THE HIGH COURT

FAMILY LAW

[2021] IEHC 168

[2020 No. 22 HLC]

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

C. T.

APPLICANT

AND

P. S.

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 12th day of March, 2021

1. Introduction

1.1 This is an application under the Hague Convention for the return of two boys who left their home in France in October of 2020 to pay a visit to their father, the Respondent, in

Ireland. The Respondent did not return them to the custody of the Applicant, their mother, on the basis that W, the older of the two, would be obliged to wear a mask if he returns to attend school in France and this, it is argued, poses a grave risk to the boys or alternatively, would place both children in an intolerable situation. A number of specific events are also relied upon in order to, cumulatively, establish the defence of grave risk.

2. <u>Facts and Issues: Masks, Messages and Medical Reports</u>

2.1 The family lived together in France until unhappy differences arose in the parties' relationship and the Respondent was asked to leave the family home. The children, anonymised for the purposes of this judgment as W and X, were born in France and were aged 10 and 4 years old, respectively, at the time of their retention here in Ireland.

2.2 The Applicant has satisfied the Court that France has always been the country of habitual residence of both children, that both parents enjoyed and were exercising their custody rights in respect of the children at the relevant time, that there was no consent by or acquiescence to their retention by the Respondent, and the procedural requirements have been fulfilled by the Applicant in terms of the Convention timelines. None of these matters was put in issue by the Respondent. It is common case, therefore, that there has been a wrongful retention of the children contrary to the Convention and the burden has shifted to the Respondent to establish a defence.

2.3 The Respondent applied to a French court for custody of his children in July of 2020, before the events the subject matter of this application, and the decision of that court was not delivered until after the retention of the children in Ireland.

2.4 On the 17th of October 2020, the two children came to Ireland, with a return ticket for the 1st of November. On the 29th of October the French Government announced that it would be mandatory for children over the age of six to wear facemasks while attending school. At this point, and in various social media messages over that day and the next, the Respondent

notified the Applicant that he would not return the children to their home. The boys did not travel to France as planned on the 1st of November.

2.5 On the 24th of November, the French court ordered that the boys should reside with their mother. Notwithstanding that order, the Respondent has refused to return the children and argues that he intends to appeal that decision.

2.6 One of the exhibits in the case was a document containing a translation of numerous messages between the two parties to these proceedings. A later, more detailed, list of exchanges was introduced by agreement between the parties as being an accurate note of their correspondence. This item, 149 pages of messages, sheds light on a number of different issues.

2.7 The messages show, in this Court's view, that whatever the differences that arose between the parties, both parents love their children. Despite their own disagreements, there is ample evidence of efforts to plan for the boys' welfare, schooling and holidays in such a way that both parents will spend time with them, which is of course a vitally important factor for any child. The messages make it clear that both parents have held differing views on the wearing of masks, and the risks associated with mask-wearing, throughout the period of time relevant to these proceedings. The messages also give a picture of the boys' daily lives and activities, and the messages are directly relevant to the question of whether or not there is any risk to the children if they are returned to France.

2.8 On the 4th of November, both boys were taken to see a doctor who provided a report in each case. In this regard, the Respondent averred: *I have confirmed with my GP, Dr [name redacted] that W and X are claustrophobic and as such would find the wearing of a mask uncomfortable and upsetting. W is also extremely anxious which makes him very uncomfortable about wearing a mask.* The substance of the medical report regarding W can be set out in full:

> "*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."

2.9 An identical report issued in respect of X. The main issue in this case is whether or not the wearing of a facemask poses a grave risk for these two boys in the specific context of their return to France, where it will be mandatory for the older boy if he is to attend school. The other incidents are set out below but the latter, while relied upon, form the basis for a potential cumulative risk argument made by the Respondent. It was not strenuously argued, that the other allegations, either alone or together, could constitute a "grave risk" within the meaning of the Convention as interpreted by relevant case law.

2.10 It is important to be clear from the outset that, whatever the position regarding W, there is no possible risk for X in relation to masks as there is no question of him being required to wear a mask in school. The most relevant messages are set out below. The other allegations are then described and discussed in the context of the applicable law on grave risk.

3. <u>What constitutes a Grave Risk of Harm or an Intolerable Situation?</u>

3.1 The Convention outlines a number of potential "defences" to the removal or retention of a child, including where there is a grave risk of harm to the child if returned. In such a case the burden of proof lies on the party who alleges grave risk.

