intolerable' is a strong word"*

[10] At paragraph 52.

[11] Paragraph 31.

and when applied to a child must mean a situation which a particular child in the particular circumstances should not be expected to tolerate. Every child has to put up with a certain amount of "*rough and tumble, discomfort and distress*" but there are some things which it is not reasonable to expect a child to tolerate including physical or psychological abuse or neglect. Fourthly, and finally, Article 13(b) is looking to the future: the situation as it would be if the child were to be returned forthwith.[12]

59. As the UK Supreme Court noted in *In re E*, the summary nature of the Hague Convention process imposes limitations on the capacity of the courts in the requested state to evaluate and resolve disputed issues of fact. There was, the Court noted, *"a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true."* [13] In *In re E* the children's mother alleged that the father (who was seeking the return of the children to Norway) had been guilty of serious psychological abuse over many years and that she and the children had lived in fear of him. The father denied those allegations. That dispute could not be resolved by the English courts within the parameters of Hague Convention proceedings. In such circumstances, the Court focused on the sufficiency of the protective means which could be put in place to mitigate the alleged risk to the children if returned, pending the resolution by the Norwegian courts of all disputed issues regarding their welfare and protection.

[12] At paragraphs 32-35.

[13] At paragraph 36.

60. The approach in *In re E* involves, in cases where there is a conflict of fact as to the existence and/or extent of a risk of harm to a child if returned to the requesting state, assuming the alleged risk of harm at its highest and then, if that assumed risk meets the threshold of "*grave risk*" in Article 13(b), going on to consider whether protective measures sufficient to mitigate such (assumed) risk of harm can be identified. That approach was endorsed in this jurisdiction in *IP v TP*: see paragraphs 41-43. Subsequent authority from England and Wales suggests that *In re E* does not have the effect of excluding any consideration of the evidence or any evaluative assessment of the credibility or substance of the allegations: see (*inter alia*) *Re C (Children) (Abduction: Article 13(b)* [2018] EWCA Civ 2834, [2019] 1 FLR 1045 and *UHD v McKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159.

61. Here any direct conflict of evidence is extremely limited and, accordingly, it is not necessary to explore further the approach that ought to be followed where a significant conflict arises or consider whether the valuable analysis in *In re E* requires any development or qualification.[14] However, there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention.

[14] Conflicts of evidence may also arise in relation to issues other than Article 13(b) "*grave risk".* In *JV v QI* [2020] IECA 302 there was an acute conflict of evidence as to whether the applicant father had consented to the removal of the children to Ireland and the judgment of Whelan J contains a detailed discussion of how such a conflict should be approached within the parameters of return proceedings under the Hague Convention: paragraph 56 and following.

62. *In re E* is also notable for its discussion of the interaction of the Hague Convention and the European Convention on Human Rights in light of the decision of the European Court of Human Rights in *Neulinger v Switzerland (*2010) 28 BHRC 706. That issue is considered further below.

Article 13(b) and Covid-19

63. Given its devasting global impact, it is no surprise that courts have had to grapple with the implications of the Covid-19 pandemic in proceedings under the Hague Convention. I have not, however, been able to identify any case addressing the specific issue arising here, where it is said that a requirement to wear a face mask – a requirement imposed as a Covid-19 measure – gives rise to a "*grave risk*" within Article 13(b).

64. In *In re PT (A Child)* [2020] EWHC 834 (Fam), the Family Division was asked to make an order for the return of PT to Spain. A number of arguments were advanced in opposition to her return, including that PT's return would give rise to a grave risk of physical harm because (1) the pandemic was more advanced in Spain and PT would be at greater risk of contracting the virus there and (2) international travel posed an increased risk of infection. The Deputy Judge rejected these arguments. He noted that the Covid-19 pandemic was a serious public health emergency in both the UK and Spain and that both countries had imposed significant restrictions on their citizens in an effort to contain the pandemic. However, he had no evidence on which he could reach a conclusion as to the relative safety of the two countries and the only conclusion that he could draw was that there was a genuine risk that PT could contract the virus whether

she remained in the UK or returned to Spain (at para 47(3)). As regards international travel, the Deputy Judge accepted that it involved an increased risk of infection but he noted that flights continued to be permitted from which he inferred that the risk was not so high that either government had felt it necessary to end flights altogether. Thus, he concluded, the increased risk, considered in the context of the likely harm that PT would suffer should she contract the virus, was not sufficient to amount to the "*grave risk*" required by Article 13(b).

65. *In re PT* was considered by this Court in *C v G* [2020] IECA 233 where the sole judgment was given by Power J (Noonan and Binchy JJ concurring). *C v G* concerned the return of a child to Poland. The High Court had refused to order his return, *inter alia* because of the risk associated with international travel during the pandemic which, in the view of Simons J in the High Court, amounted to a "*grave risk"* of harm to the child for the purposes of Article 13(b). This Court reversed that decision. Power J considered that the Judge had been in error in his approach to the burden of proof. The burden had been on the respondent to adduce evidence in relation to the pandemic such as establish a "*grave risk"* but, in fact, there had not been *"any medical, scientific or other evidence"* adduced before the High Court. In addition, Power J considered that the Judge had wrongly conflated the risk of contracting the Covid-19 virus and the risk of harm resulting from infection. They were related but were not to be equated. As regards the reliance placed by the Judge on the Irish Government's advice against "*unnecessary travel*", Power J observed that the "*purpose of returning such a child [a child who has been wrongfully removed or retained] is related, intrinsically, to his welfare and allows the issues concerning his long-term good and bests interests to be*

determined by the courts of habitual residence. An order for return, seen in its true context, could not, to my mind constitute 'unnecessary' travel."[15]

