APPROVED **[2022] IEHC 627**

THE HIGH COURT

2022 No. 9 HLC

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

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

AND IN THE MATTER OF A.B. (A CHILD)

BETWEEN

D.B.

APPLICANT

AND

H.C.

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 November 2022

INTRODUCTION

1. This matter comes before the High Court by way of an application for an order directing the return of a child who has been wrongfully removed to this jurisdiction from their country of habitual residence. The application is made

pursuant to the provisions of the Child Abduction and Enforcement of Custody Orders Act 1991. The child was taken from England to this jurisdiction by her mother on an unspecified date in mid- April 2022. The application for the return of the child has been made by her father.

2. The mother seeks to resist the application on the basis that there is a "*grave risk*" that the return of the child to England would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. It is alleged that there is a history of domestic violence by the father against the mother and that this translates into a "*grave risk*" for the child. Specifically, the mother fears that, if the child were returned to England, the father would trespass at the mother's home and take the child. The mother has averred to the belief that no restraining order would prevent such an event happening given the volatile nature, mental health difficulties and drug problems of the father.

3. In order to protect the anonymity of the child, the protagonists in these proceedings will be referred to simply as "***the child***", "***the father***", and "***the mother***", respectively. For the same reason, the identity of the locations where the protagonists reside and work has been redacted.

LEGISLATIVE FRAMEWORK

4. The application for the return of the child is brought pursuant to the 1980 Convention on the Civil Aspects of International Child Abduction ("***the Hague Convention***"). The Hague Convention has been given the force of law in the Irish State by the Child Abduction and Enforcement of Custody Orders Act 1991 ("***the 1991 Act***").

5. For the purpose of the present proceedings, the key provision of the Hague Convention is Article 13 as follows:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that—
>
> (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

6. As appears, the requested court may refuse to make a return order where the opposing party 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. This ground of opposition is sometimes referred to in the case law as an "***Article 13(b) defence***" or a "**'*grave risk' defence***".

7. The Supreme Court has outlined the approach to be taken to the interpretation of the Hague Convention as follows in *H.I. v. M.G. (Child Abduction): Wrongful removal* [1999] IESC 89, [2000] 1 I.R. 110 (at pages 123/124 of the reported judgment):

> "It has been pointed out that, since the Hague Convention is an international treaty applying to states with different legal systems, it is desirable that it be construed in the same manner by the courts of the various states who have ratified or acceded to the Hague Convention: *Re H (Minors) (Abduction: Acquiescence)* [1998] A.C. 72 and the observations of Lynch J. in *K. v. K.* (Unreported, Supreme Court, 6th May, 1998).
>
> However, since the Hague Convention has the force of law in this State solely by virtue of the Act of 1991, and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Hague Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Hague Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the *travaux preparatoires* which accompanied its adoption may legitimately be used as an aid to its construction. (See the decision of this Court in *Bourke v. Attorney General* [1972] I.R. 36.)"

8. It would seem to follow that, as a matter of domestic law, the application of the Hague Convention is subject to and subordinate to the Constitution of Ireland. The court must, of course, have regard to legislative intent, but the Hague Convention cannot itself be elevated to a quasi-constitutional status. See, by analogy, *In the matter of JB (a minor) and KB (a minor)* [2018] IESC 30 (*per* MacMenamin J. at paragraphs 86 to 89).

9. Article 42A of the Constitution of Ireland states that provision shall be made by law that in the resolution of all proceedings concerning *inter alia* custody of, or access to, any child, the best interests of the child shall be the paramount consideration. The domestic legislation implementing the Hague Convention, i.e. the 1991 Act, should, therefore, be given an interpretation which ensures that it too achieves the best interests of the child.

10. As appears from the case law discussed under the next two headings below, the best interests of the child will, in nearly all instances, dictate that they be returned to their country of habitual residence. However, in certain exceptional circumstances, it will be in the best interests of the child to refuse to direct their return.

11. The Permanent Bureau of the Hague Conference on Private International Law published, in 2020, a *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part VI Article 13(1)(b)*. This Guide to Good Practice seeks to explain some of the key concepts relevant to the application of the "*grave risk*" exception under Article 13. This has been done by reference to case law of the courts of various of the Contracting States.

12. The Guide to Good Practice does not have the same status as the *travaux preparatoires*. However, the Supreme Court has held that, in construing the 1991 Act, it is appropriate to give consideration to cases and authorities of other jurisdictions where the Hague Convention is law (*Minister for Justice (E.M.) v. J.M.* [2003] IESC 40, [2003] 3 I.R. 178). It would seem to follow that, insofar as the content of same is predicated on such case law, it is appropriate to have some regard to the Guide to Good Practice in applying the domestic legislation.

13. In many instances, the content of the Guide to Good Practice merely mirrors principles which have already been established in the case law of the Irish Courts. I will refer to the content of the Guide to Good Practice, insofar as it relates to domestic violence and protective measures, at paragraphs 37 to 46 below.

14. It should be noted that the application in the present case is not subject to Council Regulation (EC) No 2201/2003 ("***the Council Regulation***") in circumstances where the United Kingdom is no longer a Member State of the European Union. (For completeness, it should be noted that even if the UK had still been a Member State, the proceedings would not be subject to the recast regulation, Council Regulation (EU) 2019/1111 because they were instituted prior to 1 August 2022).

15. Had the Council Regulation been applicable, then the protective measures available in the country of the child's habitual residence would have been a mandatory consideration. This is provided for under Article 11(4) of the Council Regulation as follows:

> "A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."

16. There is no equivalent provision under the Hague Convention. This distinction has been emphasised as follows by the European Court of Human Rights ("***the ECtHR***") in *O.C.I. and Others v. Romania* (Application No. 49450/17) [2019] 2 FLR 748 (at paragraph 45):

> "On this point, the Court notes that as member States of the European Union ('the EU'), both States are parties to the Brussels II bis Regulation, which is thus applicable in the case (see *K.J. v. Poland*, cited above, § 58). That Regulation, which builds on the Hague Convention, is based on the principle of mutual trust between EU member States (see *Royer v. Hungary*, no. 9114/16, § 50, 6 March 2018). However, in the Court's view, the existence of mutual trust between child-protection authorities does not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual residence are capable of dealing with cases of domestic child abuse. Nothing in the Hague Convention or in the

> Brussels II bis Regulation allows the Court to reach a different conclusion."