3.2 The Respondent must 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. In *R.K. v J.K.* [2000] 2 IR 416 at 451, Barron J. noted that:

"Prima facie the basis of this defence must spring from the circumstances which prompted the wrongful removal and/or retention. The facts to support such contention must therefore in general relate to what occurred beforehand within the jurisdiction of the requesting State. Events subsequent to the removal and/or retention would be material only is so far as they tend

either to aggravate any original intolerable situation or to create one and also would normally relate to matters which had occurred since in the requesting state.

This suggests that only events which can be seen to prompt a removal or retention can be considered as material to the issue of grave risk.

3.3 Barron J. went on to adopt the following definition from *Friedrick v Friedrick* (1996) 78F 3d 1060:-

> *"… a grave risk of harm for the purposes of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute, e.g. returning the child to his own war, famine or disease. Second, there is grave risk of harm in cases of serious abuse or neglect or extraordinary emotional dependence, when the Court in the Country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection."*

3.4 Finlay Geoghegan J. considered the phrase "intolerable situation" in *P v P* [2012] IEHC 31, at para. 44: *"Intolerable" is as has been stated "a strong word" and when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate"* quoting Lady Hale in *Re D* [2007] 1 AC 619 at para. 52. She went on to quote from In *Re: E* (Children) (Abduction: Custody Appeal) 2011 2 FLR 758, adding her own comment as follows:

> *"Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse or neglect of the child herself." I respectfully agree with this observation and would add in relation to the facts of this case that discomfort and distress may be almost inevitable for a child whose parents are in dispute.*

3.5 Finally, in this regard, it is useful to recall the succinct comment of Whelan J. in considering the effect of *Neulinger and Shuruk v. Switzerland* [2011] 1 F.L.R. 122 on the meaning of intolerable in this context, when she delivered the Court of Appeal decision in *AA v. RR*, in that Court referred to as *CMW v SJF* [2019] IECA 227: *"The concept of intolerability connotes substantial and not trivial circumstances."*

4. The Messages

4.1 The following messages are some of those which were exhibited in this case and both parties agreed that they were accurate. They are set out in some detail as they form a contemporaneous record of events and of the views held by the parties at a time when neither one was likely to anticipate the messages being examined in court proceedings. In that respect, the messages constitute reasonably reliable evidence of their contents and of the state of knowledge and attitudes of those who composed and sent them.

4.2 On the 9th of May, when the Respondent asks the Applicant about the return of the children to the next school term on the 18th of May, she responds:

> *"They are really eager to go back. And they need to get back to a slightly more normal life. X cried when I told him that you did not want him to go. I am making masks for them to go out."*

And he asks: *"Beside the masks that they distribute"*, and, later on the same day he asks: *"You are making masks for the children?"*

> "CT: *Just to go shopping. It's mandatory.*
>
> PI: *And will it be mandatory at school?*
>
> CT: *No. You have the documents; it's only for adults*
>
> PT: *So teachers are going to wear masks during classes?*
>
> CT: *You have to read the document again.*

PT: *I read the document If the teacher wears a mask, they are hiding a big part of their face, that is not teaching Any teacher will tell you that"*

4.3 On the 11th of May 2020, there was another exchange between the parties about mask-wearing, in the context of what was then a global pandemic. The Applicant appears to support the general health guidelines including the wearing of masks and the Respondent questions the health advice to wear a mask, at one point responding: *"Everything I heard is that a mask does not protect you against the virus."* The Respondent suggests that the Applicant did not always support mask-wearing, or at least didn't always wear one herself, but she makes it clear that whatever her views might once have been, she has adopted the practice, wears them routinely and, as set out above, is making them for the boys.

4.4 On the 18th of May, another exchange took place about one occasion when the Applicant took the family dog out to the street so that it would not urinate in the corridor of their apartment. The younger boy, X, woke up alone and was upset. His brother, W, later told his father about this incident. The exchange makes it clear that the Respondent is criticising the Applicant for taking the dog too far down the road so that she was gone at a time when X awoke alone and became scared. The Applicant points out that he had been asleep and that it had only happened once. While the Respondent states that he does not accept this, there is no other evidence of a comparable incident in the months of daily texts or in his affidavit. This is one of the incidents that forms the main factual basis for the legal submission made that it is intolerable for the children to be left alone or in the care of the Applicant and that they may, as a result, be in grave risk if returned to France.

4.5 On the 19th of July the Respondent asks:

"Is it true that you said nothing when you went to the retirement home and a nurse forced W to wear a mask?

