



Neutral Citation Number: [2023] EWHC 83 (Fam)

Case No: FD22P00708

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2023

Before :

MR JUSTICE MOSTYN

Between :

AO
- and -
LA

Applicant

Respondent

Cliona Papazian (instructed by **Osbornes Law**) for the **Applicant father**
Lubeya Ramadhan (instructed by **A&N Care Solicitors**) for the **Respondent mother**

Hearing date: 16 January 2023

Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Mostyn

1. This is my judgment on the father's application under the 1980 Hague Convention¹ for the return of his son aged nearly 11 and his daughter aged 8¾ to Ireland. The mother accepts that on 29 August 2022 the children were wrongfully removed from Ireland to England within the terms of the 1980 and 1996² Hague Conventions. She accepts that Ireland is the primary jurisdiction and that its courts will make the long term welfare decision about the arrangements for the children. However she resists an order for the return forthwith of the children to Ireland relying on the defences or exceptions of a grave risk of harm and/or intolerability under Article 13(1)(b) and the children's objections under Article 13(2).
2. It is important that I keep at the forefront of my mind that this is a summary process of an interim and procedural character that makes no substantive welfare decisions whatsoever and which at all times respects the primary jurisdiction of the court of the child's habitual residence before the removal.
3. I did not require the mother to be cross-examined on either defence.

The background

4. The mother is 30 years old and of Nigerian descent. From age 4 until recently she lived in Ireland along with her family. The father is aged 44, also of Nigerian origin and has lived in Ireland since 2007. The parties commenced a relationship and began cohabiting from 2011. Their son J was born on 11 February 2012 and their daughter E on 5 March 2014. Both children were born in Ireland. The relationship was greatly turbulent and the dysfunction was not limited to the parents. According to the father, the maternal grandparents have evinced great hostility towards him at all material times, and have even assaulted him on occasions.
5. On 8 April 2020 the father sought a protection order from the Irish court alleging that the mother had assaulted him and thrown him out of the family home. This was granted, following which the police made a referral to TUSLA (the Irish social services agency).
6. According to the father, the parties reconciled in December 2020 but went on to separate finally in June 2021. The mother says that their date of separation was August 2020. The father says that the mother made his contact with the children difficult after their separation. Therefore, he applied to the Irish court for contact, which was granted in an order made on 22 June 2022, and which provided that he was to see the children every Saturday for 6 hours. The court further ordered that the mother was not to remove the children from the jurisdiction and granted the father joint guardianship of the children. The matter was adjourned for a further hearing on 8 September 2022.
7. The father last saw the children on 13 August 2022, when he says that J told him that they had recently been on holiday to Liverpool.

¹ The 1980 Hague Convention on the Civil Aspects of International Child Abduction as incorporated into domestic law by the Child Abduction and Custody Act 1985

² The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

8. The mother has confirmed that she removed the children on 29 August 2022. She says that shortly after that holiday she decided to move to England. The father says that he only became aware of this through a parenting app which alerted him that the children had not returned to school at the beginning of the new academic year. His fears were heightened when the mother failed to attend the hearing on 8 September 2022.
9. The mother maintains that the father was aware of her plans to relocate to England.
10. I do not need to decide if that is true as the defence or exception of consent is not relied on. However, I would observe at this early point that the way the mother went about relocating the children was not only wrongful and unlawful but, as she will discover on reading this judgment, futile.
11. The father reported the children's removal to the police and on 13 September 2022 he provided his consent for an outgoing application to the Irish Central Authority for the children's return to the Republic of Ireland pursuant to the 1980 Hague Convention.
12. Proceedings were issued without notice on 1 November 2022 when disclosure orders were made. At the first inter partes hearing before Morgan J on 22 November 2022 the mother, who was then acting in person, accepted that the removal was unlawful and indicated that she intended to defend the application on the basis of both limbs of the Article 13(1)(b) defence. She confirmed that if a return order were made that she would accompany the children back to Ireland. She further confirmed her address as set out in the order and consensual provision was made for indirect contact thrice weekly.
13. The disclosure orders made on 1 November 2022 identified that the children are living with their mother in Bradford.
14. The father is unable to travel out of Ireland as he does not have an Irish passport and requires a visa to enter the United Kingdom.

The parties' positions

15. There is no dispute that the children were habitually resident in Ireland on their removal on 29 August 2022.
16. It is the father's position that since the children have lived in Ireland since birth until 29 August 2022, they should be returned forthwith. Their school places in Ireland are held for them.
17. The mother seeks to defend the application based on Article 13(1)(b)(grave risk of harm or intolerable situation) and Article 13(2) (children's objections). In stark contrast to her stance before Morgan J it is now the mother's position that she cannot return to Ireland and that if a summary return of the children is directed, she will remain in England. The mother has relinquished her housing in Ireland and claims she has no means of supporting herself or the children were she to return. In relation to the children's objection to a return to Ireland, the mother relies on the Cafcass report, which she says records an authentic objection to a return by both children expressed with an appropriate degree of maturity.
18. The father has proposed the following protective measures:

- i) He will not support a prosecution of the mother for the removal of the children.
 - ii) He will pay maintenance for the children until the first hearing in Ireland in the sum of €100 a week.
 - iii) He agrees to the children remaining in the mother's care apart from when contact takes place.
 - iv) He will only contact the mother in writing or through solicitors.
19. However, the mother's position is that no protective measures could be devised which would enable her to consider returning to Ireland. As for housing, the father has suggested that if accommodation were not provided by the state the maternal grandfather's or maternal aunt's properties would meet the children's basic housing needs in the short term. Ms Ramadhan submitted that the former would be quite untenable. Her brother who is a heavy smoker lives at her father's property. She has a distant relationship with her father. Her sister lives in her partner's property, a one-bedroom flat. That too would be quite untenable as a solution to meet the housing needs of mother and children.

The legal framework

20. When analysing the law in the abstract I shall refer to the jurisdiction where a child was habitually resident and from where he was taken as State A and the jurisdiction to where the child was taken as State B. I shall refer to the parent who removed the child as Parent X and the left-behind parent as Parent Y. I shall attribute the female pronoun to Parent X and the male pronoun to Parent Y and the child.
21. It is trite law that a child who has been wrongfully removed by Parent X from State A, to State B must be ordered to be returned by the court of State B to State A forthwith, unless Parent X, who bears the burden of proof, can persuade the court of State B that one of the exceptions applies and that in its discretion it should decide to refuse to make the return order.

Article 13(1)(b): grave risk of harm/intolerability

The degree of likelihood

22. The exception is in these terms:
- “The judicial ... authority of the requested State is not bound to order the return of the child if the person ..., [who] opposes its return establishes that 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.”
23. The verbs “expose” and “place” are used in the future subjunctive tense. This tense is used to describe a possible action or scenario in the future. So, obviously, the exception is “looking to the future” (*Re E (Children)* [2011] UKSC 27 [2012] AC 144 at [35]) or “forward looking” (*Hague Convention 1980 Guide to Good Practice* at [35] – [37] (“the Guide”)). Under the terms of the exception the court is required to make a prediction of

the degree of likelihood of a possible future event, and then to make (in effect) a temporary order reflecting the result of that assessment. It has to do so in interim, summary proceedings where the written evidence will not be tested by cross-examination.

24. This is routine work for the court. It is what the court has to do when faced with an application for an interlocutory injunction, or when asked to make an interim care order under s.38 of the Children Act 1989. There are countless other examples where the court has to make an order of a protective nature based on a prediction about future facts.
25. Although there is an extensive body of case law about this exception, none that I am aware of addresses the requisite degree of likelihood of the perils referred to in Article 13(1)(b) or the appropriate mode of proof of that likelihood. In my opinion, the jurisprudence on the grant of interlocutory injunctions is an extremely useful analogy when analysing these key components of the exception.

The injunction analogy

26. In the seminal decision of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 Lord Diplock held at 406:

“In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.”

And at 407:

“It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.”

27. In this passage, Lord Diplock clearly acknowledges that on an injunction application it is the court's function to evaluate the applicant's chance of success. He rejected a rule, which had been embraced by some judges, that would only allow an injunction to be granted if that probability assessment was more than 50%. In his opinion, such a rule would stultify the purpose of the power to award an injunction and clog the discretion to do so. But he did not reject such a rule because it would be impossible, or even difficult, to make the assessment of the chance of success.
28. Instead, the first thing that the court has to do on an injunction application is to satisfy itself that the applicant has a "real prospect of success". This does not mean that the court has to be satisfied that the applicant is more likely than not to succeed at trial, but rather that it has a good chance of succeeding. Although Lord Diplock does not put a figure on it I expect that he would have said that a probability of no less than 25% would be needed to satisfy this standard. If so satisfied the next step is to ask if damages would be an adequate remedy for the applicant should it succeed (in which case the injunction should be refused) or if damages would be sufficient recompense to the respondent if the injunction was later discharged at trial (in which case it should be granted). Lord Diplock then continued:

"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. ...

...if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."

29. Therefore, where an interlocutory injunction is sought, and the written evidence reveals significant contested facts, the court will not normally attempt to resolve those disputes. Provided that the applicant demonstrates that it has a "real prospect of success" the court will establish, first, if damages would be an adequate remedy to either party were the injunction to be respectively refused or granted and if so will refuse or award an injunction accordingly. If damages would not suffice either way, the court will make an order based on the balance of convenience. This will be likely to favour the status

quo, but may also reflect the relative strengths of each party's case provided that this is based on facts about which there can be no credible dispute.

30. Where the interlocutory injunction sought is a freezing order, proof of a risk of dissipation of assets which would otherwise be available to meet a judgment is an indispensable requirement. In *Crowther v Crowther* [2020] EWCA Civ 762 at [47] Males LJ held that:

“(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.”

31. The standard of proof of such a risk in such a case, is not necessarily as high as “more likely than not” In *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 Gleeson CJ held that:

‘...it is not difficult to imagine situations in which justice and equity would require the granting of an injunction to prevent dissipation of assets pending the hearing of an action even though the risk of such dissipation may be assessed as being somewhat less probable than not.’³

For obvious reasons, it makes very good sense to align the degree of likelihood of “a real risk of dissipation” in a freezing order application with Lord Diplock’s “real prospect of success”, which I have suggested would be represented by a probability of no less than 25%.

