

**THE COURT ORDERED that no one shall publish or reveal the name or address of the children who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the children or any member of their family in connection with these proceedings.**



**THE COURT OF APPEAL**

**CIVIL**

**UNAPPROVED**  
**Appeal Number: 2024/48**

**Neutral Citation Number [2024] IECA 110**

**Whelan J.  
Faherty J.  
Binchy J.**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF  
CUSTODY ORDERS ACT 1991  
AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL  
ASPECTS OF INTERNATIONAL CHILD ABDUCTION  
AND IN THE MATTER OF COUNCIL REGULATION 2019/1111/EC  
AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE COURT  
AND IN THE MATTER OF TWO MINOR CHILDREN  
(CHILD ABDUCTION: GRAVE RISK, PROTECTIVE MEASURES and  
UNDERTAKINGS, GERMANY)**

**BETWEEN/**

**S.O.**

**RESPONDENT**

**- AND -**

**A.B.**

**APPELLANT**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 3rd day of May 2024**

1. This is an appeal against the judgment delivered 12 February, 2024 and order of Ms. Justice Gearty perfected on 14 February 2024 where in proceedings concerning the two minor children of the parties aged 1 and 3 years respectively, the court ordered pursuant to Article 12 of the Hague Convention and Regulation 2019/1111/EC (Brussels II *ter*) that the said two minors be returned to the jurisdiction of the courts of Germany forthwith and made no order as to costs. In her notice of appeal filed in this Court on 22 February 2024 the appellant mother appeals the said determination.

**The judgment**

2. In her judgment, neutral citation [2024] IEHC 122, Gearty J. noted that the defence of grave risk pursuant to Article 13(b) of the Hague Convention had been raised by the mother and that the children were too young to determine their views on the question of a return to Germany. She observed that extensive affidavit evidence had been filed by the parties and that in circumstances where the mother furnished a very substantial affidavit the father had, in turn, replied with a further lengthy affidavit *“In circumstances where several new matters were raised by the [father] in this substantive affidavit, I permitted the [mother] to reply to this but directed that she should confine herself only to new matters raised by him.”* Instead, the mother introduced new allegations which the judge ordered to be excised from the affidavit as being of tenuous relevance to the issue of grave risk asserted as a defence by the mother. The judge observed: *“The procedural rules governing the exchange of affidavits are important and there is always a balance to be struck between directing and managing the exchange of pleadings and ensuring that the Court has sufficient information to make the most effective and appropriate rulings in any case involving the alleged abduction of a child.”*

3. The judge at section 2 of her judgment outlines the objectives of the Hague Convention and at section 3 considers the defence of grave risk and the legal test applicable in this jurisdiction where a respondent seeks to resist an order for the summary return of a minor to the jurisdiction of the courts where the child was habitually resident on the grounds that to do so would expose the child to a grave risk of physical or psychological harm or otherwise place them in an intolerable situation. The court observed “*The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations.*” (2.2) Citing the authorities, including *C.A. v. C.A.* [2010] 2 IR 162 and the decision of this Court in *C.T. v. P.S.* [2021] IECA 132 (Collins J., Faherty and Pilkington JJ. concurring) where it was acknowledged “*...there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside.*”, Gearty J. noted “*This explains why the burden of establishing the defence is heavy and why a discretion remains for the judge, even if a grave risk to the child is identified.*”

4. The judge then proceeded to identify the agreed facts between the parties, noting that the couple were married to one another and had separated and reconciled at least once previously. The mother went on holidays to Ireland with the children in early 2023 then returned to Germany on or about 15 February 2023 and resumed residing with the father. They continued to co-habit until April 2023 when they separated, at which point the relevant Youth Welfare Office became engaged with the family. “*In May of 2023 the local District Court, following a contested hearing involving both parties, made an interim order directing that the Applicant [the father] have the sole right to determine the place of residence of the eldest [child] ...*”

5. In early June 2023, the mother collected the older child for access and obtained the child’s passport. The father had consented to a short trip by the mother with both children to the Czech Republic. Thereupon the mother took both children to Ireland. In late June the

father returned to the German District Court obtaining an order conferring on him the right to determine the place of residence of the youngest child and directing that the mother surrender that child to him. Subsequently in July 2023, the said District Court made an order prohibiting the mother from taking the children outside the territory of Germany and outside the territory of the member states of the Schengen Convention. By the time the said order was made, the mother was resident in this jurisdiction with the children. The within proceedings were instituted before the High Court seeking the summary return of the children to Germany on 17 July 2023.

6. In Section 5 of the judgment the judge reviews the evidence adduced by the mother in support of her contention that the return of the children would expose them to a “*grave risk of physical or psychological harm or otherwise place them in an intolerable situation*” within the meaning of Article 13(b) of the Hague Convention. The court noted that the mother had contended in her affidavits that alleged “... *violent incidents were supported by her exhibits which show multiple attendances with a therapist and a period of separation in 2021. Most of the counselling took place in 2021 though she also attended more recently before she removed the children. It was urged on the Court that the history of counselling was evidence of more than conflict or depression and could amount to grave risk.*” (5.2) The court noted that the mother relied on a letter from her lawyer dating from 2021 as supporting her submissions, observing “*Insofar as it repeats the [mother’s] concerns it is not independent, but it is mildly supportive in the sense that it is consistent and pre-empted some of her current complaints.*” The court noted that the father admitted that their relationship was “*of high intensity and a lot of shouting*” and she noted at 5.3 that the father “*concedes that he did throw a shoe or slipper at the Respondent and once pinned her arms to her sides.*”

7. Voluminous email, texts and other communications exchanged between the parents were exhibited and translated. The judge noted of same at 6.1: *“This is important evidence comprising messages between the parties, many exchanged before proceedings began, and less likely to have been written to create a false impression but showing the real viewpoints of the parties rather than the version of events they might later wish to present to a court.”* The judge noted messages from 2021 wherein the mother told the father that the marriage was over. This exchange occurred prior to the birth of the second child in mid-2022. *“...it contains one reference in the sequence to physical violence. This is the incident that both parties describe during which the [father] threw a shoe or slipper at the [mother]. She refers in their text exchange to this shoe incident as him hitting her, he denies that this qualifies as the item was thrown, he did not hold it in his hand.”*

8. The court noted that there was an incident at the end of 2021 where the father yelled at the mother in public but subsequently apologised. Having perused the messages, the judge observed that they contained *“bickering and name-calling”*, most often by the father but *“no single serious incident. The tone of the messages is aggrieved, tired and exasperated, in respect of both parties.”* (6.3) Examples are cited in the judgment at 6.3. The court noted that in a lengthy exchange of messages between the parties on 5 December 2022 the mother was ending the relationship *“There is no reference to physical or sexual violence.”* The judge notes that relationship difficulties arose following the birth of the youngest child in mid-2022 and there was a lengthy exchange of messages *“Again, while unhappy, she does not suggest any violence in these exchanges in December 2022. From the message above, the misconduct in question appears to be on both sides, and it is never clearly identified.”* (6.6) The court notes that the mother alludes to the father’s *“insults, senseless and absurd jealousy”* and that she describes herself feeling imprisoned in the marriage which she found

disappointing. The court notes lengthy exchanges of messages where the father suggests therapy which the mother rejects.

