[2020] IEHC 260

THE HIGH COURT

FAMILY LAW

[2019 No. 34 HLC]

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

AND

IN THE MATTER OF THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION, 1980

AND

IN THE MATTER OF J.J.C., A MINOR

BETWEEN

M.W.

APPLICANT

AND

J.C.

RESPONDENT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 5th day of February, 2020.

1. This is an application for an order pursuant to Article 12 of The Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereinafter referred to as "*the Convention*") for an order for the return of the child to her place of habitual residence in the state of Western Australia, and for the purpose of enforcing the applicant's right of custody in respect of the child. A declaration is also sought that the respondent has wrongfully removed the child from the jurisdiction of the Commonwealth of Australia within the meaning of Article 3 of the Convention and/or in the alternative, a declaration that the respondent has wrongfully retained the child within this jurisdiction. The applicant also seeks an order that the respondent take all steps to facilitate the summary return of the child to Western Australia. Further ancillary relief is sought. The application is grounded on the affidavits of Ms. Grainne Brophy of Smithfield Law Centre, solicitor for the applicant and of the applicant.

2. The child was born in 2015 in Perth, Western Australia. The applicant is the child's father, the respondent her mother. The applicant is originally from the United Kingdom but has residency rights in Australia. The respondent has Irish and Australian citizenship. The child also enjoys such rights. While the applicant accepts that he is the child's father, the respondent maintains that by his conduct, words and actions, this has not always been the case and that he continues to question her parentage by requesting DNA testing. The applicant, however, states that he has requested such testing to enable him to be named as her father on her birth certificate. While the applicant has accepted that he is the father of the child, as is evident from the matters referred to below, repeated requests for DNA testing have led the respondent to cast doubt on this. Nevertheless, he has sworn in these proceedings that paternity is not in issue and he accepts that he is the father of the child.

Relevant provisions of the Convention

3. Article 3 provides:-

"The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

4. Article 5 provides:-

"For the purposes of this Convention -

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

5. Article 13 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 -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

6. The applicant accepts that the onus of proof is on him to satisfy the court of the following:-

   (a) that the child was habitually resident in Australia at the time of removal – this is not in issue in this case;

   (b) that her removal has breached rights of custody vested in him or the courts of Australia; and

   (c) that, at the time of the removal, he was actually exercising his rights of custody within the meaning of the Convention.

7. It is pleaded that the applicant enjoys rights of custody of the child, that he was exercising them at the time the child was removed from the jurisdiction; and for some time prior to that. The respondent contends that the applicant does not enjoy rights of custody of the child and that if he has such rights of custody, he was not actually exercising those rights at the time of removal. She further argues that in the event of a return to Australia, the child will be exposed to a grave risk within the meaning of Article 13 and therefore the court ought to make an order refusing the return of the child.

8. The child was brought to Ireland by the respondent on the 20th June, 2019. These proceedings were instituted on the 5th November, 2019, within one year of the child's removal from Australia. If the applicant discharges the onus of proof to establish facts and matters sufficient to fulfil the requirements of Article 3, then in accordance with Article 12 the return of the child is mandatory, unless the respondent succeeds in establishing a defence under Article 13 and nevertheless persuades the court not to exercise its discretion to return the child.

Background

9. It is necessary to consider in some detail the background facts and circumstances as deposed to in the affidavits before the court. The parties have presented the facts to the court without any particular distinction being made between those facts which are relied upon by the applicant in order to discharge the onus of proof on him under Article 3 of the Convention, from those facts which may be relied upon by the respondent, should the issue arise regarding the requirement by her to discharge the onus in the context of a defence which has been advanced under Article 13. I have therefore recounted below the facts upon which the applicant and respondent rely, respectively, in respect of the application and the defence to the application. The onus of proof lies on the applicant under Article 3, whereas it is only if the court is satisfied that he has discharged the onus of proof, that the onus shifts to the respondent to establish a defence under Article 13.

10. The applicant and respondent are not, and never were married. In 2013 and 2014 they shared accommodation in Melbourne. The circumstances of the parties' relationship, according to the applicant is that he met the respondent in July, 2013. He moved to Melbourne in August, 2013, with the respondent moving there in late October, 2013. They house shared and while he disputes that they had a relationship he accepts that they had

sexual intercourse. In August, 2014, when the respondent discovered that she was pregnant she returned to Ireland. The respondent maintains that the applicant wished her to have an abortion and that he believed that the reason she moved to Ireland was because, at that time, abortion was not lawful in this country. The applicant places a different complexion on this and states that he assumed that this was the case because she had obtained emergency contraception the following day.

11. According to the respondent, while living in Perth in July, 2013, she met the applicant. In late October, 2013 she moved to Melbourne to be with him. The child was conceived while they resided together.

12. In August, 2014, some months after the child was conceived, the respondent re-located from Melbourne to Perth. The applicant continues to reside in Melbourne. The child lived in Perth with the respondent until 20th June, 2019, enjoying occasional visits to her maternal grandparents in Ireland.

13. The respondent contends that she is the sole and primary carer of the child and that the applicant has had little or no involvement in the child's upbringing or life. Apart from a short period of presence following her birth, he has had physical access on only three subsequent occasions, twice in 2017 and once, most recently in March, 2019. On the other hand, the applicant maintains that the respondent's conduct has been instrumental in preventing and restricting access by him to the child.

14. In 2016 when she was struggling to pay health bills for the child she felt it incumbent on her to request him to pay child support. His refusal prompted her to make application to the Child Support Agency (hereafter "*CSA*"). In January, 2017, she prepared another parenting plan which broke down the following day.

15. In May, 2017 the respondent sought, and was granted, child support through the CSA. The applicant maintains, however, that he paid maintenance before this but accepts that there were occasions when he withheld such payments because of what he contends were restrictions placed on access by the respondent. The respondent accepts that while the applicant has paid maintenance to the CSA she disputes that he is genuine in his acknowledgement of paternity. It is submitted on the facts, that the applicant refused to acknowledge paternity to the CSA and refused to complete a statutory declaration confirming that he was the child's father. While the evidence indicates that the applicant and respondent communicated with each other, primarily through the exchange of text and other forms of messages over the years, on 23rd October, 2017, through her solicitors, she wrote to the applicant seeking to have a more formal arrangement of supervised access put in place. It is suggested by the respondent that this correspondence was not replied to until 4th April, 2019. In the letter of 4th April 2019, which is addressed in more detail below, the applicant's solicitor referred to the letter of 23rd October, 2017, and commented that no reply was received from the office of the respondent's solicitor. If the applicant responded in writing in 2017, such letter has not been exhibited by either party.

16. In March, 2019, in circumstances discussed below, access was arranged. This took place over a period of hours, two according to the respondent, four according to the applicant. Correspondence suggests that discussions took place with regard to potential future access. Arrangement for the making of access calls via Skype were put in place and while there is a dispute as to whether those arrangements failed because they were not adhered to by the applicant, or were altered by the respondent, at least one Skype call took place between the applicant and the child.