CT: *Mom has been weak lately... and you're respecting lockdown in Ireland, aren't you? He only wore the mask inside the building*

PS: *No I'm not keeping the children locked down in the house because it's not mandatory anymore*

Children under 11 are not supposed to wear a mask and I guess that you didn't force X to wear a mask so I don't see how it protects their grandmother when someone from the same household doesn't wear one

CT : *Ok*

PS: *W doesn't want to wear a mask*

CT: *Ok ok ok "*

4.6 The Respondent has sworn, in respect of this nursing home visit, that "*the children were asked to wear a mask but W refused.*" This is probably not correct. Whether he seeks to mislead the Court or is swearing this because W has told him so, is not possible to decide nor is it necessary. The exchange provides strong support, in the form of contemporaneous messages which are agreed by both parties as accurate, for a number of conclusions of fact which this Court has reached, namely: that the older boy, W, did wear a mask on at least this one occasion, that W wore the mask without any apparent ill effects and that, if W doesn't want to wear a mask generally as the Respondent claims, this is the height of W's specific reaction to mask-wearing. There is no suggestion of a medical condition, nor was there any anxiety or discomfort noted by the Applicant, who was with W while he was wearing the mask, nor was such a physical or psychological reaction expected by the Respondent at that time. His only articulated concerns were his own opposition to masks (as set out in previous messages) and the statement that W did not want to wear one.

4.7 Further relevant exchanges took place from the 26th to the 29th of October. From these, it is again made clear that the Respondent is opposed to masks and refuses to allow the children to wear them. On the 26th of October the Respondent copies the above messages arising from the nursing home visit, which exchange occurred in July, to the Applicant and continues the debate as follows:

> "PS: … *I'm very surprised that you don't want to discuss something as serious as our children's health?*
>
> CT*: I support wearing masks. Wearing a mask protects oneself and protects others! If W has to wear one, he'll get used to it, I got used to it at work. I'll say it again he has to protect himself and protect others…*
>
> PS: *No, it does not protect from anything In France you wore masks the whole summer and the number of cases rises at the same speed as in the other countries where they did not make wearing masks compulsory And no, he won't get used to it because he's not going to wear it He's exempted!*
>
> CT: *It is one of the measures taken to fight covid and if it is mandatory I can't see how he'll be exempted. Would you rather have him get sick with it and fall ill?*
>
> PS*: I'm sorry but I can't trust you anymore*
>
> *In July you told me that you wouldn't force him to wear a mask and now you're saying the contrary*
>
> *I do not wear a mask when I'm in France And my kids don't either*
>
> CT: *Given the speech that he gave me yesterday, you've already filled W and X's heads with the conspiracy theories that you like so much anyway. In July, wearing a mask was not*

compulsory… and for now we still don't know whether it will be or not so there's no need to quarrel."

From this, it is clear that the Respondent is arguing that the Applicant has agreed not to force the children to wear masks, to use his words. Her response which has been characterised as such an agreement is above: *"Ok ok ok."* While it could be read as an agreement, it also could be read as a placatory reply to a statement by the Respondent. More significantly, she is responding to a statement about W not wanting to wear a mask and being exempted. No medical condition has been mentioned and no report obtained. The Applicant has also just texted: *"I can't see how he'll be exempted."* There is still no reference to the specific risks to these children, rather, the Respondent's view is that the wearing of a mask will not protect them and he concludes that, as he does not wear one, his children will not either.

4.8 On the 28th October the Respondent argues that the children are exempted from mask-wearing and adds: *"I disagree with them going back to school before we know exactly what "reinforcement of sanitary protocols" means*, and: *We'll talk again tomorrow after I go to the doctor."*

This is a message, therefore, directly before the Respondent visits his doctor in respect of sanitary protocols and at a time where, in no message of those exhibited, many of which deal directly with the risks of mask-wearing, was there a reference to either child showing any sign of distress while actually wearing a mask. It was submitted in argument that there was no evidence that the children had worn masks but the message above, on 19th July, and those on the 9th and 10th of May which refer to the children wearing masks while shopping, strongly suggest that they had, however rarely, worn masks from time to time.