66. Power J expressed her conclusions on this aspect of the appeal in terms which warrant extensive quotation:

> *87 There is no doubt that the pandemic is a serious worldwide public health emergency and that it is a situation that is changing and evolving from one day to the next. Authorities in Poland and Ireland continue their efforts to contain the spread of the disease. Without in any way diminishing its seriousness and cognisant of the fact that the path of the virus is unpredictable, it has not been established that returning a child to Poland would constitute a grave risk of physical harm solely by reason of the pandemic. No authorities have been opened to the court in support of such a proposition and such cases as are available do not suggest that returns under the Convention have been suspended by reason of the pandemic.*
>
> *88. However, notwithstanding the absence of any case law to support the proposition that the existence of the pandemic, in itself, satisfies the grave risk requirement of Article 13(b), I consider that judicial authorities need to remain alert to the need to adapt to the unique circumstances which define a global public health emergency. In applications under the Convention, courts must be*

[15] At paragraph 82.

vigilant in response to concerns raised about the risks associated with Covid-19 for as long as the pandemic remains. Regard must be had to its seriousness and to the changing path of the virus as well as to the fact that the science in many areas is evolving. In an adversarial system, there is, of course, a duty on a party who alleges that there are risks associated with the pandemic to prove so by adducing cogent and reliable evidence that is capable of being tested. In the absence of such evidence, however, and bearing in mind the best interests of a child, a court may find itself left with little option but to take judicial notice of the most reliable information that is available from officially recognised sources. Such a situation, however, must be considered as the exception rather than as the rule in an adversarial system such as ours. As matters currently stand, I take the view that the courts are entitled to presume that travel for the purposes of returning an abducted child to the place of his habitual residence constitutes 'necessary' travel. Each child is unique and what may be a low risk of harm for one child may constitute a grave risk for another. The Court is required to approach these applications on case by case basis, assessing whether travel during the pandemic would expose a particular child to a grave risk of harm or otherwise would place him in an intolerable situation if returned. In conducting such an assessment, decision makers must bear in mind the distinction between the risk of contracting Covid-19 (which may be said to be moderate or even high if precautions are not taken) and whether a grave risk of harm would ensue if such an infection were to occur. If, having conducted such an assessment, a court is satisfied that the grave risk of harm defence has been established, then it should proceed to exercise its discretion in considering

whether a return order should, nevertheless, be made in the best interests of the child concerned."

The Court made an order for return on the basis that any increased risk of the child contracting Covid-19 (whether from air travel or being in Poland) was not sufficient to establish a grave risk of harm.

67. Both *C v G* and *In re PT* were cited by Whelan J giving the only judgment in *JV v QI* [2020] IECA 302 (Binchy and Pilkington JJ concurring). There, objection was made to the return of two children from Ireland to Belgium on the basis that the pandemic was said to be "*more advanced*" in Belgium and the children would be at greater risk of contracting the virus if returned to Belgium. Reliance was also placed on the risks of international travel. Whelan J noted the worldwide extent of the pandemic. In evaluating risks said to constitute "*grave risks of serious harm*" within the meaning of Article 13(b), the court was entitled to have regard to "*the international nature of the pandemic, the uncertainty regarding its duration, whether measures are being taken within the jurisdiction of the requested State to protect the health of the citizenry including children and to evaluate whether a sensible and pragmatic solution may be achieved to address any concerns through the imposition of undertakings on the applicant directed towards the protection of the welfare, health and safety of the children in the context of ascertained risks of the pandemic attendant on their summary return to the jurisdiction of the requesting State…."* [16] There was no evidence before

[16] At paragraph 77.

the court, other than media reports, from which one could draw a conclusion that either Ireland or Belgium was more or less safe and Whelan J concluded that the High Court Judge had been correct to conclude that there was no factual basis for a fear that either child would come to harm if returned. The "*high threshold*" to establish grave risk of physical harm had not been met.

The Constitution and the Hague Convention: Article 20

68. Article 20 of the Hague Convention provides as follows:

> *"The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."*

69. Article 20 was discussed in detail by the Supreme Court in *Nottinghamshire County Council v KB* [2011] IESC 48, [2013] 4 IR 662. The appellants there were the parents of two children whom they had wrongfully removed to Ireland. At the time of their removal, the Council had brought proceedings relating to the care and custody of the children. Neither parents nor children had any prior connection with Ireland. The parents resisted an order for the return of the children on the basis that, if returned, the children would be liable to be adopted, against the wishes of the parents, in circumstances which would not be permissible in this jurisdiction because of the rights of the family protected by Articles 41 and 42 of the Constitution. The High Court (Finlay Geoghegan J) rejected that argument and the parents' appeal was unsuccessful.

70. The principal judgment in *Nottinghamshire County Council v KB* was given by O' Donnell J (with Denham CJ and Fennelly and Macken JJ agreeing with that judgment). A separate judgment was also given by Murray J. Both judgments are very detailed. In his judgment, O' Donnell J noted that whereas Articles 13 and 20 of the Hague Convention were often treated as exceptions to the general rule of speedy return, there was a significant difference between them. Article 13 prescribes a limited exception to that rule and "*does so of its own force"* whereas Article 20 does not create an exception as much as recognise one. A court of a Contracting State could not order the return of a child in circumstances where such an order was not permitted by the constitutional order of that State. Article 20 thus "*provides a mechanism whereby the necessary flexibility is built into the Convention to avoid a conflict between the international obligations imposed by the Convention, and the dictates of the domestic constitution."*[17]