17. In the letter of 4th April, 2019, in response to the respondent's solicitor's letter of October, 2017, the applicants solicitors sought to address access arrangements going forward. In the October, 2017 letter it was suggested that the applicant engage with Child Contact Supervision Services. This proposed visits in the company of a supervisor who could report on progress and make recommendations regarding further access. This was proposed as a way of building up a relationship, and once the child was familiar with her father, unsupervised access could be considered. In the meantime, access arrangements were suggested.

18. The applicant's partner works as a paralegal in the firm of lawyer's representing the interests of the applicant in Australia. A matter of significant contention is her intervention and role in this matter. In January, 2019 she sent to the respondent a message which, while on the one hand sought greater access and communication between the applicant and his child, nevertheless, contained comments reflecting on the respondent's behaviour, the circumstances of the child's conception and raised an issue concerning the child's parentage.

19. The applicant also avers that he made an attempt to seek access in October, 2018. There is, however, no objective or written evidence of this. The first written application, for which evidence has been provided in these proceedings was made to the courts on 14th June, 2019. The applicant filed an Initiating Application and Case Information Affidavit in the Family Court of Western Australia, seeking formal parenting arrangements in respect of the child. On 18th June, 2019 he sent a request to the Australian Federal Police ("*AFP*") that the child be placed on the Family Law Watch List ("*the watch list*"). On 19th June, 2019, the respondent was served with the initiating application. An affidavit of service has been exhibited which indicates that the respondent was personally served on 19th June, 2019 at 3pm. The respondent makes no reference to this in her affidavit but states that she had booked airline tickets for the flight to Ireland on 11th June, 2019.

20. On 20th June, 2019, while at the airport, the police informed her that the child was on the watch list. Having been advised by them to seek legal advice she attended at the children's court and was informed that there was no application before the court. An official sent an email to the AFP at 12.45pm informing them that the applicant's court application had not been accepted for filing and, on the same day, 20th June, 2019, the child was removed from the watch list. The flight left at 10pm.

21. On 27th June, 2019, the applicant was advised by the AFP that on 20th June, 2019 the Family Court of Western Australia notified them that his application had not been

accepted and that the child had been removed from the family law watch list on 20th June, 2019. On 28th June, 2019 the case application was closed. The applicant's lawyer was so informed by letter dated 1st July, 2019, in which it was explained that the application had been dismissed and that:-

> *"[t]he power of parentage testing under s69W is exercisable only when the parentage of the child is in question in proceedings under the Act; the Duty Registrar was correct in requiring that the primary application include final orders to be sought; even if expressed in the alternative."*

Under the heading "*Final orders sought*" the following had been inserted by the applicant:- "*that the applicant be excused from particularising the final orders sought by him until prior to trial"*. It appears that particulars of final orders sought was required to be included/inserted. Interim orders were sought that parentage DNA testing be carried out on the parties, including the child. Interim orders were also sought to restrain the removal of the child from the jurisdiction and to make provision for access.

22. The Case Information Affidavits sworn by the applicant in support of his application was the subject of detailed scrutiny before this Court. The respondent submits that at most, the applicant has inserted an "*X*" in a box marked "*Mother/Father*", which is contradicted by the contents of para. 30 wherein the applicant sought a DNA paternity test and where he stated:-

> *"A DNA test has never been completed. The respondent and applicant were housemates and lived with another male. They were only friends and never in an exclusive relationship. The respondent left Melbourne and relocated to Perth almost immediately after conception was alleged to have taken place."*

The respondent places emphasis on the word "*alleged*". Further, the applicant requested a stay order on childcare payments pending confirmation of paternity and that "*in the event the DNA test is positive*" the applicant wished to be listed on the birth certificate. The respondent has highlighted the contents of the court application documents as evidence of the applicant not in truth accepting parentage.

23. Subsequent to the removal of the child, a second application was made by the applicant on the 2nd July, 2019. Final orders sought which included an order for parentage testing and that the child be placed on the watch list. Interim access orders were also sought. The applicant forwarded this to the AFP requesting that the child be placed on the watch list. This occurred on 3rd July, 2019. On 21st July, 2019 the respondent was served with the application at which time she was in Ireland.

24. Much has been said about the circumstances in which the child's conception took place and the quality of the relationship between the parties at that time. Indeed, it has been suggested that the applicant did not wish for the child to be born, and that that was one of the reasons the respondent went to Ireland shortly after she became aware she was pregnant. The respondent states that the applicant had told her that he did not want the

child and encouraged her to have an abortion. As a result, she sought counselling. The baby was registered at Cork University Hospital and the first scan was in Cork. Her work situation dictated that she return to Australia, despite her wish that the child be born in Ireland. She returned to Perth and not to Melbourne as, according to the respondent, the applicant had made it clear that she was not welcome in his life. She points to the lack of interest which she maintains the applicant showed during her pregnancy, and his failure to attend medical appointments, including scans. She was hospitalised twice during pregnancy. The applicant was made aware of this but she contends that he showed no interest. She also states that it was only in the late stage of pregnancy that he decided that he wished to become involved in the child's life. She points to what she regards as the continuing denial by the applicant that he is the child's father and she states that this was the reason why he was not registered as the child's father on her birth certificate.

25. The applicant avers that for the first four months of the child's life he spent time with her and the respondent in Melbourne and Perth. They also visited his family in the United Kingdom. In August, 2015 he had to return to work in Melbourne, having exhausted his permitted leave from work. He states that until she was removed from Australia he continued to spend time with the child whenever he could. He emphasises that the child has lived all her life in Australia.

26. Despite the poor quality of their relationship, the respondent maintains that she was eager to facilitate a relationship between the child and the applicant, but that he did not make the effort to develop that relationship and is a stranger to the child. He has never sought information in relation to the child's education, health, welfare or interests and she believes that it is only because she sought maintenance for the child in November, 2016, that he became aware of her activities and childcare costs. He never inquired about her day to day care, her education or her medical care, and showed no interest in her life. Further, while he has expressed intermittent interest in seeing her, she states that he has not followed this through. He has not been involved in the ordinary daily care of the child. She disputes that in the early part of the child's life, when in Perth, that he looked after her. In 2015, when the child was in hospital with suspected meningitis, she avers that she contacted the applicant as he was then in Perth but he refused to come. As the child got older the applicant failed to have any form of contact or access with her and refused to agree to unsupervised access even though he had not seen the child for a considerable amount of time. She further states that he has never delivered or collected her from childcare and he was unaware and did not he seek information about the childcare centre she attended until July, 2019.

27. The respondent states that in November, 2016, the applicant informed the CSA that he was not the child's father. She contends that such denials of parentage are compounded by the relief which he sought in the court proceedings in 2019 for parentage testing and that a stay be placed on child support pending the results of that test.

28. The respondent accepts that in June, 2016, when the applicant's father passed away, and when he contacted her for financial assistance to enable him to get home to the funeral,

she asked him whether they could make things work between them. She was keen that the child would have her father in her life. In June, 2016, she prepared a parenting plan with which the applicant agreed. It was sworn in front of a public notary. However, it is maintained that he did not adhere to it and it broke down almost immediately. She states that the applicant would typically organise to visit and Skype and then cancel, forget or be too busy, miss a flight or say that he could not afford to visit. Despite assurances, he failed to Skype on Christmas Day in December, 2016.