4.9 The Respondent goes on, on the 28th of October, as follows:

"PS: *So if I get this right you want our kids to wear a dirty rag on their faces all day long which they'll touch and where a lot of bacteria is going to accumulate*

We won't even talk about all the carbon dioxide and other nasty stuff that they exhale and that they're going to inhale back

CT: *You're supposed to change it several times a day…"*

By the 29th of October, the Applicant is asking:

"*So, basically…. You are not bringing them if the thing with the mask is not put in place???!*

PS: *Like I said, we are waiting for all the information first and we will see what happens.*

CT: *No, there is 'no we will see what happens', you are bringing them. School is open, they have to resume their education in France with their teachers and their friends! You don't have the right to keep them with you. That does not add up!*

PS: *No, school is not operating like before."*

Later on the same date, he continues: *"As you know, I never wear it and nobody has been able to force me. Some have tried to intimidate me, but I've put them in their place."*

He also adds*:*

"It is mandatory to wear a mask from the age of 6. As usual in France, they forget to talk about people who are spared. Also, they spoke about limited intermingling of the students and protective measures implemented on the courtyard. So, I'm interpreting this that the students will not be allowed to touch one another during break time and I'm afraid of the psychological effects this can have, especially on X who is very much a people's person, embarrassed of being suspicious and being prohibited from touching his classmates."

And finally, when the Applicant protests: *They have school in France!* He responds:

I know they have school in France, but everything depends on the circumstances.

I don't agree that W and X wear masks… I don't know if you understand… I would defend my children until the very end no matter what the circumstances and consequences are. And especially against someone who has no interest whatsoever in their well-being or health. So, can you tell me how we are going to get somewhere instead of being narrow-minded by telling me that it's out of the question that they stay in Ireland when I asked you if you were ready to assist me with French for W since it is your native language, and you would be keener to help him than me?"

4.10 On November 3rd the Applicant sends a message, below, and receives this response:

"Their education should take place in their school! I have absolutely nothing else to add to that!

PS: *Yes, but the conditions for welcoming the children in their school have changed and you know very well that I don't agree with the fact that W has to wear a mask, especially when he is dispensed."*

And finally, on the 29 December:

"PS: *I'm keeping the children here in Ireland to protect their health since at least here they can breathe freely in school, in the stores and even in the street, which is not the case in France where I learned from my relatives that harassment of people who are exempt from wearing a mask is getting worse and worse!!* And*:*

I can send you dozens of scientific reports that show the dangers of wearing masks, if you want."

4.11 The significance of the many, detailed messages about masks, including those that post-date the diagnosis of both children with claustrophobia, is that it is never suggested that W has become anxious, breathless or distressed while wearing a mask, still less that he has any condition which might make a mask more difficult for him than it would be for another child. If either child had claustrophobia, or any symptom of same, one would expect to see a reference to it in these texts and one would expect either his father or his mother and primary

carer to have noticed such signs of distress. There was no evidence in any message of any reason why W might be dispensed, to use the Respondent's word, or exempted.

4.12 The view that neither child has a medical condition is supported by a letter from the Applicant's solicitor which was exhibited by the Respondent in this case. The letter is dated the 30th of October, and in it the lawyer repeats instructions from the Applicant as follows: "*Obviously, X and W have no health problem and no contraindication to wearing a mask.*" This letter was translated by the Respondent himself and forwarded to his solicitor so that she could read it. No comment was made in the covering email which suggested that it was incorrect, nor was any correspondence shown to this Court which might refute that statement.

5. The Medical Reports

5.1 The only evidence which suggests a medical condition is the short report of the GP, set out in full above in paragraph 2.8. While that evidence is not treated lightly, and the Court has considered it carefully, it is evidence that is directly contradicted by the Applicant's affidavit and its weight is diminished by the contents of the Respondent's own messages, none of which suggests a medical condition. On the contrary, and throughout, the messages demonstrate a strongly-held view of the ineffectiveness of mask-wearing in respect of which the Respondent has acknowledged "*he will defend [his] children to the end, no matter what the consequences.*"

5.2 In the messages, the Respondent expresses a concern about X in circumstances where the policy in France appears to him to prevent touching. This leads him to comment: "*I'm afraid of the psychological effects this can have, especially on X…*" There is no further argument based on this fear, nor is there any medical support for it. The concern expressed here, therefore, is not one that this Court needs to consider. It is set out in this judgment to illustrate how significant it is, in this Court's view, that there is no reference anywhere to

breathing, psychological or anxiety issues that could possibly be relevant to, or support the reliability of, a diagnosis of claustrophobia in W's case. Not wanting to wear a mask is a very different thing to being medically compromised when wearing a mask.