9. The court analyses a series of messages from March of 2023 following the mother's return from a visit to Ireland with the children. The court at 6.8 observed that this series of messages "*...probably formed one of the bases of the German courts' decisions in respect of the custody of the two children...*". The mother in those messages had described herself as having had "*a very bad couple of days with the two young children*", particularly the older child. In that message exchange the mother had made reference to going into a clinic to receive therapy and letting the father have the children.

#### **Treatment of grave risk**

10. In Part 7 of the judgment, the High Court judgment noted that the mother had purported to exhibit an email from her doctor which appeared to "*confirm that the [father] dictates what the [mother] should wear in order to hide her bruises and that he does not let her out of the house.*" The trial judge noted that the said doctor has subsequently signed an exhibit for the father disputing having written the said email. The judge notes that the burden of proof lies on the mother in regard to adducing evidence pertaining to grave risk and was satisfied that "*she has not proven this aspect of her case. This conclusion is supported by the lack of reference to injuries or to imprisonment at any stage in the lengthy exhibits of exchanges between the parties, samples of which are referred to above.*" (7.1) The court also noted that in a letter from her lawyer that whilst there is reference to "*aggressive behaviour*" yet "*[n]o specific incident or type of conduct is identified. There is no allegation of physical assault in the letter.*" "*At most, the letter provides evidence of consistency but only in respect of general complaints of verbal aggression.*" (7.2)

11. The mother had asserted that a note from her counsellor confirmed that she had been diagnosed with an adjustment disorder which she contended was referable to domestic

violence. However, on analysis the judge was satisfied that whilst the counsellor had referenced “*prolonged marital conflict*” (7.3), there was no reference to domestic violence. The court also noted, in *obiter* comments, that on leaving the family home the mother had moved to live within ten minutes or so of the father’s home. The judge was not satisfied that there was evidence to support her claims against the father of coercive control or of an abusive type relationship or the wearing down of the will of the mother and no evidence of the father posing a risk to the children. Of the two incidents established, the judge found there was no evidence adduced to suggest that same occurred in the presence of the children. (7.4)

**12.** In her judgment the judge carried out a detailed analysis of the evidence and exhibits put before the court by the mother in support of her contention that the children ought not to be returned to the jurisdiction of the courts of Germany on the basis of an Article 13(b) defence of grave risk. At 8.1 the judge concludes that whilst the exhibits support the conclusion that the marriage was an unhappy one, “*there is very little support for the conclusion that there was a risk of violence to the [mother] at the hands of the [father] and even less support for the proposition that the children were at risk or may be at risk if returned.*” The court noted that the local Youth Welfare Office had engaged with the family since the couple initially separated in 2021 and welfare officers had met both parties. The court noted that reports in respect of same were exhibited. “*No concerns were raised by the [mother] at that time, no risks noted by that Office in 2021 or when engaged with this family again in 2023.*” The court further noted “[t]he majority of the allegations made by the [mother], in the list exhibited at ‘AB3’ are not borne out by corroborative evidence and are contradicted in part by the [mother’s] own exhibits.” (8.2) In particular, there is “*no record of any complaints of sexual or financial abuse in the relationship, no independent verification of such allegations and nothing to support either claim.*” (8.2)

**13.** The judge observed of the voluminous contemporaneous messages that passed between the couple that the mother had contended that same bore “*a more sinister meaning when read in chronological order than might otherwise appear*”. (8.3) The judge considered that whilst same made for unhappy reading, “*I cannot agree with the submission that the messages corroborate a violent or abusive relationship.*” The court found that the messages taken together with the averments and other exhibits did “*not establish a grave risk to these children such as would persuade me not to return them to Germany.*” The judge’s assessment was that “*...contemporaneous messages are more reliable than the broad references to aggression or conflict in the exhibits relied upon by the [mother]. Her exhibits confirm conflict, but do not support allegations of aggression or of violence such as to suggest the [mother] is at risk if she returns to Germany. There is nothing to suggest that the children are directly at risk.*” (8.4) The judge further observes that the mother’s “*counsellor’s note is entirely in line with the messages exhibited. Conflict and violence are very different, and the messages certainly confirm the conflict, but not violence, still less violence which creates a grave risk for the [children].*” (8.4)

**14.** Significantly, the trial judge found that the two examples of physical contact between the couple relied upon by the mother predated her removal of the children to Ireland in early June 2023 “*by a significant period of time and could not, plausibly, be a basis for a decision to move here due to a fear of the [father].*” (8.5) The court noted the mother’s reliance on a series of Hague Convention decisions which, she contended, were authority for the proposition that it was open to a court to refuse the return of children on a basis of violence even where there was no independent evidence supporting such a claim. However, the judge analysed the said decisions, including the decision of Ní Raifeartaigh J. in this court in *D.B. v. HLC* [2023] IECA 104, and considered that they were not authority for such a proposition, and also including the case *Van de Sande v. Van de Sande* [2005] USCA 7 667; 431 F.3d



567, noting *“This is far removed from the factual circumstances of this case”*. (8.6) Likewise, the court rejected that the decision in *Baran v. Beaty* [2008] USCA for the Eleventh Circuit No. 07-12762; 526 F.3d 1340 was such authority. The court reviewed the latter judgment, noting that a former spouse of the husband had given evidence in that case attesting to his violent conduct and further there had been secret tape recordings of conversations had between the wife and husband and the combined evidence had led the relevant court to accept the wife’s version of events on the balance of probabilities. Gearty J. was satisfied *“there is nothing to compare with these incidents here”* (8.8) The court further rejected the mother’s reliance on the decision of the Canadian courts in *Achakzad v. Zemaryalai* [2010] ONCJ 318, noting that the said decision was distinguishable from the instant case, there being *“no findings or charges against the [husband] in Germany, there is no evidence to support her averment that he has been violent towards her such as to justify a fear of him.”*, which contrasted starkly with the authorities sought to be relied upon.