71. As to the test to be applied, the essence of O' Donnell J's analysis appears from the following passage:

> *"196. Article 20 does not ask whether the law, or even the constitutional law, of the requested state <u>differs</u> from that of the requesting State. If it did, it would be difficult to see how the Convention could function effectively. In such circumstances Article 20 might not merely prevent the return of children <u>from</u> Ireland, but might just as effectively inhibit the return of children <u>to</u> Ireland. The*

[17] At paragraph 163.

text of the Convention makes it clear however that this is not the test. The focus of Article 20 is not upon what occurs or may occur in the requesting State (in this case England). On the contrary it is what occurs in the requested State (the return) which is the focus for the Court of the requested State (in this case Ireland). The concept of "return" directs attention to at least two relevant matters. First, that the child has a prior connection with the State requesting the return (defined under the Convention as the State of habitual residence) to which he or she may be going back. Second, that a difference in the legal regime, and even a constitutional difference, will not itself suffice to trigger Article 20. The test is rather whether what is proposed or contemplated in the requesting State is something which departs so markedly from the essential scheme and order envisaged by the Constitution and is such a direct consequence of the Court's order that return is not permitted by the Constitution. It is the return, not the possible adoption, that must be prohibited and which is therefore the focus of the court's inquiry when Article 20 of the Convention is invoked. .."
(emphasis in the original)

The Constitution does not, O' Donnell J went on to observe, demand "*the imposition of Irish constitutional standards upon other countries or require that those countries adopt our standards as a price for interaction with us*." [18] Mere difference does not suffice: what is relevant is "*whether what it is asserted to be possible, probable or certain in the requesting jurisdiction is something which the Irish Constitution forbids*

[18] Paragraph 206

absolutely or permits in certain circumstances, and in any case whether the difference asserted is one of degree, or one of fundamental principle."[19]

72. There are important differences, both of emphasis and substance, between the judgment of O' Donnell J and that of Murray J. However, Murray J was also of the view that something truly fundamental was required. The grounds likely to give rise to a refusal under Article 20 are "*likely to involve not so much fundamental rights as fundamental aspects of fundamental rights. A denial of those rights in a fundamental fashion."* [20] Not all rights or entitlements protected by the Constitution would necessarily constitute such fundamental principles for the purposes of Article 20.[21]

The Hague Convention and the European Convention on the Protection of Human Rights and Fundamental Freedoms ("the ECHR"): the recent jurisprudence of the European Court of Human Rights

73. In July 2010 the European Court of Human Rights (Grand Chamber) gave a significant decision addressing the relationship between the Hague Convention and Article 8 ECHR.[22] That decision, *Neulinger and Shuruk v Switzerland* 54 EHRR 1087 (2010)

[19] Paragraph 209.

[20] At paragraph 69.

[21] At paragraph 70.

[22] Article 8 provides that: "*1 Everyone has the right to respect for his private and family life, his home and his correspondence.*

28 BHRC 706, [2011] 1 FLR 122 was (to quote the joint judgment in *In re E*) "*greeted with concern, nay even consternation in some quarters*" because of its potential impact on the application of the Hague Convention.

74. The court in *Neulinger* asserted its competence to review the procedures followed by domestic courts, "*in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the [ECHR] and especially those of Article 8."* [23] The "*decisive issue*" was whether a fair balance between the competing interests at stake – those of the child, the parents and the public interest (*ordre public*) involved – had been struck, within the margin of appreciation afforded to Contracting Parties. In that assessment, the child's bests interests had to be the primary consideration.[24] The court noted that there was a broad consensus – including in international law – that in all decisions concerning children, their best interests should be paramount, citing Article 24(2) of the Charter of Fundamental Rights (having earlier referred to the UN Convention on the Rights of the

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[23] At paragraph 133.

[24] At paragraph 134.

Child (CRC).[25] In the view of the court, the concept of the child's best interests is also an underlying principle of the Hague Convention and (so the court considered) Article 13 of the Hague Convention had to be interpreted in conformity with the ECHR. The court went on:

> *"138. It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences ..... For that reason, those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to a European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power ...*
>
> *139. In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully . .. To that end the Court must ascertain whether the domestic courts conducted an in-depth*

[25] Paragraph 135. The reference to the CRC is at paragraph 132. Article 3(1) of the CRC provides that *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin …" [26]

75. The court went on to hold that the enforcement of the order made by the Swiss Federal Court for the return of the child (the second applicant) to Israel would violate Article 8 ECHR. On the facts disclosed in the court's judgment, including the fact that that the child had been living in Switzerland for five years by the time that the Grand Chamber gave its decision, that conclusion (reached by a near unanimous 16-1 majority) might seem unsurprising. However, the language used by the court in the two paragraphs just set out – and in particular the suggestion that the courts of Contracting Parties were under an obligation to conduct "*an in-depth examination of the entire family situation"* – excited significant concern. As Lady Hale and Lord Wilson noted in their joint judgment in *In re E,* that language "*gives the appearance of turning the swift, summary decision making which is envisaged by the Hague Convention into the full-blown examination of the child's future in the requested state which it was the very object of the Hague Convention."*[27] They also observed that, where the requested state was a

[26] Internal citations omitted.

[27] At paragraph 22.

party to Brussels II *bis*, its courts would not have jurisdiction to conduct such an exercise.[28]

76. Against this background, the Strasbourg Court set out to clarify its ruling in *Neulinger* in *X v Latvia* [2014] 1 FLR 1135, another Grand Chamber decision. It concerned an order by the Latvian courts for the return of a child to Australia, made on the application of the Australian father. By a majority of eight votes to two, the Third Section of the Court upheld the mother's claim that the decision to order the child's return infringed Article 8 ECHR. The Grand Chamber also found a violation of Article 8, albeit by a bare majority. However, the principal significance of the decision resides in its discussion of the relationship between Article 8 and the Hague Convention and, more specifically, the extent to which Article 8 required the courts of the Contracting Parties to conduct a broad assessment of the bests interests of the child(ren) the subject of return proceedings under the Hague Convention.