29. The applicant avers that he was present in the hospital at the time of her birth and he says that after the child was born, the respondent informed him that she would not place his name on the birth certificate and thus he could not prevent her from leaving Australia with the child. He avers that he was unhappy about this but did not wish to argue or cause stress to the respondent in the aftermath of the child's birth. He thought that this would be a discussion at a later stage. In 2016 his parents travelled to Ireland to spend time with the child who was holidaying there. His brother also spent some time with the child on that holiday. His mother spent time with the child in Perth.

30. The applicant avers that he requested his name to be placed on the child's birth certificate on many occasions, which requests were refused. He exhibits copies of text messages which he sent to the applicant on 25th November, 2015, 5th April, 2016 and 24th January, 2017. The message of 25th November, 2015 records "*we need to sort this birth certificate out and come to some legal agreement then because this is just gonna keep happening and it doesn't work*". In response, the respondent wrote "*[n]o worries pay centilink back and when you have let me know and ill sort it out and u can have visitations and we can organise them legally.*" The response was "*well you will have to tell them and give them my details*". There are further exchanges in March and April, 2016 when the applicant made enquiries as to whether the birth certificate form had been obtained. There is also a response from the respondent that it was not the applicant who was looking after the child and the response was received "*don't need DNA test for that*" which engendered a further response from the respondent that she was informed that she required a paternity test in order to place his name on the birth certificate.

31. By February, 2017, the applicant had not seen the child in three months. At that stage, the child was almost two years old and the respondent states that the child did not know her father. The respondent informed him that visitation would have to be supervised until such time as the child got to know him. This was refused.

32. The respondent points to the lack of support over a period of four years, apart from the maintenance payments. In July, 2017, she had a back problem and required to be admitted to hospital, but the applicant did not contact her to offer support. She had to turn to family and friends. At that time, while the applicant had agreed to supervised access visits on a number of occasions, and despite them being organised, they did not go ahead. Further, she maintains that the applicant only suggested that he would visit the child if his company paid for him to work in Perth.

33. The applicant maintains that the respondent blocked any form of communication in 2018, for months at a time. He maintains that when he requested to see the child, the respondent either refused or, if a time was agreed, she would cancel the arrangements. Such allegations are made by both parties of either a failure to honour arrangements or cancellation thereof. He states that he sent birthday presents to the child. To the extent that it is contended that he was oblivious to the health difficulties of the respondent, he states that she did not inform him of them.

34. He avers that in November, 2018 he instructed his lawyers to prepare an application to initiate proceedings in the Family Court of Western Australia which was rejected as an urgent application and he avers that he was requested to arrange mediation. No documentary evidence of this application has been exhibited, which is surprising, given the lengths to which the applicant has gone to obtain letters/evidence of support from other persons and the volume of text message to which reference has been made in respect of other matters.

35. It is clear that during 2018, relations between the parties deteriorated significantly. In essence there was no access and no contact between the applicant and the child at that time. Whether this was due to the applicant's reluctance to make contact or the respondent's unwillingness to allow him into the child's life may be of some relevance to the subjective intention of the applicant as he now states, but there is little objective evidence to suggest that during this period, despite the letter from November, 2017, of an effort being made by him to secure rights of access through official channels.

36. It would seem to the court that matters have altered since January, 2019 and in particular following a message from the applicant's partner to the respondent on 8th January, 2019, which could be described as unsavoury and unnecessarily interventionist and where the word rape was used. Nevertheless, this drew a response from the respondent. She contacted the applicant and reminded him that he had only seen the child for short periods in the past year and that future visits must be supervised. Having received phone calls at night time, the respondent contacted her cousin who was a detective in the Victoria Police. She has provided a letter to the respondent in which she expresses considerable concern about the return of the child to Australia.

37. In February, 2019 the respondent gave notice of termination of work to her employer. She was finding it difficult to cope. In March, 2019 she advertised furniture for sale. She believes that this is when "*I received sudden interest in my daughter … after four years of nothing*." She was contacted by the applicant's mother, who wished to meet with the child. She spent the day with the child and the respondent in the respondent's home. The respondent states that she informed her that she was happy to facilitate time with the child on a Sunday. A visit was arranged at a play centre. During the course of the night and early morning, she received a number of messages from the applicant and the applicant's partner to the effect that the applicant wished to attend the play centre. She agreed because it was supervised. The respondent states that she suggested that they attempt to arrange another parenting plan. This was the first time she had seen the

applicant in two years. Her own mother was also present at the play centre. She avers that when the applicant attended at the play centre he smelled of alcohol from the night before and that the child did not know who he was. She states that the applicant produced a document which had been written by his partner, and asked for a DNA test. She was informed by the applicant that he would be taking the child on Saturday mornings, every five weeks, and would return her on Sunday night. She informed him that his daughter did not know him and she would not agree to the child going to a hotel room with a complete stranger when he had refused supervised visits. It was agreed that the applicant would Skype the child on Tuesdays and Thursdays. Apart from one such call this broke down.

38. The allegation of rape first surfaced in January, 2019 in a message from the applicant's partner to the respondent, which was repeated by her in a communication in August, 2019. The applicant seeks to explain the message to the respondent's sister in January, 2019 on the basis that it was sent in the hope of encouraging communication and was a one-off. The justification proffered to explain the further communication in August, 2019 is that this was done in an attempt to see if the respondent's sister could assist in facilitating communication between the applicant and his child. If that was so then this message can only have served to raise the temperature between the parties and matters were further compounded when, at para. 55 of his affidavit sworn on 18th December, 2019 he avers that:-

> *"my partner does consider that the respondent raped me as I told her about the circumstances of the sexual advances by the respondent towards me without my consent. My partner then received a letter from Irish solicitors accusing her of defamation and abuse. No further action was taken."*

Rights of Custody – the rights of the applicant

39. In support of his application that he enjoys rights of custody under Australian law, the applicant relies on an affidavit of laws sworn by Ms. Tracy Ellen Ballantyne. She is employed as a director of the International Family Law Section of the Commonwealth Attorney General's Department. This is the Australian Central Authority for The Hague Convention. Ms. Ballantyne refers to the Australian Family Law Act, 1975, and a section entitled "*Section 111 B Convention on the Civil Aspects of International Child Abduction*". This provides as follows:-

> *"For the purposes of the Convention:*
>
> *(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force;*
>
> *And;*
>
> (b) subject to any order of a court for the time being in force, a person:
>
> *(i) with whom a child is to live under a parenting order; or*

(ii) who has parental responsibility for a child under a parenting order; should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to spend time under a parenting order; or
(ii) with whom a child is to communicate under a parenting order; should be regarded as having a right of access to the child".

40. With regard to children from Western Australia who are born to parents who have never married, she draws attention to the reference in 111B(4)(c) to the provisions of the Family Court Act 1997 (Western Australia), s. 68 of which defines "*parental responsibility*" as follows:-

"In this Part —

parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."