**15.** On the alleged risk of *“an intolerable situation”* arising should the children be returned to Germany or be placed in the sole custody of the father, the judge concluded *“There is no evidence to suggest that this will cause an intolerable situation for the [mother] or the [children].”* (9.1) The court noted that authorities being relied upon had involved mothers who had adduced medical reports confirming mental health difficulties that demonstrated *“how intolerable it would be for them to be returned, with consequences for the children involved. There was no comparable evidence here.”* (9.1)

**16.** Before the High Court the mother had advanced the contention that she greatly fears returning to Germany because of the proximity of the father and that *“[t]he level of this fear, whether justified or not, is such that it is likely to undermine her mental and psychological health.”* The judge concluded that this argument was untenable argument, observing at 9.2:-

*“...The most a court can find when presented with a sense of fear, as gleaned from an affidavit, is that the deponent may be in fear. The concession made, effectively, that the fear may not be justified, makes the argument weaker still though it does have the benefit of being in line with the facts: there appears to be no evidence such as would justify fear on her part. To move from this position to positing mental health effects as a result of the asserted fear is a leap in logic without any support.”*

The judge was satisfied that to establish the proposition that she was in fear such as might affect her health were she to return to Germany the mother *“must produce medical evidence, not a speculative conclusion based on averments without support.”* The judge noted that none of the multiple exhibits of contemporaneous exchanges supported the claim that the mother was in fear of the father. Further in the context of her alleged mental health issues and the aetiology of same, the court noted that:

*“Without any expert report or supporting letters from treating professionals, this Court cannot determine what problems, if any, this [wife] currently faces. She carries the evidential burden of proving grave risk and there is insufficient evidence to prove that defence in this case.”* (9.4)

17. The court was satisfied further that whilst the mother had been the primary carer of both children for most of their lives, she had in the past trusted the father with their care and *“there is no evidence of any risk to them in that regard”*. The judge considered the possibility that undertakings would be appropriate in respect of the manner of return and proceeded to order the summary return of the children to Germany.

### **The Appeal**

18. The notice of appeal was prepared by the mother who self-represented in this appeal and appears to raise the following issues and grounds:

- (1) By the date of the judgment on 12 February 2024, the best and most up to date information relating to the welfare and best interests of the children exists in Ireland as they have been living here since 11 June 2023.
- (2) Whilst agreeing that the legal test for grave risk under Article 13(b) of the Convention requires “*clear and compelling evidence*”, she alleged that the trial judge failed to read the whole file and take all of the mother’s evidence into consideration and as a result the mother’s right to a fair trial pursuant to Article 6 of the Irish Human Rights and Equality Commission Act, 2014 was violated. The mother further alleges “*If only the Applicant’s evidence is taken into account then that is not an ‘impartial tribunal’.*” In substance, this amounts to an allegation of objective bias on the part of the judge towards the mother.
- (3) The third argument asserts grave risk to the children and their mother and an intolerable situation if they are returned to Germany.
- (4) It is contended that the mother and the children are Irish citizens and deemed habitually resident in of Ireland and the children’s voice cannot be excluded from proceedings deeming them “*too young to determine their views*”.
- (5) It is asserted that the children and their mother should remain in Ireland. “*Return of the children without their mother to Germany will put them at a grave risk and if the mother is to return it will result in a grave risk and an intolerable situation.*”

**The standard of review**

19. Murray J. in *A.K. v. U.S.* [2022] IECA 65 at para. 48 *et seq.* analysed the material distinctions in the review standards applicable depending on the categorisation of the issue under consideration by the appellate court. Relevant to the key issue of habitual residence in the instant case are Murray J.’s observations at para. 48 where he noted:

*“At one end of the spectrum lie cases in which the appellate court simply forms its own view as to the matter in issue untrammelled by any finding that has been reached by the trial court. This is the standard applicable to findings of pure law. Given that a finding of “habitual residence” involves the application of primary facts to what are now well-established criteria, issues of law should not arise frequently in these cases. The whole point of the approach now adopted to the term is to avoid rules of law which distort the core factual issue to be determined by the court.”*

**20.** A feature of this appeal is that whereas the appellant mother in an affidavit sworn by her on 29 August 2023, deposed *“I also confirm that the children were habitually resident in Germany at the time of their removal to Ireland in June 2023”* and indeed further confirmed that the father *“has rights of custody in respect of them pursuant to the laws of Germany”*, in the context of this appeal she sought to alter that position and contend that the children ought to be *“deemed as habitually resident”* in this State. However, under questioning from the court, she appeared to concede once more that for the purposes of the Hague Convention and in particular Article 3(a) thereof, both children were habitually resident within the jurisdiction of the courts of Germany immediately before her removal of them. The issue of habitual residence will be considered further hereafter.

**21.** These being summary proceedings, the matter was heard on affidavit by the trial judge in the ordinary way. Murray J. in *A.K. v. U.S.* considered the standard of review jurisprudence where it is alleged that there were errors on the part of a trial judge in respect of findings and determinations based on affidavit or documentary evidence alone. At paras. 51 and 52 of his judgment he observed that where, in the language of Humphreys J. in *Minogue v. Clare County Council* [2021] IECA 98, the appellate court is reviewing *“secondary findings of fact that are not dependent on oral evidence such as inferences from*

*admitted facts or those proven otherwise than by way of oral testimony”, Murray J. observed “Here, the standard of appellate review is ‘somewhat deferential’ (id.).”*

Murray J. cited *McDonagh v. Sunday Newspapers Ltd.* [2017] IESC 46 (at para. 163) where Charleton J. had observed:-

*“... the role of an appellate court in reassessing what in the court of trial was affidavit or documentary evidence is easier than when witnesses were involved, but even where that is the case, the party claiming that the trial judge assessed the facts wrongly bears the burden of proving that the trial judge was wrong.”*

Thus, insofar as the appellant contends that the trial judge erred and evaluated the evidence and facts incorrectly, the burden rests with her to demonstrate the error alleged. An appeal court is always entitled to review and correct errors of law.