77. The court began this discussion by acknowledging the distinction between the position of a court examining a return request under the Hague Convention and a court ruling on the merits of an application for custody or parental authority.[29] In the context of applications for return under the Hague Convention, the concept of the best interests of the child had to be evaluated in the light of the exceptions provided for in the Convention, namely those in Articles 12, 13 and 20. That task fell in the first instance

[28] *Ibid*

[29] At paragraph 100.

to the national authorities (including the courts) of the requested state. They enjoyed a margin of appreciation in carrying out that task but nonetheless remained subject to *"European supervision*". [30] While the court would not substitute its assessment for that of the domestic courts, it was obliged to "*satisfy itself that the decision-making process leading to the adoption of the impugned measures by the domestic to courts was fair and allowed those concerned to present their cases fully, and that the bests interests of the child were defended."* [31]

78. The court then referred to the submissions made by the various parties and interveners, including submissions requesting it to clarify the requirement articulated in Neulinger for an "*in-depth examination of the entire family situation"* and to "*set limits*" on the examination required to be undertaken by the court deciding on an application for return of a child. [32] The court then continued:

> *"104. On this point, the Court observes that the Grand Chamber judgment in Neulinger and Shuruk … may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation and of a whole series of factors. That wording had already been used by a Chamber in Maumousseau and Washington (cited above, § 74), such an in-depth examination having, in fact, been carried out by the national courts.*

[30] Paragraph 101.

[31] Paragraph 102.

[32] Paragraph 103.

105. Against this background the Court considers it opportune to clarify that its finding in paragraph 139 of Neulinger and Shuruk does not in itself set out any principle for the application of the Hague Convention by the domestic courts.

106. The Court considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, the factors capable of constituting an exception to the child's immediate return in application of Articles 12, 13 and 20 of the Hague Convention, particularly where they are raised by one of the parties to the proceedings, must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point, in order to enable the Court to verify that those questions have been effectively examined. Secondly, these factors must be evaluated in the light of Article 8 of the Convention ...

107. In consequence, the Court considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also

to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly ... is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

108. Furthermore, as the Preamble to the Hague Convention provides for children's return 'to the State of their habitual residence', the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place."

DISCUSSION

Preliminary

79. Having set out the applicable legal framework within which these proceedings are to be determined, it is now necessary to consider whether any defence to the return of W is established.

80. Before this Court, PS did not advance *any* defence to the return of X. As already explained, X is 5 years old and therefore is outside the scope of the mask mandate operative in French schools. Therefore the Article 13(b) defence relied on by PS to justify the non-return of W (or, as PS would have it, his *delayed* return) has no application to X.

81. The Covid-19 Pandemic has thrown the world into turmoil. Many of the basic things that sustain us all as human beings – social and familial contact, physical intimacy, shared celebrations and the shared rituals of grief – have been restricted or suspended to an extent unimaginable (in a strictly literal sense) prior to the emergence of the Pandemic more than 12 months ago. Life itself appears to be in lockdown.

82. In these circumstances of extreme dislocation and anxiety, frustration, fear and other strong emotions are perhaps inevitable. The restrictive measures which Governments around the world have imposed in the interests of the health of their citizens have provoked scepticism and opposition in some quarters. While that may be as may be,

insofar as there is "*debate*" as to the necessity for, and/or the efficacy of, particular public health measures to contain the spread of Covid-19, that is not a debate in which this Court has any role here. The role of this Court in these proceedings is a limited and specific one: to assess whether the material before it establishes any defence to the return of W to his mother in France. If it does not, then an order for W's return must be made in accordance with Article 12 of the Hague Convention. That is so regardless of the strength or sincerity of PS's conviction that W should not be required to wear a face mask at school and should not be returned to France while that requirement remains in force.

83. In making that assessment, this Court cannot properly rely on unsubstantiated claims or polemical assertions. As Power J explained in *C v G.*, what is required is *"cogent and reliable evidence that is capable of being tested*".

84. I stress that this appeal is concerned only with the requirement to wear face masks at school. PS has not argued that, if he returned to A, W would be exposed to any greater risk of contracting Covid-19 than that currently faced by him in Ireland. Nor has PS argued that travelling back to France at this time would expose W to any unacceptable risk. Any such arguments would, in any event, faced a very high hurdle having regard to the decisions of this Court in *C v G* and *JV v QI.*

85. Equally, no issue arises here regarding the safety and/or efficacy of Covid-19 vaccines. At the hearing of the appeal, PS appeared reluctant to accept that this was so and, as I have noted, in his written material lurid claims are made about vaccine testing and

safety (claims that are wholly unsubstantiated by any evidence before the Court). The fact is that, as of the time of writing, the European Medicines Agency has not authorised any Covid-19 vaccine for administration to persons under the age of 16.[33] It follows that there is no current prospect of vaccination being offered to children of W's age. That may or may not change. If it does, it will be a matter for CT and PS, as the parents of W, to discuss whether he should be vaccinated or not and, if they are unable to reach agreement, the competent French authorities may have to decide what is in W's best interests. However, that issue is remote, in every sense, from the issue before this Court.

Has a "grave risk" of harm to W been established?