17. As discussed below, the Irish Courts have consistently held that protective measures represent a material consideration in the assessment of a "*grave risk*" defence under Article 13 of the Hague Convention.

"HARM" AND "INTOLERABLE SITUATION"

18. The phrase "*physical or psychological harm*" is not defined under the Hague Convention. Some useful guidance as to what is encompassed by the phrase is to be found in the judgment of the UK Supreme Court in *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2012] 1 A.C. 144 as follows (at paragraph 34):

> "Third, the words 'physical or psychological harm' are not qualified. However, they do gain colour from the alternative 'or *otherwise*' placed 'in an intolerable situation' (emphasis supplied). As was said in *In re D* [2007] 1 AC 619, para 52, "'Intolerable' is a strong word, but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate'". Those words were carefully considered and can be applied just as sensibly to physical or psychological harm as to any other situation. Every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Among these, of course, are physical or psychological abuse or neglect of the child herself. Among these also, we now understand, can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent. Mr Turner accepts that, if there is such a risk, the source of it is irrelevant: e g, where a mother's subjective perception of events leads to a mental illness which could have intolerable consequences for the child."

19. This passage has since been approved of in a number of judgments of the Irish Courts, including that of the Court of Appeal in *R. v. R.* [2015] IECA 265.

CASE LAW ON EVALUATION OF "GRAVE RISK"

20. The Irish Courts have consistently emphasised that the animating principle underlying the Hague Convention is that it will, generally, be in the best interests of a child that all issues of custody and access be determined by the courts of the child's country of habitual residence. The existence of a discretion to refuse to order the return of a child who has been wrongfully removed very much represents an exception to this animating principle. For this reason, the Supreme Court has held that the "*grave risk*" exception must be strictly construed. The position is summarised as follows in *A.S. v. P.S.* [1998] 2 I.R. 244 (at 259):

> "The law on 'grave risk' is based on art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.
>
> This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.
>
> The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

21. At a later point in the same judgment, the Supreme Court stated as follows (at page 264 of the reported judgment):

> "[…] The strong thread through all the case law is the fundamental concept of the Hague Convention that (except in rare cases) the issues of custody and access should be determined in the jurisdiction of the children's habitual residence. Thus if children are abducted or retained across state lines they should be returned to their habitual residence. The exception to this fundamental concept carries a heavy burden, the test is a high one. It is not a case of determining where the custody and access should lie, what is the paramount interest of the child in that regard. It is a question

> of enforcing the Hague Convention which has at its core the paramount interest of the child that it should not be wrongfully removed or retained across state borders."

22. On the facts of that case, it had been alleged that the left-behind parent, the father, had sexually abused one of the children. The Supreme Court held that there would have been a grave risk of harm if the children were to be returned to the custody of the father. The Supreme Court went on to rule, however, that this was not the only option. Having noted that the country of habitual residence, England, has a sophisticated family law legal system which could deal with issues of custody, access and child abuse, the Supreme Court made the return of the children conditional on the father providing specified undertakings. These included, relevantly, an undertaking to vacate the family home in England to enable the mother and the children to live there pending and during the custody hearing. The Supreme Court was satisfied that the apprehended "*grave risk*" to the children could be excluded by these undertakings.

23. The Supreme Court in *P.L. v. E.C.* [2008] IESC 19, [2009] 1 I.R. 1 reiterated that all issues relating to the best interests of the child should be decided by the courts of the country of habitual residence. This principle was applied to the specific context of an asserted "*grave risk*" defence as follows. The abducting parent had alleged that the child had been sexually abused by the left-behind parent. The Supreme Court outlined the correct approach to be taken to this type of allegation as follows (at paragraph 55 of the reported judgment):

> "The correct approach to the treatment of this issue is very well established in the case law. It is not the purpose of the Hague Convention that hearings of Convention applications should turn into inquiries as to the best interests of the child. The normal presumption is that issues of that sort (which will extend to all aspects of child welfare including custody and access) will be decided by the courts of the country of habitual residence. It is the fundamental objective of the

> Convention to discourage the abduction of children from the jurisdiction of the courts which have jurisdiction to decide those issues. The courts of the country to which the child has been removed must order the return of the child, unless one of the Convention exceptions is established. A court is not entitled to refuse to make such an order based on the general considerations of the welfare of the child. It is, naturally, implicit in this policy that our courts must place trust in the fairness and justice of the courts of the other country."

24. The Supreme Court, having stated that it was indisputable that a risk of sexual abuse is a "*grave risk*", went on to identify the "*real issue*" in the proceedings as one concerning the position which the courts of the requested country should adopt in circumstances where identical allegations of sexual abuse were the subject of family law proceedings before the courts of the requesting country. The Supreme Court held that, in order to establish the "*grave risk*" defence, the abducting parent would have to persuade the Supreme Court that the courts of the requesting country had decided, in advance of argument from counsel, to make orders exposing the child to a risk of sexual abuse and that, for that reason, that court was unable or unwilling to protect the welfare of the child.

25. The Supreme Court held that the abducting parent had not made out the defence: see paragraphs 65 and 66 of the reported judgment as follows:

> "It is for the Australian court, not this court, to test the strength and veracity of the allegations of sexual abuse. It has heard oral evidence from both parties, tested by cross-examination, over a period of eight days. It has also heard expert witnesses and received their reports. The Australian courts conduct adversarial proceedings in a manner remarkably similar to our own. They are capable of protecting the interests of C. If the respondent is dissatisfied with a decision of the family court, she will have a right of appeal. For these reasons, I am satisfied that the respondent has not made out the case of grave risk.
>
> The appeal having failed on all grounds, I would dismiss the appeal and affirm the order of the High Court. In doing so, however, I would amend that order to provide that it will take effect on receipt of the undertaking of the applicant that he

> will not exercise rights of access to or contact with C., other than in accordance with the order of the Australian Family Court."

26. As appears from this judgment, an appraisal of the availability and effectiveness of protective measures in the country of habitual residence forms an integral part of the overall assessment of a "*grave risk*" defence. Rather than attempt to reach any findings, even on an interim basis, on the allegations of sexual abuse made against the left-behind parent, the Supreme Court instead considered whether protective measures were in place which would ensure that the child would not be exposed to physical or psychological harm on their return. The Supreme Court made the return order conditional on an undertaking by the left-behind parent that he would not exercise rights of access to or contact with the child other than in accordance with the order of the family court of the country of habitual residence. The Supreme Court, in response to a specific argument raised by the abducting parent, considered the legal procedures in the country of habitual residence and concluded that they were sufficient to protect the child.