### **Salient events prior to removal of children by mother to Ireland on 11 June 2023**

22. The material events leading up to the removal of the children by the mother from the jurisdiction of the courts of Germany include that, with the father’s consent, she visited Ireland with the two children in January 2023. She returned to Germany with the children in mid-February 2023 and cohabitated with the father until the relationship broke down in or about the month of April 2023. Then she moved out of the family home with the children and went to reside at a women’s shelter some ten minute drive away. Thereafter in early May 2023 the father instituted proceedings before the Family District Court in their home city. The father sought an interim order of parental custody in regard to the older child. It is very clear from the certified translation of the decision of the court that a comprehensive process was undertaken by the court and the relevant authorities including the Youth Welfare Office and the case guardian in respect of the guardianship of the children. Both parents were independently legally advised and represented by attorneys.

The judgment rendered by the trial judge in Germany on 25 May 2023 is comprehensive and thorough, based not alone on the evidence of the parties but also the detailed statements submitted by both the case guardian and the Youth Welfare Office concerning the family and the children. The court noted that due to the age of the older child, who was barely three, it was impossible to determine *“the child’s choice that might have been taken into account”*. The court observed that although the mother had *“initially prevented the children from seeing their father directly after the separation, the Youth Welfare Office and the case guardian relatively quickly succeeded in finding a visitation agreement, even if only limited until the date of the proceedings.”* In deciding to direct the interim or provisional transfer of the care of the older child to the father, the judge in a comprehensive and thorough determination observed that *“... there has been massive evidence of a temporary disability of the child’s mother to cope with childcare, having resulted in a behaviour towards the child... that was not in the child’s best interest.”* Based on the evidence, details of which were alluded to in the determination, the judge ruled that there was *“... massive reason for the assumption that the mother of the children is at least temporarily unable to cope with the education of both children during stressful situations and that there is a risk of child abuse concerning [the older child]”*. Having reviewed the evidence, the judge further observed: *“The Court has not been able to determine that currently there might have occurred any physical assaults by the children’s father against the children’s mother or the children. ...”* *“According to the impression gained, there has been a very emotional and possible vociferous couple conflict, from which the mother of the children has escaped by fleeing to a women’s shelter.”* The court separately noted that the order being made would, at least on an interim basis, *“lead to a temporary separation of siblings, which should principally be avoided.”* However, separating the siblings was considered to be warranted due to the fact that the younger child was being breastfed by the mother. It is clear from the face of the

order of the German Court that the mother had a right to appeal which appeal was required to be brought within two weeks from 26 May 2023. She did in the first instance bring such an appeal, though she subsequently abandoned same.

**The habitual residence ground**

**23.** Habitual residence is the primary basis of jurisdiction when determining if child abduction has occurred. It is an autonomous concept to be interpreted in light of the aims and objectives of the Convention to be determined on the basis of the material facts. It is determined by the place of residence of the children on the date of commencement of these proceedings by the father on 17 July 2023. The mother acknowledged (para. 3 of her affidavit of 29 August 2023) in the High Court that the children were habitually resident in Germany at the time of their removal. It follows that she implicitly accepts that their removal was wrongful and in breach of the father's rights of custody within Article 3 and (in the case of the older child) contrary to the order made by the German courts on 26 May 2023. That removal was effected by the mother in or about 11 June 2023. The mother availed of a contact/access agreement with the father entitling her to travel to the Czech Republic with the children for a few days to effect their removal from the jurisdiction of the German courts. Any suggestion that the children were not habitually resident in Germany on the relevant date under the Convention which was the date of commencement of the within proceedings in July 2023 is untenable. Further, the father acted with great expedition thereafter in tracing the whereabouts of the children and the "*request for the return*" to the Irish Central Authority pursuant to the provisions of the Hague Convention proceeded, including by the institution of summary proceedings in this jurisdiction on or about 17 July 2023.

**24.** Further the mother had expressly acknowledged before the High Court that the children were habitually resident in Germany and assertions to the contrary in the course of this appeal represent a fundamental *volte face* on her part.

25. Whilst there were some delays in the prosecution of the proceedings, these were, in part at least, referable to the conduct of the mother in furnishing very extensive affidavits with voluminous exhibits and furnishing affidavits late in the day which warranted translations of documentation and further adjournments to enable the father to respond to sundry serious allegations advanced by the mother. The mother did not establish that there were any material delays on the part of the father in pursuing his Convention remedy.

26. Briefly put, the mother adduced no evidence to demonstrate that the children subsequently lost their habitual residence or came to be habitually resident in this jurisdiction within the meaning of the Hague Convention or indeed in the context of Council Regulation 2019/1111/EC (Brussels II *ter*). The evidence put before the court by the mother indicates that herself and the children have been temporarily resident at two different women's shelters since their arrival in this jurisdiction. Being aged three and one, there can be no question of their integration into the society or communities in which they have so resided and the well-established jurisprudence flowing from the decision in *Mercredi v. Chaffe* Case C-497/10 PPU, EU:C:2010:829 is not met. Given the very young age of the children, there is no question or evidence of their integration into a social or familial environment in Ireland in the conventional sense such as would be sufficient to meet the threshold for loss of their German habitual residence.

27. Thus, I conclude, on the basis of the entirety of the evidence put before the High Court, that the children were indeed habitually resident in the Federal Republic of Germany at the date of their wrongful removal therefrom by the mother on or about 11 June 2023 and remain so habitually resident. Thus, *prima facie*, the removal was wrongful and in breach of the father's rights of custody vested in him by virtue of his paternity and further on foot of the orders made by the German court, particularly concerning the older child on or about 25 May 2023. No probative evidence was adduced to support a contention insofar as maintained



that the habitual residence of the children changed at any time thereafter. Insofar as the grounds of appeal purport to contend otherwise, they fail.

**That the trial judge was not impartial - objective bias**

28. Regarding the contention that the trial judge was in effect biased, the appellant alleges that the trial judge failed to read the entire file and take all of her emails into consideration and effectively asserts that only the father's evidence was taken into account by the High Court judge and that accordingly, the judge was not an "*impartial tribunal*". It will be recalled that Keane C.J. in *Orange Limited v. Director of Telecoms (No. 2)* [2000] IR 159 at p. 186/187 observed:-

*"..the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e. where it is found that, although there was no actual bias, there is an appearance of bias."*

29. The trial judge is highly experienced in the field of the law of International Child Abduction, including the Hague Convention and the various relevant EU Regulations. The case was presented in the High Court by an experienced legal team on behalf of the mother and included extensive affidavits sworn by her on 29 August 2023, 27 September 2023 and 15 December 2023 with voluminous exhibits. It is very evident from the comprehensive, yet succinct, analysis carried out in the judgment by the trial judge that she had perused the entirety of the affidavits and all of the exhibits advanced by both sides in this litigation. Ultimately, in substance the appellant's grievance appears to be that the refusal of the trial judge to make the orders she sought - including refusal of the father's application for the summary return of the children to the jurisdiction of the courts of the Federal Republic of Germany on the ground to that to do so would expose them to grave risk of physical or

psychological harm within Article 13(b) ought to be deemed in and of itself to constitute evidence of bias. Such a contention is untenable.