86. I will in a moment examine the individual items of "*evidence*" that PS relies on to establish grave risk. Before doing so, I should address the more general point made by PS that children in primary school in Ireland are not required to wear face masks at school. That is so as a matter of fact. But that fact does not, of itself, give rise to any inference that requiring children in primary school to wear face masks would be harmful to them or indicate that such a requirement could not properly be imposed. In fact, in advance of the recent re-opening of schools here, there were calls (including from the Irish National Teachers Organisation) for extending the requirement to wear face masks in school to pupils in senior primary school classes. The decision to require face masks to worn only in secondary schools appears to reflect a policy judgment made by the competent authorities here – informed no doubt by appropriate public health

[33] Source: www.ema.europa.eu

advice – and does not have (and does not purport to have) the effect of setting the permissible parameters for the approach to be taken in France or anywhere else. The French authorities have made a different judgment. While no comparative material was before the Court, it is clear from the report of the Weimar Family Court decision that a similar requirement is in force in the *Bundesland* of Thuringia.

87. The evidence before the Court indicates that the WHO advises against children aged 5 or younger being required to wear a face mask, including in school settings.[34] The WHO does not advise against children aged 6-11 being required to wear a face mask, though it advises that any decision to require masks to be worn by children in this age group should be made on the basis of a number of specific factors identified by it, including the *"potential impact of wearing a mask on learning and psychosocial development."* In the absence of any evidence to the contrary – and there is none – the Court should, in my opinion, proceed on the basis that the authorities in France have had due regard to the WHO advice.

88. It is also important to recall the broader context. Since the onset of the Covid-19 Pandemic, many States (including Ireland) have been forced to close schools for lengthy periods as a measure to suppress transmission of the virus. There appears to be a strong international consensus that school closures have an adverse impact on children, both in terms of learning and personal welfare and development. Distance learning is no substitute for teaching in the classroom and friendships with fellow pupils

[34] WHO "*Coronavirus disease (Covid-19): Children and masks*."

cannot be forged, or easily maintained, remotely. School closures may have wider social and economic impacts also. As a result of these considerations, Governments around the world – including the Government here – have recognised that there is a very important societal interest in keeping schools open. However, the risk of Covid-19 transmission within schools cannot be disregarded either. Requiring pupils to wear face masks while at school is one of the public health measures that have been adopted, both in this jurisdiction and elsewhere, to protect pupils (and teachers and staff) while advancing the important policy value of keeping schools open.

(i) The HSE "evidence"

89. The FOI requests made to the HSE by a third party and the HSE's responses to those requests is one of the items of evidence relied on by PS to establish that requiring the wearing of face masks in school is likely to cause harm.

90. This material was not put before the High Court and PS did not bring any application for the admission of further evidence as required by Order 86A, Rule 4(c) (the orders made by the High Court clearly being final orders). The criteria on which the undoubted discretion to admit new evidence on appeal from a final order(s) ought to be exercised has been considered on many occasions. For present purposes, it is not necessary to look beyond the decision of the Supreme Court in *Murphy v Minister for Defence* [1991] 2 IR 161 where, at page 164, Finlay CJ identified the following three requirements: (i) that the evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with

reasonable diligence for use at the trial; (ii) the evidence must be such that if given it would probably have an important (though not necessarily decisive) influence on the result and (iii) the evidence must be apparently credible.

91. The Court received the HSE material *de bene esse* and I have already explained what it is. Having reviewed it carefully, I have come to the clear conclusion that it has of no evidential value. As a matter of first principle, the fact (assuming it to be such) that the HSE/HSPC – which is but one of a number of public bodies involved in Ireland's response to the Covid-19 pandemic – may not hold any records "*which describe the proven scientific safety of masks or face-masks as a means of limiting or containing the spread of SARS-Cov2 (Covid-19) or similar viral pathogens, with particular reference to the duration the mask is worn"* does not constitute evidence that face masks are not safe to wear, either generally or when worn by primary school pupils.

92. Given that this material is not capable of advancing PS's case, there is no basis on which the material can properly be admitted into evidence. In the circumstances, its exclusion does not cause any prejudice to PS. If the material had been deployed in to the High Court, it would not have made an iota of difference to the Judge's assessment and equally could not affect this Court's determination of the appeal.

(ii) The Reaction19 Complaint

93. This document was before the High Court and I have noted above the Judge's discussion of it. As she observed, the identity of those who prepared it is unknown and

any assessment of their credibility or expertise is therefore excluded. The Court knows nothing about Reaction19 beyond the fact that "*2 concerned lawyers from Nice*" have, on its behalf, apparently made a complaint under Article 40 of the French Code of Criminal Procedure relating to the wearing of face masks as a measure against Covid-19. Presumably, that complaint will be investigated and, if considered appropriate, tried by an appropriate court or tribunal in due course. At this point, it has the status of unproven assertion only. As Mr de Blacam noted in his submissions, much of it appears to be directed to the *effectiveness* of face masks as a measure to limit the spread of Covid-19 rather than issues relating to their *safety*, though as he acknowledged there are also claims made that wearing face masks in school causes harm to pupils. However, these claims are unsubstantiated and I agree with Mr de Blacam that no weight can properly be given to this document. It is the antithesis of the *"cogent and reliable evidence … capable of being tested*" on which the Court might confidently rely and, in my view, it would be wholly inappropriate to give it any credence.

(iii) The decision of the Weimar Family Court

94. PS also relied on a recent decision of the Weimar Family Court. PS was not in a position to provide a copy of the decision itself but instead relied on what appears to be a news report about it. The decision was given on 8 April 2021, five days before the hearing of PS's appeal in this Court. The headline to the report ("***Sensational verdict from Weimar: no masks, no distance, no more tests for students***") gives a flavour of the import of the decision. The report explains that the proceedings were "*child protection proceedings*" under Article 1666 of the German Civil Code which had initiated by the

mother of two boys aged 14 and 8. According to the report, the Weimer Family Court (comprising, it appears, a single judge) ruled that, effectively immediately, two Weimer schools (presumably the schools attended by the two boys) were prohibited from requiring students to wear mouth-to-nose coverings of any kind (especially masks such as N95 masks), requiring them to maintain minimum distancing or requiring them to participate in rapid testing for Covid-19.