5.3 For all the reasons set out above and despite the medical report that, on its face, makes a diagnosis of claustrophobia in respect of W, this Court is unwilling to rely on the medical report and attaches relatively little weight to it. To be clear, the Court makes no criticism of the doctor in question and can make no finding of fact as to what led to the production of such a report given that neither the doctor nor the Respondent could be cross-examined on the provenance of, or basis for, the report. The relevant considerations in determining what weight to attach to the report include:

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.

While it is not necessary or possible to make any findings of fact in respect of what may or may not have been said to this doctor, it is sufficient to note that the factors set out combine to persuade the Court that this report, alone, has not displaced the burden of proof on the Respondent in respect of establishing a risk of grave psychological or physical harm to W should he be required to wear a mask.

6. Masks

6.1 In para. 26 of the Respondent's affidavit he avers that he is not convinced of the efficacy of face masks and believes that they are a waste of time and are more likely to cause illness than to protect from Covid-19 infection. This conclusion is one that he has no expertise to reach. The example given in para. 26, of foot and mouth disease, is anecdotal and unsupported by scientific facts or evidence which might link it to the facts of this case.

6.2 The Respondent exhibits one lengthy extract from a group called Reaction 19, which helps explain why he holds the views he does. The Court however cannot act on the views expressed by the various contributors to this exhibit. While there has been no expert in this case to assist the Court as to the general proposition that masks are dangerous, this is the proposition that the Respondent has set out to prove. It is not sufficient for him to prove that they are ineffective, as that could not constitute grave risk. Face masks are worn in many countries as part of the measures taken to reduce the spread of a global pandemic caused by a viral illness and most international medical bodies have publicly urged the wearing of masks generally. Against that background, the Respondent was required to do more than to produce a document entitled Complaint, compiled by a group of people whose names are not provided, with no reassurance as to the identities, credibility or expertise of those who contributed the material in the document.

6.2 The views expressed in the exhibit include statements, some of them in block capital letters, to the effect that imposing a face mask on a person under the age of 15 constitutes

specific criminal offences, including endangerment and deception. The statement that requiring a child to wear a mask constitutes either of the named offences shows a very poor understanding of both law and logic. As a matter of common sense, any source that produces such advice is one to be treated with scepticism. For all of these reasons, the Respondent has not shown to this Court's satisfaction that the wearing of masks generally constitutes a grave risk to either child.

6.3 This Court has already heard a preliminary application to adduce expert evidence on the issue of face masks. Not only did the proposed expert never see either child, both of whom are the subjects of this application, she had not prepared any statement which the Court could assess in order to rule on the application. In a case such as this one, where there is insufficient evidence of the relevant child having any difficulty or discomfort relating to the wearing of masks, the evidence of such an expert would have been of minimal relevance. Without a statement as to the extent of her expertise and a summary of what she proposed to say to the Court, there was no basis for the application to hear her.

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.

7. Care and Complaints

7.1 There are a number of specific instances relied upon in support of the Respondent's defence that the children will be in grave risk if returned to France. These are in addition to

his argument regarding masks. The first allegation, that X was left alone for a period of time in his home, an apartment building in France, is set out above in the section on text messages. The other incidents are described in paragraphs 18 and 19 of the Respondent's affidavit. The Respondent states that the Applicant tried to slit her wrists in January or February of 2019 at a time when X was present. He states that she also threatened him with a knife in December of 2019. The Respondent goes on to describe another incident in December of 2019 when, he says, she grabbed X by the arm at a time when she was upset and put him into a dark room. He refers to her being on medication and avers that he was "*always worried about the children's welfare while the children were with the Applicant when I was out working as she was prone to tantrums which I was afraid she would take out on the children… I have always been concerned about the Applicant's capacity to care adequately for the children…*"

7.2 There are many averments, made by both parties, as to matters of fact relating to the children. There are many more averments in respect of arguments about money and about other issues relating only to the parties' relationship with each other which are not relevant to this Court's decision. While most of these disputes cannot be resolved without detailed evidence and cross-examination of the parties, it is possible to assess the weight of the averments regarding any risk to the children for three reasons: Firstly, the statement that the Respondent was concerned about the Applicant's ability to care for the children is contradicted by the messages between the parties and their conduct over the past year. They share the custody of the boys and agree holidays and other matters, showing no sign of concern by the Respondent as to the Applicant's ability to care for these boys. This mitigates against the conclusion that the Respondent did not have confidence in her capacity to care for them. Secondly, the court in France to which the Respondent applied for custody has ruled that the Applicant should have custody of the children. Thirdly, the Respondent's own affidavit contradicts these expressed concerns.