**30.** Were the trial judge to engage exhaustively with each assertion and item exhibited by the parties, particularly the appellant mother, the judgment would undoubtedly have run to hundreds of pages. Even at appeal stage the mother presented voluminous further material in support of her appeal, much of it culled from internet searches and a significant volume of material reflecting views of entities and groups who seek to modify and extend the potential defences to abduction under Article 13 particularly directed towards of the issue of violence against women and children including the sale, sexual exploitation and sexual abuse of children. The vast bulk of the material submitted by the appellant was not directly relevant to any fact established by the mother in the instant case. She did not establish that the father had been violent to either of the children. The judgment of the German court on 25 May 2023 found (p. 5) *“The court has not been able to determine that currently there might have occurred any physical assaults by the children’s father against the children’s mother or the children.”* At p. 4 the judge had noted that the mother had admitted to the Youth Welfare Office and relevant case guardian *“to have been emotionally overwhelmed.”* The German welfare judgment concluded upon review of the relevant evidence and witnesses that *“this shall give massive reason for the assumption by the mother of the children is at least temporarily unable to cope with the education of both children during stressful situations and that there is a risk of child abuse concerning [older child].”* Thus, the risk to the older child did not emanate from the father.

**31.** Contrary to the appellant’s contentions, the judgment of the High Court, particularly including at Part 6 “Contemporaneous Messages”, Part 7 “Doctor, Lawyer and Counsellor” and Part 8 “Conclusions as to Grave Risk”, in both its analysis and conclusions is consistent only with the trial judge having perused the entirety of the exhibits and affidavits adduced

by or on behalf of the appellant before her at the hearing of the action and succinctly distilled down all relevant aspects of the WhatsApp correspondence between the parents in reaching her conclusions that the threshold of proof for Article 13(b) defence of grave risk had not been met by the mother.

**32.** Insofar as there is a factual error to be found at 7.4 of the High Court judgment, counsel for the father fairly acknowledged that same arose by reason of an error in submissions made to the court by said counsel based on a misunderstanding as to the facts which had caused her to incorrectly submit to the court that the older child had been voluntarily placed by the mother in the custody of the father for a period of three weeks in April 2023. Such had never occurred. I am satisfied that the error is not material and in and of itself had no effective bearing on the substantive outcome and conclusions of the trial judge. I am satisfied that the core conclusions on the part of the trial judge, as exemplified in her analysis of the Agreed Facts (Part 4) and Evidence of Grave Risk (Part 5), are demonstrably based on an in-depth reading and analysis of the entirety of the exhibits, particularly those of the mother. For instance, the analysis at Part 5 of the judgment disaggregates between the averments of the mother which she asserts evidences violence by the father and thus establishes the defence of *grave risk* on the one hand and the judge's forensic analysis of the real substance of the exhibits and their true probative value on the other. As the trial judge correctly noted, a number of key exhibited documents are essentially hearsay and merely repeat the mother's assertions and lack any independent support for such allegations (5.3). The court was likewise attentive to details such as the dates of certain exhibits, noting that several pertained to a period of separation between the couple which occurred in 2021 and was not probative of events in 2023 when the breakdown of the relationship occurred, culminating in the court orders made on 25 May 2023 by the relevant German District Court. Having trawled through the exhaustive WhatsApp communications

between the couple, the judge at 6.3 correctly notes the material evidenced bickering and name calling between the couple “...*but no single serious incident.*”

**33.** The judgment of the High Court at Part 7.1 notes an exhibit from the mother purporting to be a medical report from a medical doctor which alluded to “*domestic violence*” and “*frequent physical violence*”. A subsequent affidavit sworn by the applicant father exhibited a communication from the same medical doctor confirming “*This email is completely unknown to me and was not written by me. It is therefore a forgery.*” The trial judge very fairly dealt with the matter of the contents of this affidavit in a neutral manner, quite correctly observing that given “*the direct contradictory evidence*” from the doctor, the mother had not proven this aspect of her case. This Court expresses no views on the said document the veracity of which is contested.

**34.** The mother further advanced a series of complaints against various entities, including the suggestion that the German police had not properly investigated complaints of violence she claims to have made against the father. She alleged this was attributable to the alleged status of the father’s family in their home city. She complained about the conduct and engagement of the Youth Welfare Office personnel with the family prior to the interim orders made by the German District Family Court on or about 25 May 2023, further implying that there was lack of fairness in their treatment of her. She alleged that as a non-national would be treated “*like a blow-in*” by the German courts and complained that her German attorney was deficient in representing her and had arrived late for court. She complained that the case guardian had been partisan in the discharge of her functions in respect of the assessment of the mother’s care and guardianship of the children in the context of the proceedings. She also appeared somewhat dissatisfied with the legal team that represented her before the High Court in this jurisdiction and voiced concerns around perceived deficiencies in the evidence they adduced on her behalf. She further suggested that in the event of a summary return of

the children to Germany she would “lose custody of the children for one year”, although she offered no evidence in support of this assertion. She claimed that in 98% of cases undertakings such as those offered by the father to the High Court to facilitate the summary return of the children were not being complied with by applicant fathers, albeit when invited to identify any source for this claim she was unable to do so.

35. Denham J. (as she then was) in *Bula Limited v. Tara Mines (No. 6)* [2000] 4 IR 412 at p. 441 distilled the essence of the test for objective bias which, when applied to this case, amounts to asking whether a reasonable person in the circumstances of the mother would have a reasonable apprehension that she would not have a fair hearing from the High Court judge or that in light of the evidence, the High Court judge can reasonably be said to have acted throughout the hearing otherwise than entirely impartially. It is clear from the judgment when read in its entirety that the judge had perused the entirety of the WhatsApp exhibits and engaged with all of the key relevant issues comprehensively and made clear determinations on the salient issues based on the evidence that was put before her by both parties and the legal submissions and arguments advanced. Accordingly, the arguments asserting a want of fairness, a lack of independence and a lack of impartiality on the part of the trial judge lack substance. The test in *Bula Ltd v. Tara Mines (No. 6)* is not met. This ground of appeal fails.