27. This approach of directing the inquiry on a return application to the availability and effectiveness of protective measures has been consistently applied by the Irish Courts. An authoritative statement of the approach is provided by the judgment of the High Court (Finlay Geoghegan J.) in *I.P. v. T.P.* [2012] IEHC 31, [2012] 1 I.R. 666 as follows (at paragraphs 41 to 43 of the reported judgment):

> "There are limitations imposed on a court in evaluating evidence on an application for summary return pursuant to the Hague Convention. It is rare to hear oral evidence or even cross-examine deponents and a court will not normally attempt to resolve factual disputes. There was no oral evidence and no cross-examination in this application and

> the court, as already stated, should not and will not attempt to resolve the dispute as to whether the alleged incidents did or did not occur.
>
> Article 13(b) is forward-looking, in the sense that it looks at the situation, as it would be if Anna were immediately returned to Poland.
>
> The Supreme Court of the United Kingdom, at para. 36 of its judgment, in *In re E (Children)* [2011] UKSC 27, [2012] 1 A.C. 144, refers to the 'tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true'. That case concerned allegations of domestic abuse. It appears to me that the pragmatic solution to the tension referred to by the Supreme Court of the United Kingdom is of use to resolve the tension herein. The solution is that this court should first ask whether, if the allegations are true, there would be a grave risk that the child would, following the summary order for return, be placed in an intolerable situation. If so, the court should then ask how the child can be protected against the risk. That case concerned a return to Norway so Council Regulation (E.C.) No. 2201/2003 did not apply."

28. A similar approach was adopted by the High Court (Ní Raifeartaigh J.) in *S.S. v. K.A.* [2018] IEHC 795 (at paragraph 31):

> "The authorities therefore appear to require me to consider the allegations of physical abuse in the first instance and then, if there are irreconcilable conflicts of fact, to take the allegations at their height and to consider whether child can be protected from that risk, if returned to the requesting jurisdiction."

29. A very useful statement of the proper approach is provided by the recent judgment of the High Court (Gearty J.) in *In the Matter of OA and OB, Minors (Child Abduction: Rights of Custody and Habitual Residence)* [2021] IEHC 849 (at paragraph 6.12):

> "Where grave risk is properly raised, as it is here, and there is no cross-examination of the parties, the Court should approach the evidence as though it were true in its initial assessment of the situation. It would be impossible for this Court, without detailed cross-examination, to decide if the allegations were true. What this Court can assess, however,

> is the level of risk involved if the allegations were true. In other words, whether such conduct would be sufficient to establish that the children, if returned, would be at grave risk of harm such that they could not be protected in England. In this case, the answer to that question must be no. Not only is there no allegation of violence against the children by their father, there is no other evidence of grave risk to the children which cannot be assessed and addressed by the courts and social services in England."

30. The Court of Appeal, *per* Collins J., made some general observations on the approach to conflicting evidence in *In the Matter of W and X (Minors)* [2021] IECA 132 (at paragraphs 59 to 61):

> "As the UK Supreme Court noted in *In re E*, the summary nature of the Hague Convention process imposes limitations on the capacity of the courts in the requested state to evaluate and resolve disputed issues of fact. There was, the Court noted, 'a tension between the inability of the court to resolve factual disputes between the parties and the risks that the child will face if the allegations are in fact true.' In *In re E* the children's mother alleged that the father (who was seeking the return of the children to Norway) had been guilty of serious psychological abuse over many years and that she and the children had lived in fear of him. The father denied those allegations. That dispute could not be resolved by the English courts within the parameters of Hague Convention proceedings. In such circumstances, the Court focused on the sufficiency of the protective means which could be put in place to mitigate the alleged risk to the children if returned, pending the resolution by the Norwegian courts of all disputed issues regarding their welfare and protection.
>
> The approach in *In re E* involves, in cases where there is a conflict of fact as to the existence and/or extent of a risk of harm to a child if returned to the requesting state, assuming the alleged risk of harm at its highest and then, if that assumed risk meets the threshold of '*grave risk*' in Article 13(b), going on to consider whether protective measures sufficient to mitigate such (assumed) risk of harm can be identified. That approach was endorsed in this jurisdiction in *IP v TP*: see paragraphs 41–43. Subsequent authority from England and Wales suggests that *In re E* does not have the effect of excluding any consideration of the evidence or any evaluative assessment of the credibility or substance of the allegations: see (*inter alia*) *Re C (Children) (Abduction: Article 13(b)* [2018] EWCA Civ 2834,

> [2019] 1 FLR 1045 and *UHD v McKay (Abduction: Publicity)* [2019] EWHC 1239 (Fam); [2019] 2 FLR 1159.
>
> Here any direct conflict of evidence is extremely limited and, accordingly, it is not necessary to explore further the approach that ought to be followed where a significant conflict arises or consider whether the valuable analysis in *In re E* requires any development or qualification. However, there cannot be any serious doubt that factual disputes about the care and welfare of children are best resolved where the children reside. That is of course a fundamental animating principle of the Hague Convention."
>
> *Footnotes omitted

31. In summary, the approach adopted to date in this jurisdiction is as follows. The court hearing an application for the return of a child does not attempt to resolve conflicts of fact. This reflects the need for expedition in such proceedings, and also respects the animating principle of the Hague Convention, which is that issues of custody and access should, generally, be determined by the courts of the child's habitual residence. Instead, the requested court should take the allegations at their height (save possibly in cases where the allegations lack any credibility). The court should consider whether, on the assumption that the allegations are well founded, the effect of same is to expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This requires a consideration of the nature of the allegations themselves: in some instances, same will fail to reach the threshold of harm envisaged by Article 13. The term "*grave*" qualifies or modifies the risk, not the apprehended harm. It is not necessary for the apprehended harm to be grave, provided that it meets the high threshold of being intolerable.

32. The court must attempt to evaluate the level of risk of harm which would arise in the event of a return order being made. This is a forward-looking exercise. The circumstances to which the child will be returning may be very different

than those which had previously obtained. As part of this exercise, the court should carefully consider the effectiveness of the protective measures available in the country to which the child is being returned.