Ms. Ballantyne notes that the Western Australia Family Court Act 1997, s. 192 makes provision for the presumption of paternity arising from acknowledgments. It provides as follows:-

"If —

(a) under the law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, a man has executed an instrument acknowledging that he is the father of a specified child; and

(b) the instrument has not been annulled or otherwise set aside,

the man is presumed to be the father of the child."

41. On the basis of her analysis of the situation, Ms. Ballantyne avers as follows:-

"The application of [the applicant] shows that on the 14th June 2019, [the applicant] signed 'Case Information Affidavit' in support of his application to the Family Court of Western Australia. In this affidavit, [the applicant] acknowledged that he is the father of the subject child."

While the application of the applicant under the Convention states that there are existing Australian court orders in relation to the subject child, Ms. Ballantyne avers that they do

not vary or remove the applicant's parental responsibility in relation to the child and on that basis she concludes:-

> *"It would appear that the applicant retains parental responsibility under Australian law in relation to the subject child, and therefore rights of custody in relation to the subject child for the purposes of The Hague Convention."*

42. The applicant relies on the affidavit of laws to assist in discharging the onus of proof to establish that he has rights of custody within the meaning of the Convention. While the respondent has not submitted an affidavit of laws to contest the contents of Ms. Ballantyne's affidavit, counsel for the respondent challenges the accuracy of her opinion. It is submitted that this opinion is predicated on the applicant having acknowledged that he is the father of the child. Ms. Kirby B.L., on behalf of the respondent, argues that on closer examination in the applications to the Australian court the applicant continues to dispute paternity and therefore, the affidavit of laws ought not to be relied upon. The plain reading of the affidavit, it is submitted, does not lend itself to an acknowledgment of paternity and casts doubt on the conception of the child.

43. Ms. Kirby B.L. also submits that Ms. Ballantyne does not address the meaning of "*execute an instrument*" under Australian law, nor does she address whether a Case Information Affidavit is such an executed instrument. For these reasons, it is submitted that the applicant has failed to prove rights of custody within the meaning of the law of Western Australia and therefore the only two options are to strike out or adjourn the proceedings to seek a declaration of the Australian authorities pursuant to Article 15 of the Convention.

44. Counsel also submits that it is clear from the court records in Western Australia that at the time of the child's removal there was no application pending before the court and no order was in existence. It was only after the removal of the child, on the 16th August, 2019, that an order was made the Magistrate's Court.

45. The respondent has not produced to the court a legal opinion which contradicts Ms. Ballanyne's opinion and while she has not specifically addressed the issue of the request for paternity DNA testing and the effect, if any, that this may have on the application as a whole, it is clear that Ms. Ballantyne, who is familiar with the applicable laws, and who is an employee of the Central Authority in Australia, was aware of the contents of the Case Information Affidavit sworn by the applicant on 14th June, 2019. Nothing in her affidavit suggests that she has misgivings in relation to the opinion which she has expressed. The *fact* that the applicant signed the affidavit in support of his application to the family court appears to have been a primary consideration in her assessment.

46. While invited to analyse and assess Ms. Ballantyne' evidence and conclusions, care ought to be exercised by this Court that it does not unwittingly and inappropriately enter upon the interpretation of Australian laws, on which it has no expertise. On the basis of the evidence before the court and on the balance of probabilities, I am satisfied that the

applicant has established that he enjoyed rights of custody when the child was removed from Australia on the 20th June, 2019.

47. I am further satisfied that it is appropriate for this court to arrive at this conclusion, notwithstanding the respondent's reliance on Article 15. Although open to the respondent to advance a contrary legal opinion or affidavit of laws, this has not been done. This is not a case, therefore, in which there are contradictory opinions expressed as to the nature, effect and extent of the laws of a foreign country, or to the interpretation thereof, and where it may be more appropriate to invoke the provisions of Article 15.

48. The affidavit of laws is the principal evidence on which the applicant relies on this aspect of the case, while perhaps more relevant to the exercise of those rights, it seems to me that in the circumstances of this case, the court should not overlook the application made by the respondent to the CSA in its overall assessment of this issue.

Rights of Custody in the Courts of the Commonwealth of Australia

49. The case advanced by the applicant at hearing was that *he* has rights of custody. The affidavit of Ms. Ballantyne does not address the issue of custody rights in the *courts* in Western Australia. The Initial Case Application was not accepted, was closed and ultimately dismissed following a hearing in Chambers by O'Brien J. on 1st July, 2019. The applicant was informed by the child's school on 22nd July, 2019 that she had been withdrawn on 20th July, 2019. On 6th August, 2019 the respondent wrote to the Family Court of Western Australia informing it that both she and the child had left for Ireland. On 16th August, 2019, that court made orders restraining the removal of the child.

50. At the time of swearing her affidavit, Ms. Ballantyne appears to have been generally aware from the contents of the applicant's Convention application, of the existence of the court order obtained in August, 2019. This is evident from para. 9 of her affidavit where she avers that these orders do not vary or remove the applicant's parental responsibility in relation to the child and that therefore, the applicant retains parental responsibility under Australian law and rights of custody for the purposes of the Hague Convention.

51. On the evidence, I am not satisfied that it has been satisfactorily established on the evidence that the courts in Australia had custody of the child at the time of her removal.

The exercise by the applicant of his rights of custody at the time of removal

The Burden of Proof

52. The onus of proof on the applicant under Article 3 is less onerous than that which is on a respondent who seeks to rely on a defence under Article 13 of the Convention. If the applicant discharges that burden of proof, then in a defence under Article 13, the onus of proof shifts to the respondent to show that the applicant was not actually exercising such rights at the time of removal. In *N.J. v. E.O'D*. [2018] IEHC 662 Ní Raifeartaigh J. stated:-

> *"It is also clear from the authorities that where the issue of the exercise of custody rights under the Convention arises other than as a preliminary issue, the burden of*

proof lies on the respondent under Article 13(a) to establish that the applicant was not exercising his custody rights at the time of the removal."

53. At para. 73 of the Exp*lanatory Report on the 1980 Hague Child Abduction Convention ("the Pérez-Vera report")*, the author states:-

"73 … several proposals were put forward for the deletion from article 3 of any reference to the actual exercise of custody rights. The reason for this was that its retention could place on the applicant the burden of proving a point which would sometimes be difficult to establish. The situation became even more complicated when account was taken of the fact that article 13, which concerns the possible exceptions to the obligation to order the return of the child, requires the 'abductor' this time to prove that the dispossessed party had not actually exercised the custody rights he now claims. Now, it is indeed by considering both provisions together that the true nature of the condition set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate. Besides, the informal nature of this requirement is highlighted in article 8 which simply includes, in sub-paragraph c, 'the grounds on which the applicant's claim for return of the child is based', amongst the facts which it requires to be contained in applications to the Central Authorities. On the other hand, article 13 of the Convention (12 in the Preliminary Draft) shows us the real extent of the burden of proof placed upon the 'abductor'; it is for him to show, if he wishes to prevent the return of the child, that the guardian had not actually exercised his rights of custody. Thus, we may conclude that the Convention, taken as a whole, is built upon the tacit presumption that the person who has care of the child actually exercises custody over it. This idea has to be overcome by discharging the burden of proof which has shifted, as is normal with any presumption (i.e. discharged by the 'abductor' if he wishes to prevent the return of the child)."