**The Grave Risk ground of appeal – did the trial judge err in assessing the evidence?**

36. The general scheme of the Hague Convention operates such that where the application is brought within one year of a wrongful removal of children, the requested court must order the return of the child forthwith unless, *inter alia*, the respondent can demonstrate that there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place them in an intolerable situation. Where evidence of such an Article 13(b)

defence is made out, it merely opens the door for the exercise of a residual general discretion by the courts of the requested State to determine whether in all the circumstances a summary return of the children is nevertheless warranted. In *C.T v. P.S.* (*supra*), Collins J emphasised the “*narrow scope*” and “*heavy burden*” on a parent who relies upon the grave risk defence under Article 13(b).

**37.** In evaluating a claim of “*grave risk*” advanced by an abducting parent, the court must be mindful of the limitations involved in the summary proceedings which operate under the Hague Convention process. Generally speaking, if the Article 13(b) threshold of proof is not reached by the abducting parent then, subject to the establishment of any other exception or defence, there is no room in general for the court to enter into an assessment the child’s welfare which under the Convention fall to be dealt with by the courts of the child’s habitual residence. In *W.B. v. McC* [2021] IEHC 380, a decision cited with approval by this court in *DB v. HLC* (*supra*), Gearty J., having found that the “grave risk” defence was not made out, noted that “*one of the guiding principles of the Convention is that the country of habitual residence must be trusted to safeguard the best interests of children in that jurisdiction*” (para. 11.10). In arguments before the High Court, the mother had sought to align her experiences whilst resident in Germany with those that obtained in the case *DB v. HLC* where Ní Raifeartaigh J., giving judgment on behalf of this Court, upheld a High Court order refusing the summary return of a child to England and Wales. The court noted the “*father’s history of criminal convictions for assault, and criminal damage to his mother’s house, and his general history of mental health and substance abuse difficulties.*” Having analysed the evidence, this Court concluded (para. 140) that the mother had established that there was a risk of further violence to the mother if she and the child were to return to England, and that risk could be characterised as *grave* within Article 13(b).

**38.** There is an inevitable challenge for a court in resolving factual disputes between parties particularly where domestic violence is alleged. The instant case differs in significant material respects from the factual matrix in *DB v. HLC* and other authorities relied on insofar as there is a significant volume of written material including contemporaneous messages exchanges between the parties and the evidence and decision of the German court where both parties participated. Great weight must be attached to the judgment of the German court which was expressly stated to have been based on “*the substantiated circumstances and the statements presently submitted.*” That judgment evidences a comprehensive evaluation of the respective welfare interests of the children which drove the court to conclude based not alone on evidence of the parties but the case guardian representing the Office of Care Consulting and Guardianship and the Youth Welfare Office of Special Social Services for the relevant city. The German court made it clear that its orders were not intended to be irrevocable or permanent. Indeed at p. 5 of the translation, the judge makes clear “... *it shall be assumed that the temporary overburdening of the child’s mother mainly relates to the [older] child...*”.

**39.** I am satisfied that there was nothing by way of probative evidence adduced before the High Court judge that could have enabled her to reach a conclusion contrary to that of the Family Court in Germany. It is noteworthy that at p. 4 of the translation the German District Family judge concluded concerning the mother that her “...*behaviour towards the [older] child ... was not in the child’s best interest. This has undoubtedly resulted from the WhatsApp correspondence submitted by the [mother]. Therein, the [mother] herself described that she throws things at the child, that she must ‘find another way with ... , without beating and without shouting’, that she pulled ... , who was lying on the floor, by the hand and then shoved [the child] out of the living room with the feet while [the child] cried.*”

**40.** The High Court judge was faced with a cautious and comprehensive interim judgment and decision of the German District Family Court judge delivered on 25 May 2023 which evidenced a careful and detailed determination based on all of the evidence referred to in the judgment leading to the interim order which had placed the older child in the care of the father for the purposes of protecting that child's welfare.

**41.** The mother has failed to adduce evidence that could have reasonably persuaded the High Court that an order for the summary return of the children to Germany would expose them to grave risk of harm within Article 13(b) of the Hague Convention. Concerns otherwise around any upheaval or inconvenience that might be experienced by the children, who are of tender years and aged one and three respectively could readily be dealt with by means of undertakings as the trial judge alluded to at para. 9.5 of the judgment under appeal.

**42.** The decision of the UK Supreme Court in *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [2012] 2 WLR 721 was relied on by the mother to assert that her subjective perception of the risks of a return leading to an intolerable situation for the child can in certain instances be sufficient to establish a defence within Article 13(b). The facts were somewhat exceptional in the *S* case. The critical question was what would occur if the child was to be returned in the company of the mother. The UK Supreme Court concluded on the clear evidence before the court that if the mother returned she was likely to suffer such anxieties that the impact of the mother's psychiatric health in and of itself would create a situation that was intolerable for the child and where that was established then a child should not be returned regardless of whether the mother's anxieties were reasonable or unreasonable. However, the UK Supreme Court emphasised that the extent to which there would objectively speaking be good cause for the mother to be anxious upon return would nevertheless be relevant to the court's assessment of the mother's psychiatric state were the child to be returned. A special feature of the case in the view of the UK Supreme Court was



that the English Court of Appeal had made insufficient reference to the history between the parents and had paid insufficient regard to the unusually powerful nature of the psychiatric medical evidence about the mother that was put before the court. The Supreme Court also had regard to an earlier decision of *Re E* [2011] UKSC 27 where a concession was made that if there was a grave risk that the child would be placed in an intolerable situation “...*the source of it is irrelevant: e.g. where a mother's subjective perception of events lead to a mental illness which could have intolerable consequences for the child.*” Such facts do not obtain in the instant case.

**43.** It is important to recall the essential determination of the UK Supreme Court in *In re S* (*ante*) at para. 34 where it was observed:-

*“...The critical question is what will happen if, with the mother, the child is returned. If the court concludes that, on return, the mother will suffer such anxieties that their effect on her mental health will create a situation that is intolerable for the child, then the child should not be returned. It matters not whether the mother's anxieties will be reasonable or unreasonable. The extent to which there will, objectively, be good cause for the mother to be anxious on return will nevertheless be relevant to the court's assessment of the mother's mental state if the child is returned.”*

Merely reciting the decision *In re S* does not establish its relevance to the facts in this case in the absence of any clear medical evidence.