33. This pragmatic approach ensures that the requested court does not discount allegations of domestic violence on the basis of what might be described as a paper-based assessment, conducted by reference to limited affidavit evidence which has not been tested by cross-examination. Instead, the focus of the inquiry will be directed to the effectiveness of the protective measures available in the country of the child's habitual residence, i.e. the country to which the child is being returned.

GRAVE RISK DEFENCE AND ALLEGATIONS OF DOMESTIC VIOLENCE

34. The general principles governing the evaluation of an asserted "*grave risk*" defence have been summarised under the previous heading. I turn next to discuss in more detail how those general principles apply in the specific context of allegations of domestic violence.

35. The abducting parent will often urge the court to infer from a history of domestic violence perpetrated by the left-behind parent that such conduct is likely to be repeated on the return of the child. The court must carefully consider the nature of the domestic violence alleged and consider whether same, if true, would meet the threshold of a "*grave risk*" for the purposes of Article 13.

36. The wording of Article 13 requires that there be a grave risk of harm to the child. The requested court will, therefore, focus its inquiry on the position of the child in the event of a return. However, it is recognised in the case law that harm may be caused to a child who, although not having been abused themselves, has

witnessed domestic violence being perpetrated against the child's parent. The High Court (Donnelly J.) put the matter as follows in *A.A. v. R.R.* [2019] IEHC 442 (at paragraph 62):

> "The Court is satisfied that the test is whether there is a grave risk that the return would expose the children to physical or psychological harm or otherwise place the child in an intolerable situation. The focus must be on the children. Where there is a grave risk however, that the return will place the abducting parent in a specific situation that will result in the child being place in an intolerable situation, the Court is not under an obligation to return the child. The category of circumstances in which this would arise, include violence and abuse towards the abducting parent, physical and psychological harm to the abducting parent and, as will be seen below, financial hardship. The Court must be forward looking and assess the risk of what may happen on return."

37. A similar approach has since been recommended in the Guide to Good Practice published in 2020. See §§32 and 33 as follows:

> "b. A grave risk to the child
>
> 32. The wording of Article 13(1)(b) makes clear that the issue is whether there is a grave risk that the return would 'expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.
>
> 33. But harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Article 13(1)(b) exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child."

38. The allegations of domestic violence, which have been made in support of the "*grave risk*" defence, are assumed, for the purpose of argument, to be well founded. The court must then consider whether the history of domestic violence translates into a "*grave risk*" that an order for return would expose the child to physical or psychological harm or otherwise place the child in an intolerable

situation. This is a forward-looking exercise and entails consideration of the circumstances of the return, which may well be very different from those under which the domestic violence had occurred. For example, the abusive parent may no longer be residing in the child's home and may even be precluded from having access to the child pending family law proceedings in the country of habitual residence.

39. In assessing whether there is a "*grave risk*", the court must consider the protective measures, if any, available in the country to which the child is to be returned. A useful summary of what is envisaged by "*protective measures*" in this context is provided in the Guide to Good Practice as follows (at §43):

> "Protective measures are more often considered in situations where the asserted grave risk involves child abuse or domestic violence, but not exclusively. They cover a broad range of existing services, assistance and support including access to legal services, financial assistance, housing assistance, health services, shelters and other forms of assistance or support to victims of domestic violence, as well as responses by police and through the criminal justice system.
>
> *Footnotes omitted

40. The availability of effective protective measures may mitigate any risk of harm to which the child might otherwise have been exposed. The effectiveness of the protective measures in addressing the "*grave risk*" can only properly be appraised by reference to the harm apprehended. The more serious the harm, the less likely that protective measures will be able to ameliorate that risk.

41. A concrete example of the application of this approach is provided by the judgment of the High Court (Finlay Geoghegan J.) in *C.A. v. C.A. (Orse C. McC)* [2009] IEHC 460, [2010] 2 I.R. 162. There, the abducting parent (the mother) sought to resist a return order on the grounds that the left-behind parent (the

father) had been violent towards her in the past. The mother contended that, by reason of violence by the father towards her, she and her children had been forced to move to a number of different women's refuges.

42. The High Court was satisfied that there were protective measures available in the country of the child's habitual residence (England) which were sufficient to protect the mother and children from violence in the event of their return. Emphasis was placed on the fact that the mother had obtained a non-molestation order against the father the previous year and that there was no evidence that this order had been breached. See paragraph 22 of the reported judgment as follows:

> "[…] Even if I were to accept the evidence of the mother that the father has, in the past, been violent towards her, and has caused her in the past to live with the children in women's refuges in England and to have to move from one to the other, it does not appear to me that there is any evidence that the English courts and other relevant authorities are not in a position to now protect the children and their mother from any potential threat of violence by the father. The mother and children were living in a house in England prior to removal of the children to Ireland. In so considering the evidence, I am not making any finding in relation to the alleged behaviour of the father but merely wish to demonstrate that the mother has failed, even if her factual evidence were to be accepted, to meet the necessary threshold. Since the mother commenced proceedings in the English courts in 2008, and obtained a non-molestation order against the father, there is no independent evidence that he has acted in breach of such order. The English court orders produced make no reference to any such alleged breach or any determination that the father has acted in breach of the non-molestation order. There is no evidence before this court of the inability of the English courts and other authorities to protect the children and mother (if necessary) from any threats of violence by the father."

43. The facts of that case have an obvious resonance with the present case. In each instance, the abducting parent (the mother) sought to resist the return of a child to England by reference to domestic violence perpetrated by the left-behind parent (the father). In each instance, the mother had obtained a non-molestation

order against the father. The crucial distinction between the two cases is that in the proceedings before me there is evidence that the father has breached the non-molestation order. The details of the breaches are outlined at paragraphs 85 to 91 below.

44. The circumstances of the present case would, therefore, appear to be closer to those of a case recently decided by the New Zealand Court of Appeal, namely *LRR v. COL* [2020] NZCA 209. In refusing to order the return of a child, the New Zealand Court of Appeal attached significance to the fact that the left-behind parent (the father) had been convicted of assaulting the mother and for breaching family violence orders and bail conditions. See paragraph 135 of the judgment as follows:

> "The mother fears for her safety in Tasmania, where she will be living in proximity to the father and will probably be forced to interact with him to some extent in connection with arrangements concerning H. This fear is well grounded in fact. The father was recently convicted for assaulting the mother and for breaching family violence orders and bail conditions. His breaches of family violence orders and bail conditions also provide substantial objective support for her concern that the orders that the Australian courts can make provide no assurance of effective protection. This is not a criticism of the Australian court system. The unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim. That is true in Australia as it is in New Zealand."