54. Mr Finn B.L., for the applicant, also relies on the decision of McDermott J. in *B v. C* [2015] IEHC 548. There, no contact took place between the father and a child for a period of almost two years. McDermott J. noted that during that period there was no evidence of attempts by the applicant to exercise contact rights, or of interest on his part in so doing, whether by way of letter, telephone, greeting card or other means. The applicant had been the subject of criminal proceedings which precluded him from making direct contact with the respondent but he was permitted, in accordance with his bail terms, to make contact with the child through his solicitors. McDermott J. held it was open to him to seek access and maintain contact with the child, but he failed to do so. While he did not institute proceedings in respect of his contact rights before the Courts of England and Wales, he was, however, joined as a respondent in the child's grandparents' application which sought contact only and did not seek to disturb the custody arrangements under which the child was in the care and control of his mother, subject to the right of contact with the father as had been established by order of the court. McDermott J. was satisfied

that the applicant's engagement with the proceedings was a clear exercise of his right to custody under Article 3 at the time of the removal of the child. While there was little evidence of direct contact between the child and the father during the course of the criminal proceedings, this was explicable by a pending criminal trial, described as a "*dominating circumstance*", and the allegations which had been made against him that he had assaulted the child. McDermott J. continued at para. 33:-

> *"These, and other allegations made against the grandparents, were to be the subject of the fact finding hearing on the 21st and 22nd April to which they were happy to submit thereby ensuring that any future contact between grandparents, father and child was regulated and supervised by Court order. I am therefore satisfied that the applicant was actually exercising his custody right on the 14th April, 2015 and that [the child] was wrongfully removed from the jurisdiction of the Courts of England and Wales."*

55. Mr. Finn B.L. submits that this is illustrative of the purposive approach which a court should take to the question of whether custody rights are being actually exercised. He also submits that while maintenance payments, on their own, may not be sufficient evidence of the exercise of rights of custody, the fact that such maintenance is paid is a relevant consideration. In so far as reliance is placed on grave risk under Article 13(b) of the convention he submits that there must be clear and compelling evidence of the grave risk alleged, and no such evidence exists in this case.

56. On behalf of the respondent, Ms. Kirby B.L. relies on *N.J. v. E.O'D*. [2018] IEHC 662. An applicant father was named on the birth certificate which conferred rights of custody on him. Ní Raifeartaigh J. referred to the decision of Finlay Geoghegan J. in *M.J.T. v. C.C.* [2014] IEHC 196 where the court found that there was insufficient preliminary evidence that the applicant was exercising rights of custody. Finlay Geoghegan J. observed:-

> *"The authorities to which I refer simply require him to show that he kept or sought to keep regular contact or a relationship with his child. There is no evidence he did this during the three years prior to [the child's] removal from England. In circumstances where the applicant was living in the same country as [the child], the payment of maintenance through CSA does not in my judgment suffice. In the words of Lord Brandon in Re H, he was not maintaining the stance and attitude of a custodial parent. The definition in Article 5 of the Convention of rights of custody as including "care of the person of the child" underlines the requirement for personal contact or seeking to maintain contact or a relationship as part of the exercise of rights of custody. There may, of course, be factual situations where there is evidence that personal contact is precluded by court order or other reason, despite attempts made."*

57. According to Ní Raifeartaigh J., the focus of the enquiry is whether the parent sought to have a relationship with the child. She found that the father had not sought to maintain a relationship with the child or to maintain the stance and attitude of a custodial parent, in any serious way, at least from April, 2016. The evidence of a chance encounter between

the applicant and the child was not evidence of the exercise of such rights. It could not be characterised as an attempt to sustain a relationship with the child. The learned judge continued:-

> *"The applicant's main argument appears to be that the respondent was preventing him from having access to the child. It is also true that two non-contact orders were made against him. However, the applicant brought no court application seeking access or any form of rights or decision-making power in respect of the child herself. It was not suggested that he made any attempt to make arrangements through the social services, notwithstanding that the order dated January, 2017 specifically referred to the social services as the medium through which contact with the mother could be made. Nor did he make any request to the English courts to assist him in the face of what he considered to be unreasonable refusals on the part of the respondent. Further, he failed to do so despite his knowledge of the respondent's frequent trips to Ireland with the child… The height of his case in support of his being an 'active and engaged father' is that he was constantly making telephone contact with the mother, requesting access to the child and rebuffed, in circumstances where he took no concrete steps, using the relevant authorities, to secure access. Finally, although it is more minor than the other matters, the applicant does not contradict the evidence that on the three occasions he was informed that his daughter was in hospital, he failed to attend or make further inquiries as to her welfare. In all of the circumstances, it seems to me that it could not be said that at the time of the child's removal to Ireland, the applicant was 'exercising' his rights of custody within the meaning of the Convention. Notwithstanding that I must adopt a liberal approach to the 'exercise of rights of custody', I find myself unable to reach the conclusion, on the evidence before me, that this applicant was exercising rights of custody at the time of the child's removal to Ireland."*

58. Mr. Kirby B.L. submits that this is relevant to the factual circumstances which arise in this case. It is submitted that the applicant was not actually exercising his custody rights at the date of removal, was not engaged in the ordinary process of caring for the child, was not making enquiries about her day to day care, education or medical care. Visitation on three occasions for two hours on a Saturday in December, 2017 and one day in March, 2019 in the previous two years does not, it is submitted, alter the situation. She further submits that the applicant's main argument in this case is that the respondent was preventing him from having access to the child, although he brought no court application seeking access until a failed application was brought on the 14th June, 2019.

Discussion

59. While each case must be determined on its own facts, a number of relevant principles emerge. In the consideration of whether the applicant has established on a *prima facie*, or preliminary basis, that he has exercised rights of custody the Courts must take a *very liberal view* as to what constitutes exercise of custody rights. This was stressed by Finlay Geoghegan J. in *M.J.T. v. C.C.* [2014] IEHC 196 who also observed that it requires a

demonstration by an applicant parent that he or she either did, or attempted to, maintain contact or a relationship with the child. The fact that maintenance payments have been discharged does not, on its own, provide *prima facie* evidence of the exercise of rights of custody. The level of input into the day to day physical care of a child is not determinative.