95. Without intending any disrespect to the Weimar Family Court, its decision is not admissible or relevant evidence for the purposes of these proceedings. As I noted in the course of oral argument, it is clear from the report of the decision that the Weimar Family Court heard evidence from a number of expert witnesses, including a hygienist, a psychologist and a biologist, which evidence was, apparently, to the effect (*inter alia*) that the mandatory wearing of face masks in school endangered the well-being of pupils. No such evidence has been produced in these proceedings and the production of the decision of the Weimar Family Court (and of course all that has in fact been produced is a news report of that decision) cannot supply that deficiency. In circumstances where CT is unaware of the detail of the evidence given to the Weimar Family Court (as is this Court) and cannot test that evidence or the conclusions drawn from it, it would be wholly unjust to afford any weight to its decision.

96. In any event, the issue that this Court has to decide is different to the issues considered by the Weimar Family Court. It was concerned with issues of German law. We have to decide whether the evidence before the Court establishes that the requirement to wear a face mask in school amounts to a "*grave risk*" of harm to W within the meaning of

Article 13(b). In my opinion, the decision of the Weimar Family Court is not evidence of any such risk and cannot be relied for that purpose.

97. Insofar as the decision of the Weimar Family Court was relied on as "*evidence*", its admission on appeal is also governed by the principles in *Murphy v Minister for Defence* [1991] 2 IR 161. Having regard to the views I have expressed, it is clear that it does not meet the criteria for admission into evidence.

(iv) The medical report from Dr F

98. This differs from the other evidence relied on by PS in that it is directed not to any broad contention that wearing a face mask in school is generally harmful but to the narrower contention that requiring W to wear a face mask would be harmful <u>to him</u> specifically.

99. The Judge was not prepared to give any weight to Dr F's report, for the reasons set out in some detail in the Judgment (para 5.3, set out in paragraph 25 above). In my view, the Judge's analysis is unimpeachable. In the first place, no affidavit from Dr F was before the Court. The only "*evidence*" from him consisted of the two identically worded and extremely brief medical "*reports*" exhibited by PS. These were hearsay. No doubt, medical reports are often received by courts even where the doctor concerned has not verified them in evidence. But here the report relating to W was being relied on to establish a defence to the return of W (and, de facto, X also) under the Hague Convention. In the absence of sworn evidence from Dr F (and the possibility of cross-

examination on that evidence), the weight that could properly be given to those reports was, in my view, extremely limited, assuming that they were admissible at all. The reports were not addressed to the High Court and did not, in terms, address the proceedings or any issue in the proceedings. The next point is that, while CT is not a doctor, as W's mother she is better positioned than Dr F to express an opinion on whether W suffers from claustrophobia. Though Dr F referred to X as *"this patient of mine*", there is no evidence that he had ever seen W previously (and CT says clearly that he had not) and he therefore had to rely entirely on what PS told him about the child. PS expressly accepted in argument that Dr F had simply translated into medical language what he (PS) had told him about W's alleged anxiety about wearing a face mask. No independent assessment or verification appears to have been involved. The hollowness of the exercise is demonstrated by the fact that Dr F saw fit to issue a report in identical terms about X. Given his age X is not obliged to wear a face mask either in Ireland or in France and at the hearing of the appeal PS made it clear that, as far as he was aware, X had never worn a face mask. Even so, Dr F obliged in providing PS with a report indicating that X was also suffering from claustrophobia and could be exempted from wearing a mask.

100. CT has stated very clearly in her affidavit that neither W nor X is claustrophobic and *"have never had any such difficulties."* As Mr de Blacam observes, there is no suggestion of any such difficulties in the French psychologist's report (or, for that matter, in the van Aswegen report). CT also states her belief that neither of her sons would have any issues with wearing a mask. As the Judge noted, there is no objective evidence that contradicts this evidence. The only concrete assertion made by PS in this

context is that W refused to wear a mask on a visit to his grandmother and great-grandmother. CT states that this is not the case. She says that, after some initial reluctance, W wore a face mask. CT was present at that visit; PS was not. His evidence is therefore hearsay and her evidence is to be preferred. In any event, the onus of proof is on PS. CT's affidavit evidence could not be disregarded in the absence of cross-examination: see *RAS Medical Limited v Royal College of Surgeons of Ireland* [2019] IESC 4, [2019] 1 IR 63.

101. Before leaving Dr F's report, I would add that, even if taken at its full face value, it would in my opinion fall some way short of establishing any "*grave risk*" of harm to W in in the event that he is required to wear a face mark at school. Significantly greater detail of W's condition, and the adverse consequences for him of being required to wear a face mask, would be required before the Court could possibly conclude that such a "*grave risk*" had been demonstrated.

"Grave risk" arising from the absence of any exemption from the requirement to wear a face-mask?

102. PS initially asserted that there was no possibility of exemption from the requirement to wear a face mask in school in France. That was contradicted by CT who said that there was an exemption available on grounds of "*disability*", similar (so she said) to the exemptions available here. While PS swore a further affidavit in response to CT's affidavit, he did not take issue with these statements and at the hearing of the appeal, he appeared to accept what had been said by CT but suggested that such a threshold for

an exemption in France appeared to be much higher than is applicable in Ireland.