A heightened degree of likelihood in some cases

32. However for a certain type of case, namely where an interlocutory injunction is sought to restrain a publication by the media, Parliament in the Human Rights Act 1998 has modified these rules and provided for a higher test than that provided for in *American Cyanamid*. Section 12(3) of the 1998 Act provides:

“No such relief [which might affect the exercise of the Convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”

33. In *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 Lord Nicholls addressed this provision and held at [20]:

³ Cited by Andrews LJ in *Les Ambassadeurs Club Ltd v Yu* [23]

“These considerations indicate that “likely” in section 12(3) cannot have been intended to mean “more likely than not” in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that “likely” should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of “real prospect” but permits the court to dispense with this higher standard where particular circumstances make this necessary.”

And at [22]:

“...on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success “sufficiently favourable”, the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (“more likely than not”) succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

34. In that case there were disputes of fact (see [6]) but those notwithstanding Lord Nicholls was able at [25] to conclude on the written material, untested by cross-examination, that:

“On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance.”

The injunction granted by Lloyd J (wrongly based on the *American Ethicon* standard) was discharged.

35. In my judgment this case is clear authority for the following principle. Where a statute stipulates a heightened degree of likelihood of a future harmful event as a precondition for an order protecting Party X against the happening of that event, the court must appraise the written evidence and make a decision whether, applying that heightened standard of probability, Party X would succeed at a trial in proving the pleaded facts.

Article 13(1)(b): the degree of likelihood

36. I revert to the Article 13(1)(b) exception. Here, the possible future event is expressed in the alternative:
- i) The first alternative is that in consequence of a return to State A the child will be exposed to physical or psychological harm. The requisite level of harm is that it is ‘intolerable’ (Guide para 34; *Thomson v Thomson* [1994] 3 SCR 551 (Supreme Court of Canada *per* La Forest J)), which I take to mean “severe”. The use of the verb “expose” rather than “suffer” means that the apprehended event is not the infliction of actual harm but that the child is placed in a setting which is dangerous⁴;
 - ii) The second alternative is that in consequence of a return to State A the child will be placed in an intolerable situation.

I shall refer to these alternatives together as an “intolerable peril”. Domestic violence, economic disadvantage and educational or developmental impairment are commonly cited causes of an intolerable peril.

37. The court has to be satisfied that there is a “grave risk” of the child having to endure an intolerable peril. The term “grave” qualifies the risk and not the harm to the child. The Guide at para 34 thus states, perhaps tautologically:

“It indicates that the risk must be real and reach such a level of seriousness to be characterised as ‘grave’”

38. A “grave risk” therefore means a high probability. It cannot mean anything else.
39. The requirement of proof of a “grave risk” signifies that the degree of likelihood that must be proved will be higher than the *American Cyanamid* standard. Equivalently, it has to be higher than the degree of likelihood of dissipation needed to be proved to get a freezing order. I cannot see any reason why it should be, in the great majority of cases, any less than the civil balance of probability. I see very good reasons why as a matter of logic, semantics, and the avoidance of family law desert-island exceptionalism, the high probability denoted by “grave risk” in Article 13(1)(b) should, in the great majority of cases, be the same level of probability as that required in a case governed by s. 12(3) of the Human Rights Act 1998 (i.e. more likely than not).
40. However, as explained by Lord Nicholls in *Cream Holdings Ltd v Banerjee*, there may be cases where the potential adverse consequences, should the future event happen, will be particularly grave. In such a case, he said, it may be necessary for a court to depart

⁴ Professor Perez-Vera in para 29 of her report uses the concept of danger here.

from this general approach and to allow a lesser degree of likelihood as a prerequisite for a protective measure.. This mirrors what Baroness Hale was saying in *Re E* at [33]:

“Second, the risk to the child must be "grave". It is not enough, as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as "grave" while a higher level of risk might be required for other less serious forms of harm.”

41. She said the same in *Re S-B Children* [2009] UKSC 17, [2010] 1 AC 678 at [9]:

“Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school.”

42. However, I consider that a court should, in Lord Nicholls’s words, be “exceedingly slow” to depart from the general approach where the Article 13(1)(b) exception is relied on. Therefore, save in very exceptional situations, the court would need to be satisfied that if the child were returned it was more likely than not he would have to endure an intolerable peril.