60. In the context of a defence advanced under Article 13, in *M.S.H. v. L.H. (Child Abduction: custody)* [2000] 3 I.R. 390, McGuinness J. in the Supreme Court held that the fact that the applicant was in prison and thus his ability to exercise his custody rights were impaired could not, of itself, deprive the applicant of a legally established right of custody. She stated that the failure to exercise rights of custody must be *clearly and unequivocally* established. It is also evident from the appealed High Court judgment that there is no requirement for an applicant to show that he or she was to some extent taking immediate care of the child at the date of the removal. Herbert J. stated:-

> *"Should this be the case, then persons under disability, for example, a person serving a term of imprisonment, persons incapacitated by sickness or accident and persons whose occupation necessitates long absences from home such as mariners would all be deprived of the benefits of The Hague Convention in the case of an unauthorised removal of their children. In my judgement, this could hardly have been the intention of the contracting States in entering into this agreement on the civil aspects of international child abduction."*

The applicant emphasises the reference to "*persons whose occupation necessitates long absences from home*" and submits that this applies in this instance, given the distance the parties lived apart in Australia.

61. I now address the issue of whether the applicant has discharged the onus of proof of establishing the *actual exercise* of rights of custody *at the time of the removal* of the child on a preliminary or *prima facie* basis. I have considered the evidence of contact between the applicant and the child, both personally and via technology, the payment of maintenance and the court application which I am satisfied was served on the respondent prior to her departure but after she had booked tickets for the flight home and although it may have been rejected for the stated reason, it ought to be taken into consideration. I must have regard to the communications between the parties relating to attempts to establish a structured access regime and parenting plan, even if such efforts proved to be less than successful. Matters to be considered include the letter of the 4th April, 2019 from lawyers for the applicant in Australia, subsequent emails and letters from the solicitor, Ms. Gopal, to the respondent. Emails and letters authored by the respondent should also be considered including those of 5th and 7th May, 2019, in which, while rejecting the proposals advanced in the letter from the applicant's Australian solicitor, stated her intention to facilitate a relationship between the applicant and his child and expressed the view that the only option going forward was through the Child Support Centre and Relationship Australia. In this regard, while the applicant was initially resistant of supervised access, he avers that he was in contact with Relationship Australia and

sought mediation. He exhibits to his affidavit a certificate from a Family Dispute Resolution Practitioner, dated 29th May, 2019, certifying that he did not attend for dispute resolution because of the other party's refusal or failure to attend. The date of the last attempted attendance at family dispute resolution was stated to be 8th May, 2019.

62. Taking the above into account, I am satisfied, that given the burden of proof which lies on the applicant, he has established on a preliminary or *prima facie* basis, that he was exercising rights of custody at the time of the removal of the child from Western Australia.

63. In accordance with the provisions of Article 12, therefore, as the child was removed from her habitual place of residence less than one year prior to the institution of the proceedings the court is obliged to order the return of the child forthwith, unless a defence under Article 13 is established by the respondent.

Article 13 of the Convention – general considerations

64. While a number of potential defences may be raised under Article 13, given the tender age of the child, issues concerning the child's views and objection have not been canvassed and do not arise. In addition to the respondent's contention that the applicant was not actually exercising rights of custody she also maintains that there is a grave risk to the child's physical or psychological harm or that the child otherwise will be placed in an intolerable situation.

Article 13(a) defence – that the applicant was not actually exercising rights of custody at the time of removal

65. I now address whether the respondent, has discharged the onus of proof of establishing that the applicant did not actually exercise rights of custody at the time of the child's removal.

66. The respondent seeks to discharge this burden of proof, *inter alia*, by attempting to rebut the evidence which has been advanced by the applicant in the first stage of the process under Article 3. The affidavit of laws, deposed to by Ms. Ballantyne, concentrates on whether the applicant had rights of custody under the laws of the Commonwealth of Australia or perhaps Western Australia, but is not an opinion on whether those rights were actually being exercised by the applicant.

67. The facts, or absence thereof, on which emphasis was placed by the respondent in attempting to establish a defence under Article 13(a), include:

i. lack of physical contact, inquiry and physical access to include remote access via technology. This must also include a consideration of any restrictions or impediments to such access/visits alleged to have been placed on this by the respondent;

ii. the absence of the applicant's name from the child's birth certificate and the questioning of parentage through requests for DNA analysis including in the context

of the applicant's stated acknowledgement that he is the child's father, in these and other proceedings;

iii. the contents of the Case Information Affidavit;

iv. the securing and payment of maintenance, including communication with the CSA in Australia; and

v. the quality of the relationship between the parties, including that between the respondent and the applicant's partner and the effect this will have on the child's wellbeing.

68. There was no court order in existence on the date of removal. In my view while limited, if any, consideration ought to be given to the fact of the obtaining of that order after the child had left, different considerations apply to the earlier, albeit failed, application lodged on 14th June, 2019. The fact is that the applicant attempted to seek interim access and an order to restrict the removal of the child from the jurisdiction. It seems to me that this is an important consideration in the determination of whether, as per McGuinness J., it has been *clearly and unequivocally* established by the respondent that the applicant has not exercised rights of custody and whether this is consistent, or inconsistent, with maintaining the stance and attitude of a custodial parent.

69. It is submitted by the applicant that he did more than discharge maintenance payments. He lives and works in Melbourne some 3,500 kilometres distance from Perth. He states that this makes it difficult for him to maintain regular access, but he had contact with the child in the months after her birth and he visited her on the three stated occasions in 2017 and 2019.

Conclusion on the exercise of the Rights of Custody at the time of removal

70. I am satisfied that whatever the quality of the relationship between the applicant and the respondent and the quality of the contact between the applicant and the child, there was contact between them in the early days. Thereafter, contact was at best sporadic. The applicant seeks to explain this on the basis that he was prevented from having access and that the respondent sought to place unreasonable conditions on access visits. To adopt the reasoning of Ní Raifeartaigh J., however, it was open to him to make application to court to seek access, something which he did not do at least, on his uncorroborated evidence, until November, 2018 and as a matter of objective analysis, not until June, 2019. This court must have some reservations regarding the reliability of the applicant's suggestion that proceedings were in contemplation in November, 2018. The applicant has gone to great lengths to exhibit communications and correspondence, to exhibit photographs and to provide significant detail in relation to the exchanges between the parties on many issues. It is a matter of some surprise, therefore, why proceedings, draft proceedings or an exchange of communication corroborating or evidencing the contemplation of those proceedings have not been placed before the court. It seems to me, therefore, that I should not lay serious emphasis on this assertion in the assessment of whether the applicant was actually exercising rights of custody.

71. Whatever may have been the position up to the end of 2018 and in this regard, the evidence of an expressed desire by the applicant to exercise rights of custody or to truly wished to maintain contact with the child but was obstructed in so doing by the response and attitude of the respondent is somewhat equivocal, what the court has to consider is whether, at the time of the removal, the respondent has established that the applicant was clearly and unequivocally not exercising rights of custody. This brings me to a consideration of the events which have occurred since January, 2019 and in this regard, I have already referred to the court application of 14th June, 2019 which, it seems to me, is a matter of significance which I must take into account.

72. I have already referred to the communication of the 8th January, 2019, by the applicant's partner, who described herself therein as his "*new wife*". She wrote, amongst other things, that she wished to give the respondent an opportunity to explain herself, that the respondent did not "*get to decide-[the child] is going to spend time with her dad. If [the child] is [his] why are you so afraid for a test. It's kind of obvious*", and she protested that the respondent was inhibiting a relationship between the child and the applicant. She also informed her that she could send a picture of the child's room and "*place in our lives*". There are some further unhelpful comments such as "*how many would-be dads do you have?"* and "*you disgust me, why would you go off the pill, and rape someone, then get pregnant and run away … And blame him for all your misgivings*." It seems clear that the message being conveyed at least implied, if not expressly questioned, the child's paternity.