7.3 At para. 22 of his affidavit, the Respondent swears that the following is the true situation:

> *"I fully intended to return the children to France at the end of their visit but events intervened in that a mandatory face mask requirement was put on children attending school by the French authorities which permitted no exception. I want to assure this Court that my retention of the children herein is not a roundabout way for your deponent to wrestle custody from the Applicant nor is it designed to flout the decision of the [French] Court… As things stand I will take the children back to France once the mask wearing requirement is lifted."*

He goes on to depose that the children should not be separated so as to explain why X has not returned home even though he will not be required to wear a mask as he is not yet 6 years old. These averments undermine his stated concerns and worries as set out in para. 19.

7.4 A bald denial in itself is rarely sufficient to refute an averment and, usually, the Court is left in a position whereby it must find against the party who bears the burden of proof. Here, the Court finds against the Respondent not only because he bears the burden of proof as to the matters he submits constitute a grave risk to the children, but because the other evidence tends to support the Applicant's denials, rather than his allegations. In respect of the one incident which is admitted in full, that of leaving a child alone for a few minutes, this is clearly within the category of "*trivial circumstances*" to use the phrase of Whelan J. in *CMW v SJF* [2019] IECA.

7.5 Such incidents must be viewed in their factual context. The Applicant was the primary carer for both boys from December 2019 and their only carer from the time when the Respondent left the family home. The family lived in an apartment and the family pets include a dog which must be taken outside from time to time. The Applicant accepted that this incident had occurred. The Respondent learned, from W, that X had been left alone for a short time and had been crying. This is not evidence suggesting a grave risk to X.

7.6 The Respondent has also relied on police reports, made by him against the Respondent and alleging assault and neglect, to support his allegations that the Applicant is not a capable carer for the children. The Court notes that these reports were not made until January 2021, after he received the papers in these proceedings. The dates of the events of which he complains (December 2019 and March 2020) should be noted. Had he harboured serious concerns in that regard, it seems likely that he would have made the reports at a much earlier stage. This lengthy delay also suggests that these events were not matters that could have prompted the retention of the children so many months later, particularly when one considers that the boys had spent time with the Respondent that summer. Had these concerns carried any weight, he would have acted upon them before January of 2021. The sole catalyst for his actions appears to have been the announcement that French schools would require pupils over the age of six to wear masks.

7.7 For all of these reasons, those that support the Applicant's denials and those that tend to cast doubt on the Respondent's allegations, the Court is not satisfied that the Respondent has proved the allegations made in respect of the Applicant's care of her children. There is insufficient evidence of any concern, let alone one which might constitute a grave risk of harm to either child in this case, if he is returned to the care of the Applicant.

8. Objections of the Child

8.1 The Respondent anticipated in his affidavit that W would object to being returned to France, which views, he submitted, should be respected. W is now nearly 11 years old and was interviewed by a psychologist in order to explore his attitude to future living arrangements. Any objection to living in France, if expressed, in no way binds the Court but in a sufficiently mature child, an objection may carry weight depending on other circumstances. In this case, the views expressed by W could not, on any interpretation, be described as an objection to moving back to France.

8.2 The Respondent submitted in oral argument that W was not invited to discuss mask-wearing but, even if he was not, this child clearly wants to go home to his mother. It does not appear likely to this Court that W knows nothing about the proposal that he will be wearing a mask in school if he returns to France. Messages quoted above strongly suggest that both boys are aware that the wearing of masks is an issue in their family, to put it neutrally. Equally however, W has an excellent relationship with his father, wishes to have conversations with him every evening by phone and to enjoy frequent visits. The view of the expert assessor is that this relationship must be nurtured. This is clearly an important conclusion which should guide the conduct of both parties in future, but it cannot affect the Court's legal duty to order the return of both children to their home in France.

9. Conclusions

9.1 This Respondent holds strong views about the wearing of facemasks. He relies upon his objection to masks to justify his refusal to return both his sons to their home in France. Only W will be required to wear a mask in school. The Respondent's GP has provided a report on W to the effect that he has claustrophobia. I attach little weight to this medical report, which is refuted by the Applicant's affidavit and by the text messages between the parties.

9.2 None of the other incidents described by the Respondent is established to the extent necessary for the Court to accept his version of the events in question. It must be added for completeness that these alleged events, even if true, would not constitute evidence of grave risk to either child such as would require the Court to refuse to return the boys.

9.3 Given the conclusions of fact set out above, the Court does not consider this an appropriate case in which to place a stay on the order directing the return of the children to their home in France.