**44.** The decision in *Re S* represents exceptionality and was dependent on psychiatric evidence of a kind not put before the High Court or this Court by the mother. The more recent decision of the English Court of Appeal in *Re A (Child Abduction: Article 13b)* [2021] EWCA Civ 328 demonstrates that the medical evidence to be adduced should demonstrate that a return would result in deleterious psychiatric impact for the mother such as would preclude her living alone with the child. Grave risk is a highly fact-sensitive defence. The

crucial question was whether the impact of being required to return the child would be likely to cause a breakdown in the mother's mental health such that the child would be placed in an intolerable situation. The mother had established that the psychiatric evidence could not have been obtained at the original High Court trial. Accordingly, those cases do not assist the appellant here, being entirely distinguishable in material respects.

### **Conclusions on Grave risk and intolerable situation**

45. I am satisfied that the allegations on which the mother relied in her efforts to establish grave risk and an “*intolerable situation*” within Article 13(b) should the children be returned were effectively contradicted by the father’s evidence and were not substantiated by the mother in any material respect such as could have led the trial judge to a conclusion that the summary return of the children to Germany, be that effected with or without the company of their mother as she should elect, would expose either of them to physical or psychological harm or otherwise place either of them in any intolerable situation. The mother expressed fears that she will be prosecuted for child abduction and at risk of imprisonment on her return thereby losing care of the children. The father has offered an undertaking not to engage with or prosecute any criminal complaint against her which offers a protective measure to resolve her said concern and thereby address this potential impediment. Further any inconveniences or upheaval attendant upon their travelling from this jurisdiction back to Germany and in the initial phase until all issues pertaining to the welfare of the children have been comprehensively addressed by the German courts can potentially be mitigated against by appropriate undertakings and protective measures as considered further below. The allegations advanced by the mother in support of her claim of grave risk were not substantiated. The trial judge, having considered same, was entitled to conclude that they should be discounted as she proceeded to do. Further the contention of the mother that she would be exposed to risks, including of physical harm or assault from the father, in the event

that she returned with the children was not substantiated. The contention that the police in the German city where the family reside would not adequately respond to any complaints of domestic violence against the father lacked credibility. Any suggestion that it is not possible for the mother to get justice within the family law legal system in Germany is unpersuasive and cannot be accorded any weight.

**46.** The courts in this jurisdiction, having regard to the principle of the comity of courts, are entitled to be satisfied that issues concerning the welfare of both children will be adequately dealt with by the German authorities upon the children's return. It is to be recalled also that in child abduction cases involving other EU Member States (except Denmark), Article 11(4) of the (revised) (Brussels II *bis*) Regulation, EC No 2201/2003 courts of Member States have been precluded from refusing to order a child's return upon the basis of Article 13(b) of the Hague Convention "*if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*". I note that in Chapter III of Brussels II *ter* Regulation EU 2019/1111 (the Recast Regulation), which amended and recast Regulation EC No 2201/2003 (Brussels II *bis*) and has been operative since 1<sup>st</sup> August 2022, Article 56 provides that the enforcement of a decision may be suspended if it "*would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances*".

**47.** When viewed in a contextualised way, the mother's arguments fall away. Her case for intolerability of the situation on her return hinges on her assertions of physical violence by the father towards her and the children and that the alleged violence towards her took place in the presence of the children. Beyond bare assertions, those claims are not made out. There was simply no evidence adduced by or on behalf of the mother which was sufficient to establish that a situation would obtain upon her return with the children to the jurisdiction of

the courts of Germany whereby she would be exposed to a risk of assault or physical violence or psychological violence at the hands of the father without recourse to any remedy such as would expose the children to an intolerable situation. Her claim that the source of the intolerable situation she contends for is the father remains unsubstantiated. Fears not necessarily rationally based can be addressed through the mechanisms of protective measures and undertakings to be given by the respondent in light of the objectives of the Recast Regulation, Brussels II *ter* to which Ireland and Germany are parties. Decisions from jurisdictions not parties to that Regulation such as U.S. and Canada are of limited assistance in this instance. The burden of proof rested with her and she signally failed to discharge same. Further, I take into account that protective measures taking the form of undertakings hereinafter to be identified, if provided by the father, would potentially ameliorate any inconvenience or obstacles militating against a smooth return of the children pending the German courts dealing with all aspects of the welfare of the two children, such that neither grave risk nor an intolerable situation have been made out as stateable propositions.

48. The mother has not established, based on any cogent psychiatric evidence, that her subjective perception of events is such as will lead inevitably to a mental illness which could have intolerable consequences for both of the children in the event that a summary return is directed to the jurisdiction of the courts of Germany.

**The supplemental evidence adduced before the Court of Appeal**

49. On the morning of the hearing the mother sought and was granted leave to adduce further evidence including a report from the Daycare Centre the children have attended in recent months, an email dated 2 April 2024 wherein solicitors for the father indicated he was not “*open to mediation at this stage*” and a statement from an Irish women’s shelter where the mother and children have been resident since 22 June 2023. The latter offers no first-

hand evidence which could support any of the defences being advanced by the mother and merely recounts what the mother has stated or asserted from time to time. The short statement is replete with hearsay and offers no first-hand analysis or evidence or assertion which would tend to support any of the defences asserted by the mother pursuant to Article 13 of the Hague Convention.

**50.** Additionally, subsequent to the hearing the mother submitted copies of documentation which she had read from in submissions to this Court, including mandates of the Special Rapporteur on violence against women and girls its causes and consequences dated 19 September 2023 addressed to Secretary General Bernasconi, Secretary General of the Hague Conference on Private and International law signed by, *inter alia*, the Special Rapporteur on violence against women and girls, its causes and consequences, the Special Rapporteur on the sale, sexual exploitation and sexual abuse of children and the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment.

**51.** It is fully understood that the mother does not wish to return to Germany with the children. Her preference is to reside in this jurisdiction where a number of her close relatives are now resident. She has resided here in the past. However, it may be open to the mother to make an application to the relevant court in Germany on notice to the father for leave to relocate with the children to this jurisdiction. Her personal preferences cannot operate as a veto against the summary return of the children where no defence has been made out pursuant to the provisions of the Convention as would warrant a refusal of the order for summary return.

**52.** In other respects, the mother took issue with the judge's observations suggesting that it was "*an unusual choice*" for the mother to choose to reside a mere ten minute drive away from the father if, as she contended, she was in fear of him. She explained that decision was based on the need to reside close to the older child's playschool which makes sense.