45. It should be emphasised that the circumstances of the New Zealand case were more extreme than those of the present case. As appears from the passage above, the father in that case had been convicted of assaulting the mother. Moreover, the mother's mental health had been characterised as frail: she had a history of depression and substance abuse, in particular alcohol abuse. The New Zealand Court of Appeal considered that there was a very high risk that the return of the

mother and the child to Tasmania would cause a relapse in terms of her mental health and substance abuse. There are no such features in the case before me. The New Zealand judgment is nevertheless instructive in that it provides a concrete example of a return order being refused by reference to the fact that the left-behind parent has repeatedly violated protection orders.

46. This approach is consistent with the Guide to Good Practice: Part VI Article 13(1)(b) published by the Permanent Bureau of the Hague Conference on Private International Law. It is stated as follows at §59:

> "In cases where the taking parent has established circumstances involving domestic violence that would amount to a grave risk to the child, courts should consider the availability, adequacy and effectiveness of measures protecting the child from the grave risk. Where legal protection and police and social services are available in the State of habitual residence of the child to assist victims of domestic violence, for example, courts have ordered the return of the child. In some instances, however, courts may deem such legal protection and services to be insufficient to protect the child from the grave risk, for example where the left-behind parent has repeatedly violated protection orders, which may put the child at grave risk of physical or psychological harm, or given the extent of psychological vulnerability of the child."
>
> *Footnotes omitted

FACTUAL BACKGROUND

47. The child is approximately eighteen months old, having been born in May 2021. The father has been registered as one of the child's parents on the birth certificate. As a consequence of this, the father has acquired parental responsibility for the child by operation of law. See Section 4 of the (UK) Children Act 1989.

48. The mother is currently twenty-three years of age. The mother had been born in England but had moved with her family to Ireland when she was approximately twelve years of age. The mother subsequently moved back to England when she was nineteen years of age. The mother has resided at a dwelling house in D— since 2021. This dwelling house is held in the sole name of the mother and is mortgage free.

49. The father is thirty years of age and grew up in L—, England. The father had served in the British Army for a period of approximately five years. The father suffers from Post-Traumatic Stress Disorder ("*PTSD*") and from depression; and has a history of substance abuse and anger management issues. The father had been working in L— when he first met the mother. The father subsequently relocated to D— to live with the mother in or about March 2021. The father's work requires him to be away from home for extended periods of time.

50. The mother and father had been involved in an intimate relationship between December 2019 and April 2022. The mother alleges that she has been the victim of domestic violence at the hands of the father since May 2021. Various incidents have been catalogued in the mother's affidavits and include, *inter alia*, the smashing of glass in the sitting room door; the pulling of the mother by her hair; the biting of the mother on her head; the hitting of the mother on her head with a hairbrush; the damaging of property belonging to the mother, including a mobile telephone, television; remote control and laptop. The mother alleges that the child was present for most of these incidents.

EVENTS OF APRIL 2022

51. The mother asserts that her decision to travel to Ireland with the child was triggered by events on 11 April 2022. The mother has averred on affidavit that on that morning the father "*picked up a bowl with milk and threw it in anger at the wall, it hit the wall and bounced off the wall and landed very close to the baby and the milk spilled over the baby*".

52. The mother goes on to aver that she went to the local police station and made a statement to the police about the domestic violence which had been perpetrated against her. The father was then arrested and taken to the police station for questioning. The police changed the locks to the mother's house while the father was in custody. The father was subsequently released without bail conditions and without charge pending further investigation into the matter.

53. On his release from custody later the same day, the father re-entered the mother's house, seemingly through an unlocked door. The mother has described how she had been "*terrified*"; that she "*coaxed*" the father into the doorway of the house; and that eventually he left. The mother called the police again and the police arrested the father for a second time that day while he was sitting in his car down the road from the mother's house.

54. The mother avers that she subsequently travelled to Holyhead Port with the assistance of police officers from D—. Specifically, it is averred that the police put the mother in contact with a liaison person at the Port who was tasked to meet the mother from the train and to ensure her and the child's safety. It is also averred that the police had contacted the Port Authorities to ensure that the father had not purchased a ticket in order to follow the mother to Ireland. The precise

date upon which the mother travelled to Ireland is not clear from her affidavits. It appears to have been in or around 23 April 2022.

55. The father's version of events is very different. In essence, the father alleges that the mother had contrived his arrest on 11 April 2022 in order to create an opportunity for her to move to Ireland. Specifically, the father avers on affidavit that the mother put in place a series of arrests and allegations, and sought police assistance, to ensure that he could not have stopped her removing the child from out of the jurisdiction.

56. The father denies that he has ever subjected the mother to domestic abuse and specifically denies the allegation that he threw the bowl against the wall on 11 April 2022. The father does, however, accept that the mother's laptop was broken that day but asserts that this was as a result of its falling accidentally to the ground. The father avers that, after the first arrest, he had been released unconditionally and was not precluded from returning to the mother's house. The father avers that he returned home to collect his belongings and to hug the child goodbye. The father also avers that, following his second arrest that day, he had been released on police bail on condition that he did not attend at the mother's house. The father says that no charges have been brought against him arising out of these alleged incidents.

57. The father has made a series of counter-allegations against the mother, accusing her of being controlling of him, of being a habitual user of cannabis, of having scratched him with her nails on occasion, and of having provoked arguments with him. The father concludes his affidavit as follows:

> "[The mother] is in no way afraid of your deponent, as she alleges. Moreover, she has proven herself well capable of seeking the assistance of the courts and other authorities in England. They are also well capable of protecting [the

> mother] against any threat or risk. I have already consented to a non-molestation order which I have complied with. Even if I were to breach it, [the mother] has access to the Police and courts, to enforce the order. I live some distance from [the mother's] home, and I am happy to offer to the Court any undertaking that might be considered necessary to ensure her safety pending the matter resuming in the courts in England."