73. From January, 2019, there is objective evidence of an increase in activity and of attempts by the applicant to arrange access on a more formal basis. In his affidavit, the applicant avers that in February, 2019 he contacted Relationships Australia to initiate mediation and that the respondent unblocked him after his mother contacted her requesting whether she could see the child when visiting Australia. Physical access was arranged and took place on 3rd March, 2019. A Skype call was made on 5th March, 2019 when the applicant spoke with the child for 15 minutes. He states that on 6th March, 2019 the respondent unilaterally changed pre-arranged contact days to Mondays and Thursdays, rather than Tuesdays and Thursdays; and that she did not answer calls. He believed that the child had invited him to her fourth birthday party and he bought presents for her. He also believes that the access visit in March, 2019 was very successful and that he got on well with the child. The detailed letter to which I have previously referred was sent on the 4th April, 2019.

74. While the letter contains a statement which appears to at least implicitly question the paternity of the child (at para. 5 it is stated that "o*ur client does not recall relations which your client around the time of conception*") more formal access arrangements were sought and discussed. A DNA test was also discussed. With regard to the future it is recorded that the applicant was hopeful of an amicable resolution and he signified that he had sought the assistance of Relationships Australia to facilitate mediation. In the meantime, he wished to continue access in accordance with the verbal arrangement which had been discussed. Reference is also made in the letter to attempts to negotiate a

parenting plan on 3rd March, 2019. A view was expressed that supervision was unnecessary. As the child's birthday party was imminent, an early response was requested "*to enable our client to make the necessary flight and accommodation arrangements.*"

75. On 5th May, 2019, the respondent outlined her response stating that access would be supervised. She maintained that agreements of this nature had been repeatedly suggested but that the applicant had not been able to comply. She advised that if the arrangements were not adhered to in the future, all communications would cease and the applicant could proceed to court. Importantly, in a reply of 7th May, 2019 the applicant's solicitors confirmed access times including supervised access during the month of May. A further exchange took place during the course of that day. The respondent stated that she had experienced anxiety over the past couple of nights, that she had received abusive texts and that she did not feel that the suggested environment for the access meeting would be right for the child. Therefore, she stated that she would not be attending the play centre and access for visitations as previously suggested by her.

76. I am satisfied that the evidence establishes that the applicant was actually exercising rights to custody at the time of removal. This is particularly evident from the actions and responses of the parties, the correspondence and communications, particularly from March to May, 2019, the physical and skype access between the applicant and his child, albeit of a limited nature, and the contact made by the applicant with Relationship Australia and his attempts at mediation. When taken in conjunction with his court application of 14th June, 2019 (albeit subsequently rejected as not having been properly completed), the service of those proceedings on the respondent and the payment of maintenance, I am satisfied that at the time of the child's removal from Australia, the applicant was maintaining the stance and attitude of a custodial parent. Having considered the evidence, I am not satisfied that the respondent has discharged the onus of proof of establishing that, at the time of the removal of the child, the applicant was not actually exercising rights of custody.

Grave Risk

77. I now turn to the second potential ground of defence under Article 13 of the Convention. It is submitted that the court should exercise its discretion not to return the child because of the existence of a grave risk; that her return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. Ms. Kirby B.L. submits that the time for assessing grave risk is when the application is heard. Mr. Finn B.L. submits that the circumstances giving rise to grave risk, at least on a *prima facie* basis, must arise from the circumstances which prompted the wrongful removal. While he accepts that the conduct of the applicant is relevant in this regard, he argues that there is no evidence that any conduct on the part of the applicant placed the child at grave risk of psychological or physical harm. Reliance is placed in this regard on dicta of Barron J. in *R.K. v. J.K. (Child Abduction-Acquiescence)* [2000] 2 IR 416 where he stated at p. 451:-

> *"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."

Counsel submits there is absolutely no evidence of any such risk and that, in any event, there is a high threshold, as explained in *Friedrick v. Friedrick* (1996) 78F 3d 1060, that in order to establish a grave risk of harm, it must be shown that the return of the child places the child in imminent danger, prior to resolution of any custody dispute. In that case, Boggs J. cited examples of returning a child to a warzone, famine or disease. An issue might also arise in relation to whether the courts of the place of habitual residence might, for whatever reason, be incapable or unwilling to give the child adequate protection. He submits that there is no evidence of this in this case.

78. In the event that the court concludes that there is a grave risk, the court must consider whether, in any event, in the exercise of its discretion under the convention, the child should nevertheless be returned.

79. In *B v. C*, McDermott J. described the discretion vested in the court under Article 13(b) as being very limited. He observed that the court is dealing with the summary application for the return of the child and that when allegations are made that the return will give rise to a grave risk of physical or psychological harm, or an intolerable situation for the child, it is not for the court in this jurisdiction to determine whether the alleged incidents relied upon did or did not occur. Such an issue is in large measure the subject of the proceedings before the family court in the country of habitual residence. He continued:-

"The proper approach to be adopted under Article 13(b) is set out in the decision of the Supreme Court in A.S. v. P.S. [1998] 2 I.R. 244 in which Denham J. (as she then was) in delivering the judgment of the Court stated (at page 259) that:

> *"The law on "grave risk" is based on Article 13 of the Hague Convention, … It is 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."*

This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across State borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

80. In *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, Fennelly J. stated at para. 57:-

"The authorities are clear that the burden here is on the mother and that the test is a high one. Grave risk is not, of course to be equated with consideration of the

paramount welfare of the child. The obvious reason for this is that I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the Convention for their future's speedily to be decided in that jurisdiction."

There, allegations of sexual abuse had been made by the respondent against the applicant father and at the time of the removal access was suspended. Fennelly J. observed that while it was not the purpose of the Convention that hearings of applications for return should turn into enquiries as to the best interests of the child:-

"…the normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issue. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general consideration of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country".

81. As McDermott J. also pointed out, Article 13(b) imposes a heavy burden of satisfying the court that there would indeed be a grave risk of substantial harm if a child were to be returned. Referring to the decision in Re. *HV (Abduction; Children's Objections)* (1997) 1 FLR 392, he noted that the Supreme Court considered that the court in this jurisdiction is entitled to have regard to the practical consequences of directing the return of the child and whether any risk of harm could be reduced or extinguished by undertakings or by reliance on court procedures in the Convention state.

82. No evidence of an expert nature has been adduced to substantiate the claim of grave risk to the child. In *B v. C* allegations of abuse of the *child* were the subject of court proceedings, yet the court did not refuse to return the child. Until 20th June, 2019 and throughout her lifetime the child resided in Australia. There is no evidence that it is the return to that *jurisdiction* which places her at grave risk.