Appraising the risk: protective measures

43. Where the exception is raised there will inevitably be strong factual disputes between the parents. Before embarking on an appraisal of the relative strengths of the respective factual cases the court will first ask whether the facts pleaded by Parent X would, standing alone, amount to an intolerable peril. If the answer is no, that is the end of the defence. If the answer is yes, the court will ask if the intolerable peril can be nullified by protective measures against Parent Y (*Re E* at [36]).
44. On an application for an interlocutory injunction this would be an entirely conventional approach. The court will ask in such a case whether the risk of the mischief in question can be nullified by the giving of undertakings, before it embarks on an enquiry about the sufficiency of damages and the balance of convenience.
45. Most types of intolerable peril can be nullified by appropriate protective measures. If State A is a subscriber to the 1996 Convention (as is the case here) then it almost certainly will have exclusive primary jurisdiction to resolve the substantive welfare dispute (Article 7(1)). Under Articles 7(3) and 11, State B can impose ‘any necessary measures of protection’ which take effect in State A by operation of law (Article 23)

and lapse when State A imposes measures required by the situation (Article 11(2)). These powers “strongly reinforce the return mechanism of the 1980 Convention” (*Re J (A Child)* [2015] UKSC 70 at [31]). The protective measures can include non-molestation orders and orders for the provision of maintenance so that Parent X and the children can be housed and supported until the court of State B can deal with those issues.

Appraising the risk: finding facts

46. If, for whatever reason, protective measures will not nullify the apprehended intolerable peril, or if their imposition would be disproportionate or impracticable, then the court will have no option but to do the best it can to resolve the main factual disputes between the parties in order to determine if it was more likely than not that were a return ordered the child would have to endure an intolerable peril (*Re E* at [36]). In common with injunction proceedings, that determination will not involve the parties being cross-examined and re-examined (these being summary proceedings where oral evidence is very rare generally, and unknown where the Article 13(1)(b) exception is relied on). The court in effect evaluates Parent X’s chances of successfully proving that the child would have to endure an intolerable peril if he were returned.
47. In *Re B (Children) (Abduction: Consent: Oral Evidence)* (Article 13(B)) [2022] EWCA Civ 1171 at [54] Moylan LJ stated:

“Like Mr Turner, [Mr Setright] pointed to the difference between Article 13(b) and consent. The latter is a fact-finding exercise while the former is not. The former is not, because to embark on such an exercise when determining a case under Article 13 (b) would encroach "on both the summary aspect of the jurisdiction, and on the welfare jurisdiction of the requesting state, and which can be a difficult exercise on balanced written evidence if the parties are not heard orally." The latter is a fact-finding exercise and one in respect of an issue which, Mr Setright submitted, goes to the "heart of the case" when consent is relied upon.”

This passage highlights the fundamental distinction between the two exceptions. The exception of consent requires proof of past facts, whereas the Article 13 (1)(b) exception requires the making of a prediction about the likelihood of a future event. However, each requires the court to make a probabilistic assessment, in the former case as to whether past events have happened and in the latter as to whether future events will happen. As explained above, an essential difference between the two processes, is the standard of proof required to reach the decision. But, as I have sought to suggest above, in almost all Article 13(1)(b) cases the standard of proof required for the prediction should be the normal civil standard. Further, when making the prediction, the court in almost every case will have to make some findings about past events, since, as Lord Byron put it, "the best prophet of the future is the past".

48. So, under the Article 13(1)(b) exception the court will usually be undertaking an exercise of finding both past and future facts. The passage I have cited above says that such a fact-finding exercise is either impossible or, if possible, very difficult. I do not understand this. Plainly, if the protective measures sought do not nullify the risk, or if

protective measures cannot be imposed, the court is going to have to conduct a form of fact-finding exercise about the past events on the written evidence, amplified by written and oral submissions, as best it can. Were it to be suggested that in the absence of functioning protective measures the court should simply assume that the allegations pleaded in support of the exception by Parent X are true and then go on to refuse the application, then I would say that such an approach would be unlawful. This is because the burden is on Parent X to satisfy the court that it is more likely than not that if the child is returned he will have to endure an intolerable peril. That decision can surely only lawfully be made by weighing the evidence of both parents.

49. The passage implies that if there is a dispute about the truth of alleged past facts then that dispute can only be resolved by testing the allegations in cross-examination. I disagree. In my opinion, in summary proceedings of this nature the requisite findings can be made in virtually every case, whichever exception is relied on, without cross-examination, for the reasons that follow in the next section of this judgment..

Appraising the risk: cross-examination

50. Cross-examination traditionally has a lofty, almost numinous, reputation as being the best forensic tool for establishing the truth or falsity of a disputed fact.. In *Carmarthenshire County Council v Y* [2017] EWFC 36 at [7] – [8] I reviewed the authorities and held:

“7. FPR 22.2(1)(a) provides that the general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved, at the final hearing, by their oral evidence. FPR 22.6(2) in effect removes the right to give oral evidence-in-chief as in all cases a witness (other than a summoned witness) will have been required to provide a witness statement, which will stand as evidence-in-chief. Oral evidence-in-chief now requires the permission of the judge be given. FPR 22.11 provides the right to cross-examine a witness on his or her witness statement. Thus, the general rule is that facts in issue are to be proved by written evidence-in-chief and oral evidence given under cross-examination. Of course, facts may also be proved by hearsay evidence pursuant to the Civil Evidence Act 1998 and FPR 23.2 – 23.5, but the general rule is that oral evidence given under cross-examination is the gold standard.