However, the judge's remark is merely *obiter* and had no bearing on the substantive outcome of the case and in and of itself is not a valid basis for interfering with the conclusions of the trial judge which were carefully reached after a comprehensive analysis of the extensive material put before her by the parties. The supplemental evidence offers no valid basis to vary the decision of the High Court.

### **Proposed protective measures and undertakings**

**53.** The father had instructed his counsel before the High Court that he was willing to give the undertakings which operate in the context of Council Regulation (EU) 2019/1111 of 25 June 2019, the Recast Regulation, recital 45 of which provides:

*“Where a court considers refusing to return a child solely on the basis of point (b) of Article 13(1) of the 1980 Hague Convention, it should not refuse to return the child if either the party seeking the return of the child satisfies the court, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return. Examples for such arrangements could include a court order from that Member State prohibiting the applicant to come close to the child, a provisional, including protective measure from that Member State allowing the child to stay with the abducting parent who is the primary carer until a decision on the substance of rights of custody has been made in that Member State following the return, or the demonstration of available medical facilities for a child in need of treatment. Which type of arrangement is adequate in the particular case should depend on the concrete grave risk to which the child is likely to be exposed by the return without such arrangements. The court seeking to establish whether adequate arrangements have been made should primarily rely on the parties and, where necessary and appropriate, request the assistance of Central Authorities or network judges, in particular within the European Judicial Network in civil and*

*commercial matters, as established by Council Decision 2001/470/EC, and the International Hague Network of Judges.”*

I have regard, in particular, to Recitals 30, 31, 45, 46, 59, 73 and 79 as well as, *inter alia*, Articles 15, 27(5) and 34 of Brussels II *ter*, Recast Council Regulation (EU) 2019/1111.

**56.** The protective measures offered by way of undertaking by the father include:

(1) That he undertakes not to pursue criminal proceedings now pending against the mother in Germany. This arises from a complaint made by him to the relevant German police authorities following discovery in June 2023 that the mother had abducted the children in breach of his rights of custody and the order of the German court. This would potentially constitute a temporary impediment to summary return within A 56 of the Recast Regulation if no such undertaking was forthcoming from the father.

(2) He undertakes that for period of three calendar months from the date of the mother's return with the two children to Germany firstly not to enforce rights on foot of the interim order made in respect of the older child and in proceedings 1 F465/23 eA of 25 May 2023. Secondly, he undertakes, for the same period, not to enforce the order made in his favour on 23 June 2023 by the relevant District Family Court in proceedings 1 F654/23 eA in respect of the younger child which conferred on the father the right to determine the place of residence of the youngest child and ordering the mother surrender the child to the father. This protective measure is necessary is to enable either party to bring proceedings in the local German Family Courts so that a full and proper hearing of both parents, witnesses and interested parties can take place concerning the welfare of the children.

(3) That the father undertakes to vacate and stay away from the family home of the parties for three calendar months from the date of the mother's return to Germany with the children, to enable the mother to reside there with both children should she

wish to do so pending proceedings coming on for hearing before the German courts and any orders of the said courts. I note that in an affidavit sworn on 15 April 2024 at paragraph 7 the father deposed as follows:-

*“I instructed my counsel to submit to the High Court that I was willing to provide the following undertakings to the court: that I would not pursue the criminal proceedings pending against the appellant in Germany for her removal of the children from Germany. That I would vacate the family home following the children’s return to Germany with the appellant and undertake not to enforce the orders of the German Court dated 25 May 2023 and 22 June 2023 for a period of time to allow the appellant to institute proceedings in the German courts. I remain willing to undertake to this court that I will not pursue criminal proceedings pending against the appellant and that I will vacate the family home and refrain from enforcing the German orders above for a period of six weeks following the return of the children to Germany with the appellant to assure the court that the children’s welfare will be secure and a smooth transition back to Germany ensured in the event that this Honourable Court decides to affirm the order of the High Court.”*

**57.** In a post-hearing email sent at 4:04pm on 15 April 2024 on behalf of the father to the Court of Appeal Civil Office, solicitors on behalf of the father indicated as follows:-

*“Further to today’s hearing, in the event that the court upholds the decision of the High Court I confirm that the respondent will:*

*(1) Provide the undertaking referred to in paragraph 7 of his affidavit sworn on 15<sup>th</sup> April 2024 for a period of three months from the date of the children’s return to Germany.*

*(2) Pay the appellant’s and the children’s travel costs from Ireland to Germany.”*



**Preliminary conclusions on the protective measures and undertakings offered**

58. My preliminary view is that the proposed protective measures and undertakings are adequate, reasonable and proportionate and meet the requirements of the Recast Regulation and facilitate the mother, should she wish to do so, in travelling with the children back to Germany to reside with them in the family home which the father will have vacated so that there will be security and stability for the mother and children and minimisation of any disruption for them for 3 calendar months until all issues pertaining to the welfare of the children can be brought before the German courts. I am satisfied, subject to hearing the views of the parties, that provided the undertakings aforesaid are combined in one affidavit and deposed to by the father the various proposed undertakings offered by him offer adequate protective measures to address the Article 13(1)(b) issues arising.

**Conclusion**

59. For all the reasons outlined above, I am satisfied that the appellant has failed to establish any of the grounds of appeal advanced by her. The court fully understands that she has a personal preference to reside with the children in this jurisdiction. That is an entirely legitimate wish on her part. However, it must be subject to a process whereby the courts of competent jurisdiction in the habitual residence, namely the Federal Republic of Germany, are afforded an opportunity to make a determination on the issue of relocation should the mother wish to submit same and any other issues concerning the children's welfare to the said courts. Any perceived concerns asserted by the mother are adequately addressed by the protective measures proposed. Having due regard to the spirit and intendment of the Hague Convention and the extensive jurisprudence, including of this Court and the Supreme Court, reiterating that the defences are to be construed restrictively, no valid basis has been identified by the mother to support any defence pursuant to Article 13(b) whereby this Court

could legitimately interfere with, reverse or vary the orders of the High Court and this appeal is accordingly dismissed.

**60.** Given the circumstances of the case which pertains to the welfare of children of very tender years and the supervening importance of and public interest in such issues being determined expeditiously by this Court and given the circumstances of the mother, the court proposes to make no order with regard to the costs.

**61.** Both parties have liberty to apply regarding any issue, including the specific terms of any protective measures or undertakings being proposed or the manner in which same should be provided or any other matter, including costs. Such application to be made expeditiously and not later than seven days from the date of delivery of this judgment.

**62.** Faherty and Binchy JJ. have requested that their agreement with the within judgment be hereby recorded.