83. Having considered the evidence and the submissions of the parties, I am not satisfied that grave risk, within the meaning of the Convention, has been established by the respondent. That the relations between the applicant and the respondent are fraught and that an allegation has been made in relation to the circumstances of the conception of the child, do not, it seems to me, on the evidence expose the child to a grave risk. That the applicant's partner has become involved in making or spreading allegations is quite unfortunate. That the applicant tends to run with the allegation does little to assist in assuaging the respondent's concerns. The respondent may have a significant apprehension for the plans which the applicant has for the child within his new family. However, the question for the court is whether the return of the child places *her* at grave risk or in an intolerable situation.

84. It does not appear to me that circumstances of grave risk have been established or that the issues and concerns which have been raised by the respondent are ones which cannot be properly considered in any proceedings concerning an application for the relocation of the child or an application in respect of access or custody by the court of the child's habitual residence.

85. In the circumstances, I am not satisfied that clear and compelling evidence has been adduced by the respondent to establish as a matter of probability that there is a grave risk of physical or psychological harm or the existence of an intolerable situation for the child.

The courts discretion under Article 13

86. It is also submitted by the respondent that insofar as the exercise of the court's discretion arises for consideration under Article 13, that the court should refrain from exercising its discretion to nevertheless return the child to Australia because of a number of important factors. First, the respondent is the primary carer of the child. The child is four and a half and is attending school in Ireland. She has the benefit of extended family support in Ireland. The respondent has obtained work in Ireland and they have a place to live here. If returned to Australia, the respondent will have to locate a place to live as her property has been let. She will have to seek and obtain a job, find a school for the child and re-establish a support network. The respondent maintains that she is fearful of the applicant's partner, who has made serious allegations against her. In all of the circumstances, it is submitted that it would be in the child's best interests for her to remain in Ireland.

87. Insofar as the court's consideration of the best interests of the child is concerned, it is clear that the requested court is not required to conduct a full welfare assessment as to what is in the best interests of the child. In *X. v. Latvia* [2014] 59 EHRR 3 it was stated that in the assessment of the child's best interests:-

> *"this task falls in the first instance to the National Authorities of the requested State, which have,* inter alia*, the benefit of direct contact with the interested parties. In fulfilling their task under Article 8, the domestic courts enjoy a margin of appreciation, which however remains subject to a European supervision whereby the court reviews under the Convention of the decisions that those authorities have taken in the exercise of that power."*

Mr. Finn B.L. submits that proceedings are in being in Australia and the respondent may join to those proceedings an application to re-locate the child, should she so wish.

88. In the overall assessment of the circumstances of the child and the facts and evidence in this case, the court has taken into account the best interests of the child. McDermott J. noted in *B v. C* , however, that a fair balance must be maintained between the competing interests of the child and his parents; and the purpose of the Convention to ensure a prompt return of wrongfully removed children to the jurisdiction of the courts of their habitual residence. The contracting parties to the Convention have determined, as a

matter of general principle, that a prompt return is in the child's best interests. I have considered the likely effect of the return the child in line with the principles outlined in the decision of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* [2012] 54 EHRR 31, in its application to Convention proceedings and as discussed in this jurisdiction in authorities such as *R v. R* [2015] IECA 265 where Finlay Geoghehan J. observed that, particularly in the context of assessing grave risk:-

> *"Nevertheless, notwithstanding the requirement that the child's best interests are considered it remains clear that the requested court is not required to conduct a full welfare assessment as to what is in the best interests of the child. The best interests of the child must be evaluated in the context of the nature of the application and the exception in the Hague Convention being relied upon."*

The court has also considered a decision in *X v. Latvia*.

89. I am satisfied that there is likely to be disruption experienced by the child on being returned to her country of habitual residence. She is now attending school in Ireland and has the benefit of an extended family support base. The court is also conscious of the effect which this may have on the respondent. Nevertheless, the child, who is now just a short of her fifth birthday, has been in this jurisdiction for a relatively short period and proceedings were initiated promptly after a removal. As was observed in *B v. C* , by McDermott J., the removal itself necessitated a change in school and residence and while I am not oblivious that the respondent may face short-term problems, it seems to me that the overall best interests of the child in this case are in line with the stated objectives of the Convention. Any lingering concerns of the respondent in relation to what may or may not occur on return might also be addressed in terms of undertakings, which I shall further discuss with the parties.

90. In my view, therefore, the courts in Australia are currently best placed to decide on the general best interests of the child and the welfare considerations pertaining to her. Therefore, even if I am incorrect in my conclusion that the respondent has failed to discharge the onus of proof placed on her by Article 13, and if the court were required to consider whether, in the exercise of the discretion under Article 13, it ought nevertheless direct the return of the child to the country of its habitual residence, I remain of the view that this is a case in which the court's discretion should be exercised to order the return of the child.

91. The decision of this court is likely to come as a great disappointment to the respondent, who, on the evidence that I have considered, is now and has been the child's loving carer since birth. I have also found that the applicant has rights of custody and has actually exercised those rights. The Hague Convention provides that, in normal circumstances, children should be returned after a wrongful removal to the country of their habitual residence and that it is in the best interest of the child that this should be done. In *A.U. v. .T.N.U.* [2011] 3 I.R. 683 Denham J. provided the rationale for this principle, albeit in the context of a case where the view and wishes of the child were considered, and the exercise by the court of its discretion in such circumstances:-

"This fundamental principle is in the best interests of the children and is applied generally. It is also the case that in interpreting and applying Article 13 of the Convention, Courts should not lightly exercise a discretion to refuse to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the Courts in such a country. Furthermore, those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie, which is of primary importance."

92. In all the circumstances, I am satisfied that the court should make an order for the return of the child.

Stay and Undertakings

93. Ms. Kirby B.L. submits, on the authority of decisions such as *C.A. v. C.A. (otherwise C McC)* [2010] 2 I.R. 162, that the court should place a stay on a return order to permit the respondent to pursue proceedings in the courts of habitual residence. Finlay Geoghegan J. held that it was not contrary to the Convention to place such a stay where there were proceedings in being, or intended, for the purposes of seeking the approval for the relocation of the child. There, the court was satisfied that it was in the interest of the children that a number of moves between jurisdictions be minimised. Mr. Finn B.L. however, emphasises the requirement for early and summary return of a child found to have been wrongfully removed, and submits that the facts of that case were distinguishable. The jurisdictions in that case, the UK and Ireland, are in close proximity and easily accessible. Ms. Kirby B.L. also refers the court to the decision of MacMenamin J. in *T v. M* [2008] IEHC 212 where a stay was placed in circumstances where the defence of grave risk was not established. A stay was imposed pending proof of compliance with undertakings and a timeline for the proceedings in the courts of the other country.

94. In all the circumstances, including the support structure which is now in place in this country for the child, the fact the proceedings have been instituted in Perth while the applicant resides in Melbourne, the concern of the respondent of the involvement to date of the applicant's partner, and most importantly in order to minimise, insofar as is possible, disruption to the child, I am satisfied that the court should exercise its discretion to stay the order for return pending receipt of information as to a timeframe for the proceedings in Australia; and to be addressed in relation to undertakings.