8. Why is this? It is because it reflects the long-established common-law consensus that the best way of assessing the reliability of evidence is by confronting the witness. In *Crawford v Washington* (2004) 541 US 36 at 62 Scalia J, when discussing the explicit command to afford cross-examination of witnesses in criminal cases contained within the Sixth Amendment to the U.S. Constitution, stated:

"To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that

reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better")."

51. In *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27 at 260 Macdonald J was referred to the American jurist John Henry Wigmore, who observed that "cross-examination is the greatest legal engine ever invented for the discovery of truth".
52. This probably over-states the potency of the technique.
53. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) Leggatt J (as he then was) at [15] – [22] famously spoke about the inherent unreliability of testimony based on memory. At [22] he stated:

"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

54. In *Carmarthenshire County Council v Y* at [17] I stated:

"In my opinion this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

55. These passages have since been cited in many reported cases⁵.
56. Since then, Leggatt J’s views on the potential dangers of placing too great a regard on testimony based on a witness’s memory have been expressed in para 1.3 of the Appendix to CPR PD 57AC. This states:

“Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory:

(1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but

(2) is a fluid and malleable state of perception concerning an individual’s past experiences, and therefore

(3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.”

57. These principles have been reiterated for family proceedings in para 14 of the President’s Memorandum on Witness Statements dated 10 November 2021.
58. Accordingly, cross-examination is by no means an indispensable method for a court to discover the truth. Indeed, as Lord Leggatt has pointed out both judicially and as a speaker, cross-examination may lead to a court making a judgment based on a witness’s demeanour, which course is pregnant with the real risk of making an entirely wrong assessment. In his recent speech to the *At A Glance* Conference⁶, he stated:

“If you try to infer veracity from demeanour, you are likely to be fooled by witnesses who have an honest demeanour but are lying and to disbelieve witnesses who have a poor demeanour but are in fact giving honest evidence ”

59. Therefore, in the unlikely event that protective measures cannot or do not nullify an apprehended intolerable peril to a child, it should be possible, with the assistance of skilled advocacy, to make the necessary findings of fact and the necessary predictions on the written material to determine whether the exception is established, or not. This is precisely what Lord Nicholls did in *Cream Holdings* when applying the heightened requisite degree of likelihood stipulated in s.12(3) of the Human Rights Act 1998. And,

⁵ Bailii records that *Carmarthenshire County Council v Y* has been cited in 31 reported authorities. These include *R (Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) per Warby J at [39]; *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) per Stewart J at [96]; *Khan v General Medical Council* [2021] EWHC 374 (Admin) per Julian Knowles J at [71]; *Re P (Sexual Abuse: Finding of Fact Hearing)* [2019] EWFC 27 per Macdonald J at [260].

⁶ At a Glance conference: 12 October 2022, Keynote address “Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony”. <https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf>

as I have shown, Lord Diplock in *American Cyanamid* recognised that such a finding on the written material would be possible.

60. In my opinion the same reasoning ought to apply logically to all other exceptions under the 1980 Convention including consent, acquiescence and settlement, although I accept that the weight of authority is against me. I agree with Moylan LJ that these exceptions require a fact-finding exercise but I do not agree that it is only with the benefit of seeing witnesses ‘tested in the crucible of cross-examination’ (as Scalia J put it) that the ‘truth is beaten and bolted out’ (in the words of Sir Matthew Hale). To be frank, cross-examination is often a largely pointless and futile exercise if it amounts to little more than counsel putting disputed facts to a witness. It is a dispiriting and largely useless experience for a judge to listen (often through translators) to lengthy cross-examination of a witness along those lines (as so often seems to be the case in Hague cases).
61. It is a very rare case where, without having been confronted by the documentary record or known or probable facts, a witness nonetheless collapses under cross-examination and admits that his witness statement is untrue.
62. On the other hand, as Leggatt J pointed out, the primary utility of cross-examination is to demonstrate the inconsistency of a witness by referring him to contemporary documents and incontestable facts. This process certainly underscores the inconsistency of the witness and therefore impeaches his credibility. But, if the truth be known, the inconsistency can just as well be pointed out, if somewhat less dramatically and forcefully, in oral submissions by counsel to the court.
63. Nor should the so-called rule in *Browne v Dunn* [1894] 6 R 67 mean that there has to be cross-examination if a party is asking the court to disbelieve the other party. In that case Lord Herschell LC held that a witness cannot be ambushed by a previously unadvertised allegation of dishonesty. He stated, in effect, that a witness must be given a fair opportunity to deal with the allegation by it being put to him in cross-examination.
64. However, in *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349 at [95] the Court of Appeal referred with seeming approval to my view expressed in *Sait v General Medical Council* [2018] EWHC 3160 (Admin) that this rule must be regarded as obsolete as the modern system of conducting litigation would prevent any such ambush happening. At [46] I stated:
- "It is impossible to conceive that the modern system of pleadings, witness statements and skeleton arguments will not give the necessary notice of impeachment of credit. The modern system requires all cards to be put face up on the table and forensic ambushes are basically impossible."
65. If I am wrong and this rule subsists, there can be no question of it derailing summary proceedings of this nature. In *BPY v MXV* [2023] EWHC 82 (Comm) Butcher J assumed that the rule still existed, but stated:

“However, it is not an inflexible [rule]. Procedural rules such as this are the servants of justice and not the other way round.”