103. In the absence of any persuasive evidence that wearing a face mask at school will cause any difficulty for W (and the clear evidence of CT that it will not), it is not necessary to form any view as to the availability of exemption from the requirement to do so or the parameters of any such exemption(s). It would be surprising if the requirement to wear a mask was as absolute as PS initially asserted. The WHO advises that the use of masks for children of any age with "*development disorders, disabilities or other specific health conditions*" should not be mandatory.[35] The (limited) evidence from CT suggests, that the competent authorities in France have had due regard to that advice. It does not follow, as PS appears to think, that the exemptions available in France must mirror exactly those applicable in this jurisdiction. In any event, it is not necessary to delay further on this issue. I would add only that, in my view, even if Dr F's medical reports were to be taken at face value, they would not establish an entitlement to an exemption from any applicable requirement to wear a face mask in this jurisdiction. [36]

[35] *Coronavirus disease (Covid-19): Children and masks.*

[36] A "*Face covering*" is required to be worn by persons aged 13 and older in retail premises and public transport unless a person has a *"reasonable excuse"* for not doing so. "*Reasonable excuse"* includes where "*the person cannot put on, wear or remove a face covering (i) because of any physical or mental illness, impairment or disability, or (ii) without severe distress."* Dr F's medical reports do not address these conditions. Of course, W and X are not subject to these provisions because they are less than 13 years of age.

Conclusions on Article 13(b) "Grave risk"

104. The analysis above leads inevitably to the conclusion that the evidence before the Court falls very significantly short of establishing any "*grave risk*" of harm to W within the meaning of Article 13(b) of the Hague Convention. Far from there being "*clear and compelling evidence*" capable of satisfying the "*stringent burden*" and "*high threshold*" identified in the jurisprudence, there is in fact no plausible or meaningful evidence that being required to wear a face mask at school in the event that he is returned to France will have any adverse impact whatever on W.

Article 20 of the Hague Convention and the Constitution

105. Article 20 was not referred to by PS. He did however seek to rely on Articles 41, 42 and 44 of the Constitution as a basis for resisting the return of W. If , as PS argues, it would be a breach of those provisions to return W to France, that might amount to a defence under Article 20.

106. It is apparent that no Constitutional arguments were made in the High Court and on CT's behalf, Mr de Blacam submitted that such arguments should not be entertained on appeal.

107. The provisions of the Constitution relied on by PS are Articles 41 (the Family), Article 42 (Education) and Article 44 (Freedom of Conscience and Religion). No reliance was placed by PS on Articles 40 or 42A of the Constitution.

108. There is a substantial body of authority to the effect that Article 41 applies only to families based on marriage: see, most recently, the decisions of the Supreme Court in *HAH v SAA* [2017] IESC 40, [2017] 1 IR 372 and *IRM v Minister for Justice and Equality* [2018] IESC 14, [2018] 1 IR 417. In *IRM*, the Court indicated that it may be necessary at some point to address the question of whether the legal and constitutional position of unmarried parents, as between themselves and their children, should be afforded greater recognition than presently exists.[37] However, as I shall explain, no such issue arises here.

109. *Prima facie*, "*the Family*" in Article 42.1 of the Constitution is that referred to in Article 41 and thus a family based on marriage and that was the view of the Supreme Court in *State (Nicolaou) v An Bord Uchtala* [1966] IR 567. Again, in an appropriate case that may require reconsideration but this is not such a case.

110. Assuming, in PS's favour, that he is entitled to rely on Article 41 and 42, it avails him nothing. There is no conflict between those Articles and the Hague Convention. In *ACW v Ireland* [1994] 3 IR 232, a challenge to the constitutional validity of section 6 of the Child Abduction and Enforcement of Custody Orders Act 1991(which, it will be recalled, gives the Hague Convention the force of law in the State), relying (*inter alia*) on Articles 41 and 42 was rejected by Keane J in the High Court. As O' Donnell J observed in *Nottinghamshire County Council v KB,* it is not difficult to see why the

[37] At paragraph 240.

provisions of the Convention incorporated in Irish law were found compatible with the Constitution. The values and interests that the Hague Convention seeks to advance are entirely consistent with the values underpinning Articles 41 and 42, for the detailed reasons set out by O' Donnell J in *Nottinghamshire County Council v KB.*[38]

111. Of course, there may be circumstances in which the return of a child under the Hague Convention could conflict with Articles 41 and/or 42. No such conflict arises here. The relationship between PS and CT has broken down. The children live with CT in A. They are, and have always been, habitually resident there. The Family Court of the *Tribunal Judiciare* has determined that their habitual residence should remain in A. The children attend school there. CT wishes them to return to A and to school and has no difficulty with the fact that W will have to wear a face mask at school (a requirement imposed by the State, not by CT). Articles 41 and 42 do not give PS a constitutional wildcard allowing him to dictate whether and under what conditions his children should attend school or entitling him to retain W because he disagrees with French policy relating to the wearing of face masks at school. Articles 41 and 42 do not privilege an Irish parent (or a parent in Ireland) by giving them some form of constitutional veto in circumstances such as those here and to allow those provisions to have such an effect would be fundamentally at odds with the Hague Convention.

112. Article 44 of the Constitution was referred to in PS's appeal papers but no basis for any suggestion that the return of W (or X) to France at this point in time would infringe

[38] At paragraphs 160-162.

Article 44 was identified in argument. PS did not articulate any objection to the return of the children on grounds of conscience or religious belief.