PROCEDURAL HISTORY BEFORE ENGLISH FAMILY COURTS

58. The mother made an application on 22 April 2022 to the family law court at D— for a non-molestation order pursuant to Section 42 of the (UK) Family Law Act 1996. This application was made remotely and on an *ex parte* basis. There is some confusion as to whether, as of this date, the mother had already travelled to Ireland with the child. Counsel on behalf of the mother indicated, in oral submission, that her instructions were that her client was already in Ireland on 22 April 2022, and that this was, in part at least, the explanation for why the application was made remotely rather than by way of an in-person hearing.

59. This is not, however, confirmed on affidavit. At all events, there is nothing on the face of the order of 22 April 2022 which indicates that the family court had been told that the mother had wrongfully removed the child from the jurisdiction of the English Courts.

60. The operative part of the non-molestation order reads as follows:

> "From and after service of this order upon him the [father] whether by himself or acting jointly with any other person is forbidden to:
>
> Use or threaten any violence towards [the mother]
>
> Threaten, intimidate, harass or verbally abuse [the mother] in any way
>
> Go to [the mother's home address] or go into the road known as [Redacted] in [Redacted] or go to any property at which he is aware that [the mother] is living.

> Send any threatening or abusive letters, emails, texts or voicemail messages to [the mother]
>
> Make any threatening or abusive telephone calls to [the mother]
>
> Communicate with [the mother] whether by letter, telephone, text message or other means of communication including all forms of social media except through her solicitors [Details of solicitors redacted]
>
> Damage or attempt to damage or threaten to damage any property belonging to [the mother] or jointly owned by the parties
>
> Damage or attempt to damage or threaten to damage any of the contents of [the mother's home address]
>
> The respondent is also forbidden to instruct or encourage any other person to do anything which he is forbidden to do by the terms of this Order.
>
> This order shall remain in force until 4:00 pm on the 22nd April 2023 unless before then it is varied or discharged by an order of the court."

61. The proceedings were made returnable before the family court, via telephone, on 6 May 2022. It appears that on the return date the father consented to the non-molestation order, which had initially been obtained on an *ex parte* basis, being made final. Accordingly, the non-molestation order remains in force until 22 April 2023 unless before then it is varied or discharged by a court order. The father has denied that he had made admissions at the hearing on 6 May 2022 as to domestic abuse having been perpetrated by him.

62. A number of weeks after the non-molestation order was made final, the father brought his own application before the family courts on 18 May 2022. The application was for a "*child arrangements order*" pursuant to Section 8 of the (UK) Children Act 1989. The court order prepared subsequent to that hearing records that the family court had been informed that, on or about 23 April 2022,

the mother had travelled to Ireland. It is further recorded that the mother indicated to the family court, by way of her counsel, that this was a temporary measure to protect her own safety and that it was her wish to return the child to her permanent home in D— when it is safe and appropriate to do so.

63. The family court determined that there was not sufficient information before it to allow it to determine the father's application, and, accordingly, the court made certain directions as to the exchange of witness statements. The matter was relisted on 4 July 2022. The court order of that date recites that declarations were made to the effect that the child had been habitually resident in England as of the time the proceedings were issued, and that the child had been wrongfully removed from the jurisdiction of England and Wales. The family court revoked certain of the case management directions previously made on 18 May 2022. The proceedings were then adjourned generally. Presumably, this was done to await the outcome of the return application before the Irish Courts.

THE APPLICATION FOR THE RETURN OF THE CHILD

64. The father instituted the within proceedings seeking the return of the child on 6 July 2022. Thereafter, the High Court (Gearty J.) gave directions as to the exchange of affidavits and written legal submissions. The return application came on for hearing before me on 10 November 2022.

65. The hearing proceeded on the basis of affidavit evidence only in circumstances where both parties were agreed that—having regard to the well-established case law on return applications—there should be no cross-examination. The hearing took the form of a hybrid hearing so as to allow the father to observe events in the court room by way of a remote connection.

66. Counsel on behalf of the father has raised an objection to the content of the second affidavit filed on behalf of the mother. It was submitted that the content of the affidavit went beyond that permitted. It was further submitted that the mother only had liberty to file an affidavit dealing with the outstanding criminal investigations which she said were ongoing. Whereas the father accepts that this allowed the mother to deal with, and to exhibit, the police reports and the email from L— police, the father objects to the balance of the affidavit. This objection was first raised before Gearty J. on 6 October 2022, and then reserved to the hearing of the return application.

67. Counsel objected to two specific aspects of the second affidavit as follows. First, the reference made to a message sent to the mother by the father on 19 June 2022. (The content of this message is set out at paragraph 85 below). This message was sent a number of weeks prior to the swearing of the mother's first affidavit on 25 July 2022. Counsel submits that had the mother wished to refer to this message, then she should have done so as part of her first affidavit. Counsel further submits that a respondent should not be permitted to "*mend their hand*" or "*bolster*" their case in a supplemental affidavit. The second aspect objected to is the reference to an alleged criminal offence.

68. For the reasons which follow, I am satisfied that the evidence in relation to the message sent on 19 June 2022 is properly before the court and is admissible. First, there is nothing in the order of 8 September 2022 which restricts the matters which can properly be raised in the replying affidavit. Secondly, the replying affidavit is dated 27 September 2022. Had the father wished to reply to this affidavit, there would have been ample time to do so in advance of the scheduled hearing date on 10 November 2022. Thirdly, this aspect of the

affidavit is highly relevant to one of the principal issues in the proceedings, namely the effectiveness of the non-molestation order as a protective measure. It would be inappropriate for this court, in the context of proceedings engaging the best interests of the child, to exclude otherwise admissible evidence by reference to what is, in effect, a technical objection to the admission of the affidavit. Finally, the father cannot be said to have been taken by surprise by the evidence. It is, after all, a message which he himself sent to the mother. Indeed, the father himself should have brought this message to the attention of the court in his own affidavit. Instead, the father avers that he has complied with the non-molestation order. This is an untruth.

69. Following on from the hearing, the court sought and obtained from the parties' solicitors copies of the witness statements prepared by the father and mother in the context of the family court proceedings. The court also sought and obtained from the Central Authority a copy of the "*released without bail*" note provided to the father following his first arrest on 11 April 2022.