66. The *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P on 13 March 2018 ("The Practice Guidance") states at para 3.8:

"Oral Evidence

The court will rarely make a direction for oral evidence to be given. Any party seeking such direction for oral evidence will need to demonstrate to the satisfaction of the court that oral evidence is necessary to assist the court to resolve the proceedings justly."

67. In *Re K (Abduction: Case Management)* [2011] 1 FLR 1268 at [15] Thorpe LJ stated that:

"Not only should orders for oral evidence be extremely rare but, in my judgment, they should never be made in advance of the filing of written statements on the point in issue"

68. In *Re B (Children) (Abduction: Consent: Oral Evidence) (Article 13(B))* [2022] EWCA 1171 at [53] Moylan LJ stated that:

"The preponderant effect of the [overseas] authorities was that oral evidence was rarely permitted generally but with courts being more inclined to hear oral evidence on the issue of consent."

69. While I entirely accept Moylan LJ's stricture that I should not have glossed the word "necessary" in para 3.8 of the Practice Guidance by suggesting that its synonym is "demanded", I would suggest, having regard to what I have written above concerning the summary nature of the proceedings and the doubtful utility of much cross-examination, that para 3.8 should be applied literally and conscientiously in every case where an order for cross-examination is sought.

A consequential discretion

70. Where the court of State B is satisfied that the terms of the exception have been proved this gives rise, at any rate in theory, to a consequential discretion to decide whether or not to return the child to State A. This "discretion" arises from the clear language of the exception: "*The judicial ... authority of the requested State is not bound to order the return of the child if the person ..., [who] opposes its return establishes*" Indeed, the language of the exception does not frame the discretion in neutral terms but, in using the negative compound-verb form "not bound to return" implies that under the Convention the court is normally bound to order a return; that only very exceptionally will it not do so; and that it will not necessarily and invariably refuse to do so where the exception is proved.
71. That is not how the discretionary power has been interpreted. On the contrary, it has been held to be of the type of discretionary power granted to the court which is more theoretical than real and where its exercise is almost invariably driven by proof of the

threshold facts that trigger the discretion. Thus, in *In re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, HL Baroness Hale stated at [55]:

"But, as my noble and learned friend, Lord Brown of Eaton-under-Heywood, pointed out in the course of argument, it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate"

72. Similarly, in *In re M (Children) (Abduction: Rights of Custody)* [2008] AC 1288, at [45] Baroness Hale cited the above passage from *In re D*, and observed that it was not the policy of the Convention that children should be put at serious risk of harm or placed in intolerable situations. It is true that the Guide at para 42 states that:

"...where the court is satisfied that the evidence presented / information gathered, including in respect of protective measures, establishes a grave risk, ... it is within the court's discretion to order return of the child nonetheless."

However, the Guide gives no examples of situations where the court might, having made that finding, order a return nonetheless. And I cannot conceive of any.

Article 13(2): child's objections

73. The correct approach to the child's objections exception was laid down by the Court of Appeal in *Re M (Republic of Ireland)(Child's Objections)(Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074. At [18], Black LJ stated:

"In England and Wales, the normal approach to the child's objections exception is to break the matter down into stages. There is what is sometimes called the "gateway stage" and the discretion stage. The gateway stage has two parts in that it has to be established that (a) the child objects to being returned and (b) the child has attained an age and degree of maturity at which it is appropriate to take account of his or her views. If the gateway elements are not established, the court is bound to return the child in accordance with Article 12. If the gateway elements are established, the court may return him or her but is not obliged so to do. This approach has not been challenged before us."

And at [76]:

"The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be

made in all the circumstances. What is relevant to each of these decisions will vary from case to case.”

74. The approach that was taken there has been summarised by MacDonald J in *H v K (Return Order)* [2017] EWHC 1141 (Fam) at [46] –[47]:

“46. The law on the 'child's objection' defence under Art 13 of the Convention is comprehensively set out in the judgment of Black LJ in *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] 2 FLR 1074 (and endorsed by the Court of Appeal in *Re F (Child's Objections)* [2015] EWCA Civ 1022) and I have regard to the clear guidance given in that case. In summary, the position is as follows:

(i) The gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are satisfied in 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 his or her views.

(ii) Whether a child objects is a question of fact. The child's views have to amount to an objection before Art 13 will be satisfied. An objection in this context is to be contrasted with a preference or wish.

(iii) The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage.

(iv) There is a relatively low threshold requirement in relation to the objections defence, the obligation on the court is to 'take account' of the child's views, nothing more.

At the discretion stage there is no exhaustive list of factors to be considered. The court should have regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available. The court must give weight to Convention considerations and at all times bear in mind that the Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly”.

47. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are authentically the child's own or the product of the influence of the abducting parent, the extent to which they coincide or at odds with other considerations which are relevant to the child's welfare, as well as the general Convention considerations (*Re M* [2007] 1 AC 619).”