113. Articles 40 and 42A were not relied on by PS. In light of my findings relating to Article 13|(b), there is no question of W's return being in conflict with these Articles. While it is clear that different approaches have taken here and in France (and elsewhere) on the issue of whether to require face masks to be worn in primary schools, no argument was made to the effect that it would not be constitutionally competent for the State to impose such a requirement in this jurisdiction. Furthermore, the difference here is one of degree only. Masks are required in secondary schools here. That requirement applies to pupils as young as 12. W is now 11. It is quite inconceivable that such a difference could engage the exceptional jurisdiction to refuse to return recognised in Article 20, as explained in *Nottinghamshire County Council v KB* .

114. PS also sought to rely on section 12 of the Criminal Law Act 1976. It creates an offence of giving false information about the commission of an offence. It has no relevance to any issue in this appeal.

115. The new grounds which PS seeks to advance on the basis of Articles 41, 42 and 44 of the Constitution therefore have no substance or force. In the circumstances, it does not appear necessary to reach any definitive view as to whether PS should be permitted to rely on these grounds. The decision of the Supreme Court in *Lough Swilly Shellfish Growers Co-Operative Society Ltd v Bradley* [2013] IESC 16, [2013] 1 IR 227 sets out the applicable principles. The jurisdiction to permit new grounds to be advanced on

appeal is an exceptional one. However, in *Ennis v AIB plc* [2021] IESC 12, the Supreme Court (per MacMenamin J) indicated that there may some categories of appeal where the principles set out in *Lough Swilly* are to be applied more flexibly. *Ennis v AIB plc* involved proceedings for summary judgment. While the proceedings here are also summary in form, having regard to the urgent nature of Hague Convention proceedings and the importance of such proceedings being brought to finality as quickly as possible, the relevant policy considerations arguably weigh in favour of the *Lough Swilly* principles being applied less rather than more flexibly. Article 8 ECHR may also be relevant in this context. In any event, these issues should be left to be addressed in an appeal in which they properly arise.

Article 8 ECHR

116. It remains only to address Article 8 ECHR. In light of the decision of the Grand Chamber in *X v Latvia*, it is clear that Article 8 does not affect the substantive interpretation or application of the Hague Convention (or, as it was put by the court in *X v Latvia*, it "*does not in itself set out any principle for the application of the Hague Convention by the domestic courts")*. Its requirements in this context are procedural, though that is not to suggest that they are unimportant.

117. The return of a child "*cannot be ordered automatically or mechanically."* Objections to the return "*must genuinely be taken into account by the requested court*" and a reasoned decision given which addresses such objections specifically and in appropriate detail.

118. The exercise undertaken by the Judge, as set out in her detailed Judgement, manifestly satisfied these requirements and I have conscientiously sought to do so also.

119. The court in *X v Latvia* also stated that the courts in a requested state must satisfy themselves that "*adequate safeguards are convincingly provided*" in the state where the child or children are habitually resident and that, "*in the event of a known risk, that tangible protection measures are put in place."*[39] No risk to W or X has been established, so no question of protection measures arises here. As regards the provision of "*adequate safeguards",* I have no grounds for doubting that CT will adequately safeguard the children if returned. In any event, I note that the Family Court of the *Tribunal Judiciare* has already made orders regarding the welfare of W and X, including issues of access. The French courts are available to PS in the event that any further issues arise following the return of W and X to A, including any issue that may arise from W's return to school and the requirement for him to wear a face mask at school. I note, in this context, that PS has legal representation available to him in A.

120. I am satisfied accordingly that Article 8 provides no obstacle to the immediate return of W and X to France.

[39] Paragraph 108.

CONCLUSIONS AND ORDER

121. It is not in dispute that the proofs required for the making of an order for the return of W and X pursuant to Article 12 of the Hague Convention are satisfied here.

122. The evidence before the Court falls very significantly short of establishing any "*grave risk*" of harm to W within the meaning of Article 13(b) of the Hague Convention. There is no plausible or meaningful evidence that the requirement to wear a face mask at school will have any adverse impact on him.

123. No defence under Article 20 of the Hague Convention arises here.

124. Article 8 presents no impediment to the immediate return of W to A. The evidence clearly establishes that the immediate interests of W (and X) are best served by return into the care of CT in A. Any issues regarding their bests interests in the longer term can best be determined by the French courts, in accordance with the fundamental underlying rationale of the Hague Convention.

125. It follows from these conclusions that I would affirm the orders made by the Judge. W and X must be returned forthwith to France. Mr de Blacam indicated that CT would travel to Ireland to collect the children and asked that PS would bring the children to her for that purpose. That appears to be a sensible arrangement. I would allow the parties a short period to agree appropriate return arrangements. It is obviously in the interests of everyone – and most particularly the interests of W and X – that these

arrangements should be agreed rather than imposed by the Court.

126. In making the necessary arrangements, the parties should have regard to the observations of Whelan J at the conclusion of her judgment in *JV v OI.* It is important to ensure a smooth and calm transition of the children from their current place of residence with PS into the custody and care of CT for the purposes of returning to France. PS must facilitate this. I understood Mr de Blacam to suggest that CT intends to travel to Ireland, and to travel back with the children, by ferry. If that is so, the children should be transferred to CT at or immediately proximate to the ferry port, at a time to be agreed. The arrangements should be such as to avoid CT becoming subject to quarantine here. Both PS and CT must take all appropriate steps to minimise the risk of W and X being infected with Covid-19 during their journey from their current place of abode in R back to their habitual residence with CT in A.

127. The Court will list this matter for further directions at **4 pm tomorrow, 29 April 2021.** At that hearing it will wish to be told whether agreed return arrangements have been put in place and what those arrangements are. In the absence of agreement, the Court will give whatever directions are necessary to ensure the immediate return of the children. Any other issues arising from the Court's decision can also be addressed at that hearing .

Faherty and Pilkington JJ have indicated their agreement with this judgment.