DISCUSSION AND DECISION

70. From the time she was born, the social services in England have identified the child as being at risk of physical and psychological harm. A social worker and a police officer attended at the maternity hospital in May 2021, a number of days after the child had been born. The mother avers on affidavit that they informed her that the father was known to the social services, and that they had concerns for the safety of the child due to the father's history of domestic violence against his previous partner.

71. The nature of the apprehended harm has been summarised as follows in the record of a subsequent case conference held on 28 May 2021:

> "[The father] has a history of domestic violence, suffers with PTSD, has poor relationships with his family and has been accused of sexually touching his older child.
>
> He has not done any work to address these issues and continues to need to be calmed by [the mother].
>
> [The mother] takes responsibility for encouraging [the father] to stay calm and work with people who are there to help the family. She does not accept that some of [the father's] behaviours in the past have been his responsibility and accepts what he has told her rather than challenging past aggression."

72. (It should be emphasised that the allegation that the father had sexually abused his daughter from another relationship has not been substantiated and no charges have been preferred against him in this regard. By order dated 22 June 2021, the family court at [redacted] directed that the father be allowed access to this daughter every alternate weekend and any other time as may be agreed.)

73. It is also recorded that the father had misused cocaine in the past but that it was not known, at that time, whether this was continuing to present as a problem. There was also a concern that the mother was isolated in that she had only recently moved to live in D—.

74. The Health Visitor is recorded as expressing the following concern:

> "[The father] has an extensive police record relating to a violent past. This includes domestic violence towards intimate partner, violence towards his own family members and at least one recorded assault on a health care worker."

75. The father is recorded as having four convictions for offences against the person: two of battery, and two of assault occasioning actual bodily harm. The father is also recorded as having been convicted of an offence against property. Specifically, the father is described as having turned up at his own mother's

address and as having smashed the rear kitchen window when he was not allowed in due to his behaviour.

76. The potential harm / risk to the child is summarised as follows:

> "[The child] may be exposed to scary situations in which her father becomes angry. This could impact on all aspects of her development and feeling safe at home.
>
> [The child] could grow up to think that it is okay for men to get angry and accept relationships in which she becomes a person who is shouted at or treated badly."
>
> […]
>
> "If [the father] uses drugs or drinks lots of alcohol around her and her mum he could become unpredictable, be more likely to get angry and could cause her harm."

77. The following advice is provided to the mother:

> "If [the father] gets angry and will not calm down [the mother] should go with [the child] to a neighbour or to a lockable room in the home and call the police for help."

78. The social services made a decision at the meeting on 28 May 2021 to the effect that the child would become subject to what are described as "*Child Protection Plans*" under the category of "*Physical Harm*". This seems to have involved regular social worker involvement. The father avers on affidavit that the social services remained involved until in or about January 2022 and then closed their file. The father also avers that he did not engage positively with the social services as he felt that their involvement was unwarranted and overly intrusive.

79. The mother avers that the father has perpetrated acts of domestic violence against her since May 2021. The mother catalogues a number of incidents of domestic violence and domestic abuse in her first affidavit. The mother also avers that she is fearful that the child would be harmed due to the violent outbursts of the father. The mother further avers that these outbursts had initially been sporadic;

had increased to weekly; and, as of April 2022, the "*anger outbursts*" were occurring on a daily basis.

80. The approach which this court is required to adopt when adjudicating on a "*grave risk*" defence in the context of allegations of domestic violence has been discussed earlier: see, in particular, paragraphs 34 to 46 above. In brief, the court is required to take the allegations made at their height. The acts of domestic violence alleged against the father are such as to present a risk of physical and psychological harm to the child. Indeed, the existence of this risk has been recognised by the social services and police in England since the time of the child's birth. The escalation of the acts of violence in April 2022 prompted the police to arrest the father and to change the locks on the mother's dwelling house. The English Courts made a non-molestation order against the father on an *ex parte* basis on 22 April 2022 and confirmed this order on 6 May 2022.

81. Having identified the nature of the harm apprehended; and having confirmed that same comes within the type of harm which Article 13 of the Hague Convention is intended to safeguard against; the court must next consider whether protective measures sufficient to mitigate the risk of the apprehended harm can be identified.

82. In assessing the risk, the court must consider the circumstances which the child would face if a return order were to be made. The assessment is forward-looking. Here, the domestic arrangements would be very different from those previously prevailing. The mother and father would no longer be cohabiting. Crucially, the father would be prohibited, by the non-molestation order, from going to the mother's house or, indeed, to the road upon which it is located. The father is also prohibited from contacting the mother.

83. Section 42A of the (UK) Family Law Act 1996 provides that breach of a non-molestation order is a criminal offence punishable by up to five years imprisonment. A breach is an arrestable offence and it is not necessary to obtain an arrest warrant.

84. If the father complied with the terms of the non-molestation order, then the risk of physical and psychological harm to the child would be avoided. One of the principal questions for determination on this return application is whether the existence of the non-molestation order constitutes a sufficiently effective protective measure so as to reduce the level of risk of further domestic violence to an acceptable level, i.e. to reduce the risk to one which is less than grave. It is very difficult to make an accurate prediction in this regard. However, having regard to the following factors, I am satisfied that there is a grave risk that the father will breach the non-molestation order and that such a breach would expose the child to harm and expose her to an intolerable situation.

85. The first and most obvious red flag is that the father has, in fact, already breached the non-molestation order on at least two occasions. The first breach consisted of the sending of a message to the mother on 19 June 2022 as follows:

> "Hey [mother's name] please can I have some pictures of our baby I beg you :(I'm so sorry for everything I love you both so Much please don't tell police I messaged I can get 5 years in jail, I promise I'll keep the pictures of social media and I won't tell anyone about you sending them Me please my darling xx
>
> There just pictures please my beautiful I beg you I'm missing her whole life :(I'm so down baby I tried to commit suicide last week my mate cut me down please babe xx
>
> I nearly did over [name of his child from a previous relationship] and you was with me then and you have then done this baby you know how my mental health is :(please just keep me in baby's life I beg you"

86. It is apparent from the content of this message that the father was not only aware that the act of sending a message was in breach of the terms of the non-molestation order, but he was also aware that the breach exposed him to a potential prison sentence of five years. The fact that he was undeterred from breaching the order is a cause of grave concern.

87. This breach of the non-molestation order cannot be discounted as a mere technical breach. Whereas an attempt might be made to minimise the breach by saying that a request for photographs of the child is benign and does not imply any risk of harm to the child, the overall tone of the message—in particular the reference to suicide—is manipulative and indicative of coercive control.