75. In *In re M (Children) (Abduction: Rights of Custody)* (supra) when speaking of the discretion in child objection cases Baroness Hale said at [46]:

“In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.”

Disposal: Article 13(1)(b)

76. In her position statement and oral submissions Ms Lubeya Ramadhan eloquently argued that:
- i) The mother is clear that she cannot return to Ireland. If summary return of the children is directed, she will remain in England. Her anxieties about returning to Ireland have led her to conclude that she cannot return even if the children are ordered to. The mother has relinquished her housing in Ireland and has no means of supporting herself or the children were she to move back.
 - ii) The mother has stated that there are no protective measures that could enable her to consider returning to Ireland. The mother does not consider the protective measures offered by the father to be adequate to safely facilitate her return.
 - iii) It is clear from the CAFCASS report that the children are well cared for and thriving. The children need to continue to live in a secure environment. The only way this can be achieved is by remaining in England in their mother's care. If a return is ordered and the mother remains in England, it is queried how the basic needs of the children will be met. Who they will live with, where they will be educated and how they will maintain a relationship with their mother are all unknown.
 - iv) If returned to Ireland, the children will be separated from their primary carer. It is unknown where the children will live or attend school.

- v) It is unknown how quickly proceedings may be listed to resolved in Ireland. Return may result in the children being separated from their mother for a prolonged period, potentially irrevocably.
 - vi) The children have never been in the sole care of the father and mother asserts he has not been present or consistent within their lives. His accommodation is unsuitable and the children have a strained relationship with him. J has reported to the Cafcass Family Court Adviser (FCA) that he is opposed to seeing his father. E has described the father ‘disturbing’ them during video calls.
 - vii) It is unknown what outstanding criminal proceedings against the mother are in existence in Ireland. This may prevent her travelling for contact if the children are living there.
 - viii) The mother is concerned about the father’s mental health and personality. Mother asserts that father is inconsistent and abusive. Mother is aware that the father has another wife and family in Nigeria and he spends large amounts of time there. The children have never been his priority.
 - ix) It is submitted the mother has met the high requisite threshold pursuant to Art 13(1)(b).
77. Ms Ramadhan has not so much been instructed by the mother to make bricks without straw as to make bricks out of thin air. The mother’s primary argument is that the likelihood of an intolerable peril to the children arises principally because of her change of mind about her willingness to accompany them if a return was ordered. The court is always extremely hostile to having a gun held to its head and sceptical of forensically self-generated facts which are claimed to meet the legal test.
78. Let me be clear. All of the supposed grave risk of intolerable peril is a result of the mother’s unlawful and wrongful conduct. It would be a remarkable example of the triumph of injustice over justice, of wrong over right, if a mother could clandestinely relinquish her housing, pluck the children out of school, remove them to England in breach of a court order and then state that she will not accompany if they are returned, thereby enabling her to present them to this court as prospectively abandoned, homeless, unschooled and destitute with the result that a return order is refused on that basis.
79. I will not do so.
80. At para 60 the Guide states:
- “Where assertions of grave risk based on economic or developmental disadvantages upon the return of the child are made, the analysis should focus on whether the basic needs of the child can be met in the State of habitual residence. The court is not to embark on a comparison between the living conditions that each parent (or each State) may offer. This may be relevant in a subsequent custody case but has no relevance to an Article 13(1)(b) analysis. More modest living conditions and / or more limited developmental support in the State of habitual residence

are therefore not sufficient to establish the grave risk exception. If the taking parent claims to be unable to return with the child to the State of habitual residence because of their difficult or untenable economic situation, e.g., because his / her living standard would be lower, he / she is unable to find employment in that State, or is otherwise in dire circumstances, this will usually not be sufficient to issue a non-return order.”

81. I agree with this fully.
82. The Republic of Ireland is a modern, liberal democracy with a strong emphasis on social justice. In the absence of any evidence about its laws, I shall assume they are the same as ours and that were the mother and the children to present themselves as homeless to the authorities they would be rehoused and provided with benefits to support themselves at a level sufficient to meet their basic needs. I have no doubt, if the Irish court has not dealt with the interim situation before their arrival, a hearing would be convened very shortly thereafter. An email from the father’s Irish solicitor confirms this.
83. In my judgment the mother’s claims in support of her Article 13(1)(b) defence, taken at their highest, do not satisfy me that it is more likely than not that on their return to the Republic of Ireland the children would be either be exposed to an intolerable level of physical or psychological harm or otherwise placed in an intolerable situation. On the contrary, I am satisfied that they would not be either thus exposed or thus placed. I do not therefore need to weigh the parties’ respective cases to evaluate the mother’s prospects of success of proving the exception as her case taken alone comes nowhere near doing so.

Disposal: Article 13(2) – children’s objections

84. In the Cafcass report both children are recorded as saying to the FCA that they did not want to return to Ireland. In their letters to me they said respectively (J) “I don’t wanna go back to Ireland” and (E) “I want to stay here and for him to leave us alone”. The FCA states in her report:

“As documented above, J and E, expressed a wish not to return to Ireland to live”

She further recorded:

“should the children summary return be directed, E questions whether Ms A will return to Ireland with them. This mirrors the sentiment Ms E expresses at the conclusion of her statement”

In the concluding paragraph of her statement the mother said:

“I have been asked to think about protective measures to help me return to Ireland with my children if they are returned but the more, I think about it the more I cannot think of any protective measures this father can put in place that would help and I do not see how I could return.”

85. In her written and oral argument Ms Papazian submitted that:

“...a fair reading of the Cafcass report shows that these children do not object to a return to the Republic of Ireland. They make no complaint against Ireland and express their loss of their lives there. Such complaints as they make have amount to preferences and even those have to be filtered in the context that each have been overly involved in the adult disputes by their mother”

During argument I suggested that Mr Papazian was perhaps guilty of the heresies identified and extirpated by the decision in *Re M*. That decision arrested the practice of analysing children’s objections to see if they were in accordance with the objectives of the Convention. In *B v B* at [19] I stated that:

“The objections in question must be of appropriate maturity having regard to the terms of the Convention and they must be an objection to being returned to the homeland for the purposes of the courts there working out as soon as may be possible what is in the child's best interests. That is not the same as an objection to being returned to Lithuania per se ”

This approach I now recognise as being quite wrong. The question is a simple, literal one. Does the child object to being returned? All the old arguments about the objection being the wrong kind of objection, or that the objection was not really an objection but rather a wish or a preference are now consigned to oblivion. So I confess to being slightly surprised to hear them recycled by Ms Papazian.

86. The first two stages of the *Re M* exercise are clearly satisfied. The children have objected and they are of a sufficient age and degree of maturity for it to be appropriate for their objections to be listened to, and taken account of, by me. Their objections are not childish nonsense.

87. The two preconditions being satisfied I am given a discretion to refuse to order their return.

88. In her submissions Ms Ramadhan argued:

- i) Both children object to returning to Ireland.
- ii) Both children have been assessed as being mature for their age. They are eloquent and able to articulate their views clearly, providing balanced reasoning for their desire to remain in England.
- iii) The children have both written letters to the Court. It is submitted their views are balanced, well-reasoned and genuine.
- iv) The strength of feeling that both children have expressed is clear in the Cafcass report when asked about the impact upon them if return is ordered. J would feel ‘depressed and reluctant’ and would just ‘cry’ (paragraph 16). E would feel ‘sad’ (paragraph 21).

- v) Both children have expressed a strong wish to remain in England. The impact of an order contrary to their wishes and feelings will cause great distress.
89. It is clear to me that the children have been influenced in their views by their mother. The fact that E is aware that her mother's stance is that she will not return with them should a return order be made is very telling. This factor significantly reduces the weight of the children's objections. But even if that factor were not present I would not exercise my discretion in favour of a refusal to order their return. The life experience of children of this age is largely one of enforced submission to decisions taken by adults in their best interests, whether they like those decisions or not. Adults decide where they live, where they go to school, who their friends are, where they go on holiday, what they eat, what they wear and how they are allowed to entertain themselves. So if the court decides that they should be returned to their place of habitual residence for decisions about their home to be made there, they would naturally expect that to be yet another decision about their lives which they would have to accept, again, whether they liked it or not.
90. Put another way, irrespective of whether their wishes have been the subject of influence by their mother, I cannot see how, on the facts of this case, where the conduct of the mother has been so blatant, the wishes of the children could deflect the court from making the decision which justice cries out to be made. That decision reverses the mother's wrongful and unlawful conduct and puts her back in the position from where she must approach the question of relocation lawfully and responsibly namely by making an application to the Irish court.
91. I do not accept as genuine the mother's forensic stance that were a return order to be made she would not accompany the children back to Ireland. All the evidence is that the mother is an intensely loving parent even if her conduct in abducting these children was deplorable. I regard it as inconceivable that she would in effect abandon her children if they are ordered back to Ireland for the welfare decision to be taken by the court there.

Decision

92. For the reasons set out above I am not satisfied that the mother has proved either exception. Therefore, under Article 12, I must order the return of both children to the Republic of Ireland "forthwith". Forthwith literally means immediately, but it is the practice of this court always to give some time for arrangements to be made to effect an orderly return.
93. I make an order that the children shall be returned no later than three weeks following the handing down of this judgment i.e. by 14 February 2023. This period should be sufficient for the mother to be able to make an application to the Irish court, which I repeat, has primary and exclusive jurisdiction over all welfare issues, for permission to relocate the children to England, and for an urgent interim order allowing her to remain here pending the substantive hearing.
94. It would appear that the mother would be entitled to legal aid to make that application and, as I have stated, it would appear that the interim application could be heard very quickly. Nothing that I say in this judgment signifies any kind of steer from me as to what the result of such an interim application should be.

95. The order that I make today will require the return of the children by 14 February 2023 and will record the father's undertakings as set out above. If, before that date, the result of an interim application in Ireland is that the mother is allowed by the Irish court to remain here pending the final determination of her substantive application then this order will be stayed and will stand dismissed on a final order being made in the Irish court granting her application.
-