88. Moreover, the request for photographs has to be viewed in context: the family court had expressly put in place a procedure whereby the father could seek photographs of the child from a nominated third party (an aunt of the mother). There was no need, therefore, for the father to approach the mother directly to request photographs.

89. The second breach of the non-molestation order consisted of the posting of a "*story*" by the father on his Instagram profile on 6 July 2022. The text of the posting, overlaid on an image of the father, reads as follows:

> "People need grow up 😂
> made your bed lay in it, using kids as weapon vile people
>
> Abduct my daughter to another country and think it's all a game well gunna be all alone in uk now aint' she"

90. The mother has averred on affidavit that she felt threatened by the content of this posting. This is an entirely reasonable reaction on her part: the reference to the mother being all alone in the UK is open to the interpretation that the father is implying that the child will be taken away from the mother thus leaving her "*all*

alone". The posting is also open to the interpretation that the mother, on her return to England, will be isolated and thus vulnerable. On either of these interpretations, the content of the posting is menacing.

91. The father has averred on affidavit that he has not breached the non-molestation order. This averment is untruthful and is entirely inconsistent with his previous acknowledgment of a breach in his message of 19 June 2022 (above). The fact that the father shows no remorse for the breaches is a cause of grave concern and undermines any confidence in his complying with the order in the future.

92. The second factor which supports the characterisation of the risk as "*grave*" relates to the conduct of the father on 11 April 2022. On that date, the father, upon his release from police custody, re-entered the mother's dwelling house notwithstanding that the police had changed the locks for the mother's safety. It also appears that the father damaged the mother's laptop. The father suggests, unconvincingly, that this was the result of the laptop accidentally falling to the ground from the arm of the sofa.

93. The third factor is that the father has a number of convictions for violent behaviour. Specifically, the father has four convictions for offences against the person: two of battery, and two of assault occasioning actual bodily harm. Moreover, the father also has a conviction for offences against property in relation to an incident in 2014. The father was refused entry to his own mother's home and, in response, smashed a window. The fact that the father committed such an act against a close family member is a cause of grave concern.

94. The fourth factor which supports the characterisation of the risk as "*grave*" is the alleged attempt by the father, in April 2022, to ascertain the whereabouts of the mother in Ireland. The mother has put before the court strong, credible

evidence of the following. The father gained access to one of the mother's email accounts and changed the password, thus locking the mother out of her own email account. Thereafter, the father posed as the mother by sending emails from her account to the mother's grandmother. These emails sought to elicit the address at which the mother was staying in Ireland.

95. The father has denied these allegations on affidavit. In the absence of cross-examination, it is not possible for this court to reach a definitive conclusion—one way or the other—on where the truth lies. Rather, the court is required to engage in a different exercise, namely, to evaluate the level of risk. For this purpose, the allegations are to be taken at their height. Even allowing that some qualification may be required to this general approach, i.e. that the court takes the allegations of domestic violence at their height, the evidence is persuasive. The mother has exhibited copies of the relevant emails. The content of same, whereby the mother is supposedly looking for an address which would presumably be well known to her, tends to corroborate the mother's version of events.

96. It should be reiterated that the term "*grave*" qualifies the risk, not the apprehended harm. It is not necessary for the apprehended harm to be grave, provided that it meets the high threshold of being intolerable. The requested court is obliged to evaluate the level of risk that the child will be exposed to harm or an intolerable situation. There does not have to be a certainty.

97. Here, there is a grave risk that the father will continue to breach the terms of the non-molestation order. In particular, there is a grave risk that the father will continue to contact and harass the mother, and that he may attempt to enter her home. There is also a grave risk that he will repeat the type of domestic violence

which he has perpetrated in the past, including damage to property and to person. All of this would expose the child to harm and an intolerable situation.

98. The Hague Convention does not oblige the taking parent and child to tolerate such a grave risk. A non-molestation order will only be regarded as an effective protective measure where it can reasonably be anticipated that it will have a deterrent effect on the abusive parent. As stated by the New Zealand Court of Appeal in *LRR v. COL* [2020] NZCA 209, the unfortunate reality is that where a perpetrator of family violence is not willing to respect court orders, there is only so much that any legal system can do to protect the victim.

99. The fact that the mother can have recourse to the last resort of calling the police does not mean that there would be effective protective measures available in the sense that that term is employed for the purposes of the Hague Convention. It goes without saying that this is not intended as a criticism of the English police or social services. The chronology of events confirms that both agencies have been solicitous to ensure the wellbeing of the child since her birth. The difficulty is that there are limits to what even the most diligent police force and social services can do to guard against a recalcitrant domestic abuser who has previously violated court orders. The present case is one of the truly exceptional cases where a return order should be refused.

CONCLUSION

100. The default position under the Hague Convention is that the requested court will order the return of the child to their country of habitual residence. This both (i) ensures that the assessment of the best interests of the child is carried out by the court which is optimally placed to made decisions on custody and access,

and (ii) creates a deterrent effect against the wrongful removal of children by signalling that the abducting parent should not expect to benefit from their wrongful removal of the child.

101. Having said this, it has to be acknowledged that the narrowly drawn exceptions under Article 13 are an integral part of the scheme of the Hague Convention. These exceptions serve the same purpose as the rest of the convention, i.e. they are also intended to advance the best interests of the child. In some, admittedly exceptional, cases, the best interests of the child will be served by a refusal of an order directing the return of the child. Whereas the exception is to be strictly construed, this should not be done to the point of rendering Article 13 meaningless.

102. The ECtHR has held that the existence of mutual trust between child-protection authorities does not mean that the State to which children have been wrongfully removed is *obliged* to send them back to an environment where they will incur a grave risk of domestic violence, solely because the authorities in the State in which the child had its habitual residence are capable of dealing with cases of domestic child abuse.

103. For the reasons explained, I have concluded that the present case is one of the truly exceptional cases where a return order should be refused. As to costs, my provisional view is that no order should be made in circumstances where both parties are represented by the Legal Aid Board. If either side wishes to contend for a different costs order, they should file written submissions within 14 days.

Appearances

Ann Kelly for the applicant father instructed by the Legal Aid Board
Bairbre Ryan for the respondent mother instructed by the Legal Aid Board

Approved Garrett Simons